DEPARTMENT OF COMMERCE ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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INTRODUCTION AND OPENING REMARKS

MS. PERLMUTTER: Good morning, everyone. Welcome to the first of our series of roundtables on digital copyright policy issues. We're delighted to be in Nashville and glad that all of you here could join us today at Vanderbilt University Law School. And I'd like to thank the law school very much for hosting us today. And welcome, also, to those of you joining by webcast.

I'm Shira Perlmutter, chief policy officer at the U.S. Patent and Trademark Office. This roundtable is part of the process started by the Department of Commerce's internet policy task force in last July's Green Paper on Copyright Policy, Creativity and Innovation in the Digital Economy. The Green Paper identified a number of issues on which the task force would undertake further work with the goal of making recommendations, and three of those issues are the subject of today's roundtable.

The Green Paper work has been led by my office, the U.S. Patent and Trademark Office with the National Telecommunications and Information Administration, or NTIA. And we've also been

consulting with the Copyright office in that endeavor, so we're happy that its general counsel, Jacqueline Charlesworth, could join us also here today.

We've already started this process with a full day public meeting in Washington in December and we've received numerous written comments from a wide range of stakeholders on all of these topics. So we now want to broaden and deepen the discussion, and so we've come to Nashville to hear directly from those of you with us today. And we're very pleased that we were able to accommodate everyone who wanted to participate. I note that, as one would expect, many of today's participants are from the music industry and the discussion will doubtless reflect that particular perspective. Other roundtables in this series will be held in Cambridge, Massachusetts, in Los Angeles, and at Berkley, and are likely to involve more participants from other sectors, as well.

So our goal today is to have interactive discussions rather than prepared presentations, or a series of one-way presentations. So I'd like to ask that everyone keep their comments short so that we can have active engagement by all participants. And I do want to reassure everyone that we're open to all options and all suggestions, and that is legislative

change may or may not be the best approach on any particular topic. We'd also like to hear about possible market solutions, voluntary initiatives or guideline approaches, as well.

So the first issue we'll discuss, taking them in the reverse order that they were addressed in the Green Paper, is the appropriate calibration of statutory damages for copyright infringement.

Now, as we described in the Green Paper, we're focusing specifically on how statutory damages are calculated into particular contexts; one of them is private individuals engaging in file sharing and the other is secondary liability claims against mass online services, services that make huge repertoires of material available online. So what we'd ask is that everyone focus on those specific issues rather than debating the value or application of statutory damages, generally.

We'll then have a coffee break and then we'll turn to discussing the first sale doctrine and its relevance and scope in the digital environment. So the Green Paper formulated this by asking whether there is a way to preserve the benefits that the first sale doctrine achieves in the analogue world in the digital world.

So what are these benefits? Will the market develop in ways to provide them, and if so, how? If not, what type of solutions in the digital environment could be appropriate? So here I'd like to say we'd like to dig a bit deeper than just a debate over a yes or no answer, whether first sale should or shouldn't apply, but rather what are we trying to accomplish and how can we get to that end?

And our final discussion today after lunch will be about the legal framework for the creation of remixes. So in the Green Paper we ask whether, despite the availability of many remixes today on the internet, whether their creation is being impeded too much by legal uncertainty. And if so, whether there's a need for new approaches. And if so, what would they be.

So, let's begin. If any of the observers either here today or online has any comments, there'll be time to raise them immediately after each discussion, we've set aside about a 20-minute chunk of time for comments from those who aren't sitting up here with the panel. And for those of us in the room, if you do have a comment, please go to the microphones in the aisles. There's two microphones up front here. And for those who are watching the webcast, I'm told that on the bottom right of the screen there's a box

that says, Leave a message, and if you complete that, then a popup chat window will appear where you can type your question and then we will have someone read the questions or comments.

So we're very excited about beginning this series of roundtables and I thank you in advance for your participation, for being here this morning, and I look forward to learning a lot from the conversation.

So let me give the floor to John Morris, who's the associate administrator and director of internet policy at NTIA, and then we'll hear there Jacqueline Charlesworth from the Copyright office.

MR. MORRIS: Thank you, Shira. Let me just add, just really frankly, just a few sentences of welcome to the first of the series of roundtables. And NTIA, like PTO, is housed within the Department of Commerce and we work closely with PTO on a broad range of issues through the internet policy task force. And just as PTO is the lead agency on, within the executive branch on intellectual property issues, NTIA is the lead agency on internet and communications policy issues. And so we're very pleased to join PTO and the important work that it's leading on intellectual property issues.

You know, this meeting is kicked off, as Shira

said, by the Copyright Green Paper that Shira's office labored very hard on last year, and the goals that are espoused in that Green Paper of insuring a meaningful copyright system that continues to provide necessary incentives for creative expression, while at the same time preserving technological innovation are goals that we think can and must be accomplished in tandem. And to achieve those goals it's important that we hear from a wide variety of stakeholders, including those who create content, those who distribute content, and those who consume content, and everyone in between. So we've already benefitted from one meeting in Washington and a lot of very helpful comments, and so we look forward to continuing those conversations today.

So with that, let me turn the floor over to Jacqueline Charlesworth from the U.S. Copyright Office.

MS. CHARLESWORTH: Thank you, John, and thank you, Shira. Good morning, everyone. It's always a good thing for me to be in Nashville, I love this town, and even if only for a brief visit. I want to thank Shira and her colleagues at USPTO and the Department of Commerce, including NTIA, for inviting the Copyright Office to attend today's roundtable.

As many of you know, a little over a year ago following a speech by the Register of Copyrights, Maria

Pallante, at Columbia Law School, the House Judiciary Committee embarked on a wide review of our copyright law to ensure that it is fit for the digital age and identify areas that may need to be updated.

The U.S. Copyright Office is working closely with Congress and others to support that review process. Among other things, we are studying the question of what works and making it available. And we have recently embarked on a study of music licensing, an issue of particular concern to people in Nashville. In fact, I'll be here in a couple of weeks for Copyright Office roundtables on those issues.

In the context of this overall process of review and examination of our copyright system to see, as John said, whether there are areas that may need to be updated, the Green Paper produced by Shira and her staff and released not long after Chairman Goodlatte's announcement about the review of our copyright laws represents an extremely impressive effort to identify and vet some important issues where copyright intersects with the internet. In fact, I would say no one who knows Shira can help but be impressed by her knowledge of copyright law and her dedication to these issues.

While the Green Paper process is separate from

our effort at the Copyright Office, the two are related in the sense that the attention to our copyright system in each process will enhance and inform the review process, the larger review process that's underway. And the Copyright Office is coordinating closely with the USPTO to make sure there is no week that is roundtable or comment-free, so we're keeping the lawyers busy.

Shira, I think it's your turn next -- no. No, we are trying to coordinate the schedules a little bit, and we appreciate the fact that you guys are busy and also very dedicated to your task and are contributing immensely to this effort of both of our offices.

On a more serious note, I'm glad to see so many of you here today to share your views on the three topics under consideration; statutory damages, the first sale doctrine in the digital age and the legal framework for remixes. I think I can safely say that we will be hearing a diversity of views on these issues, and perhaps because it is so connected to creativity, copyright tends to incite a lot of passion. And so your views are essential. It is critical that they be heard by those responsible for copyright policy in our nation and I will be listening with great interest to you today. Thank you.

MS. CHAITOVITZ: So our first discussion today is going to be about statutory damages. Statutory damages, as you know, normally range from a minimum of $750 to a maximum of $30,000 per work infringe with a potential to be raised to a maximum of $150,000 upon a finding of willful infringement, or lowered to a minimum of $200 upon a finding of innocent infringement. The Copyright Act permits a copyright owner to elect to seek such statutory damages because actual damages can be difficult to prove in court, and proving actual damages in an online environment can be even more challenging.

So we're going to focus our conversation here today on statutory damages in the context of secondary liability for large scale infringement and for individual file sharers. With respect to statutory damages for secondary liability, there are competing arguments about the potential negative impact on investment and the need for a proportionate level of deterrence. Finally, there have been calls for further calibration of the levels of statutory damages for individual file sharers in the wake of the large jury awards that have been awarded in the two cases that have gone to trial.

So, first, for the participants, when you want

to say something, if you could put your tag like this, if it stays up. And also, could we begin with all the participants briefly introducing themselves? Again, this isn't to make a statement, but please tell us who you are and where you're from. Thank you.

MR. BEITER: Okay. My name's John Beiter. I'm an attorney here in Nashville with the law firm of Shackelford, Zumwalt & Hayes. I'm here today speaking on behalf of SESAC, which is the second oldest and the fastest growing performance rights organization in the United States. And SESAC submitted joint comments in this process, along with the National Music Publishers Association, the Nashville Songwriters Association International and Church Music Publishers.

MR. GERVAIS: I'm Daniel Gervais. I'm a professor here at Vanderbilt Law School where I teach U.S. and international intellectual property law and music law, and I welcome my students in the room.

MR. HARRINGTON: My name is Michael Harrington, I'm from Boston originally, I live here in Nashville, I teach at Berklee, and I'm also a consultant in music copyright and digital issues.

MR. MARKS: I'm Steven Marks from the Recording Industry Association of America. We represent record labels that create, manufacture and

distribute approximately 85 percent of the recordings in the United States.

MR. PERZANOWSKI: I'm Aaron Perzanowski. I'm a law professor at Case Western Reserve University School of Law.

MR. SHEFFNER: Ben Sheffner, vice-president of legal affairs at the Motion Picture Association of America. We represent the six major motion picture studios here in the U.S.; that's Sony Pictures, 21st Century Fox, Paramount Pictures, Walt Disney Studios, Warner Brothers and NBC Universal.

MR. CARNES: I'm Rick Carnes, I'm a professional songwriter and I'm here representing the Songwriters Guild of America.

MR. CURTIS: I'm Alex Curtis. I run a project called Creators Freedom Project. It's a project to empower creatives to take control of their small business and leverage today's technology with a creative spark.

MR. SCHWARTZ: I'm Eddie Schwartz, president of the Songwriters Association of Canada. I'm co-chair with Mr. Carnes over here of Music Creators North America, and I'm on the executive committee of CM, which is the International Counsel of Music Creators which is based in Paris.

MR. TEPP: My name is Steve Tepp, I'm president and CEO of Sentinel Worldwide. I'm here today representing the Global Intellectual Property Center of the U.S. Chamber of Commerce.

MS. CHAITOVITZ: Thank you.

MR. GOLANT: Hi everyone. Thanks for coming. As Ann had said, when you have a question or a comment, raise your card, Alain over here will try to order your questions so that there'll be some method of order here.

And I will start with the first question, and here it goes: Should individuals who are engaged in file sharing on a personal level with no profit making motive or commercial element be treated differently than other entities in infringement award purposes? Why, or why not?

Who would like to go first? Maybe someone from the music group or the MPAA?

MR. SHEFFNER: Well, I would say this, this is Ben Sheffner from the MPAA. I do not believe that the law, itself, that the law should create different categories for different infringers. That said, the status of the individual or the activity in which he or she is engaged is of course a factor in determining where within the range of statutory damages

the award should fall. So if the person is engaged in relatively noncommercial behavior, the award should probably fall lower in the range. If he or she is engaged in for-profit commercial activities, it should fall higher in the range.

There's a variety of factors. The statute, itself, isn't terribly as specific, but certain circuits have elaborated on the statute in jury -- in the model jury instructions, we cited the 9th Circuit's in our written comments taking into account things like how egregious the infringement was, how long the infringement was taking place, again whether it was relatively commercial or noncommercial. And I say relatively because the line today is not always so clear.

So again, just to sum up, the law, itself, should not create these sort of different categories for individuals versus corporate or commercial defendants, but it's entirely appropriate for courts to craft jury instructions that will in fact take those factors into account.

MR. GOLANT: Thank you. Does anyone have an additional comment or a response to what Ben has said? Steve?

MR. MARKS: Thanks. Yeah, I would agree

with what Ben said and add that we need to keep in mind that one of the purposes of statutory damages is deterrence, and that deterrence obviously needs to be considered in the circumstances of a particular case or the facts of a particular case, but it's something that is important.

There's obviously been a lot of attention given to two cases that were part of a program that we had obviously bringing suit against individual file sharers as part of an overall piracy program. That program has long ended but, you know, we had two out of a very large amount of people who are contacted about infringing activity, and in those cases you had four different jury verdicts, three in one case and one in another, where a jury of their peers found that they were culpable for the infringing activities and also that they had, you know, lied about the actions that they had taken.

So again, this is a case by case factual circumstance-driven kind of analysis, but deterrence I would say is something that we need to keep in mind as we consider statutory damage discussions.

MR. GOLANT: Thanks for that. I think Aaron had his card up first, then followed by Daniel and John.

MR. PERZANOWSKI: So I would agree that deterrence is incredibly important, something that we need to think about here, and I'm certainly not going to defend the behavior of either of the two defendants in the cases that we've referred to so far. I think it's really important though to keep in mind that among the general public, right, among the sort of group of consumers that copyright law is tasked with regulating the behavior of, copyright law doesn't have a particularly strong reputation right now, right? Copyright law, as evidenced sort of by the behavior of lots of consumers seems to be struggling from some sort of a problem with credibility and legitimacy.

And that's a huge problem, right? Copyright law only functions if we have massive, widespread voluntary compliance with the law. And I think that's a goal that we should all be keeping in mind here. And I worry that when you see these sort of astronomical damages awards under the statutory damages regime, leveled against individual consumers, that that sort of underscores in the minds of many people in the public that copyright law is frankly crazy, right? That's not a good thing for the copyright system, for headlines to be splashed across the nation's newspapers that a single mother is facing millions of dollars in

statutory damages for sharing a couple of dozen songs, right? That doesn't do any of us any good.

So there is a point at which deterrence can backfire, right? There's this notion in psychology of reactants, and reactants might be what we're seeing among a certain segment of our consumers, and I think that's something that we need to be sensitive to.

MR. GOLANT: Thank you for that. Daniel?

MR. GERVAIS: So it's interesting from the previous speakers what we're hearing, and I agree, is that the current statute really tries to hit two nails with one hammer, and one is the fact that damages are hard to assess in copyright cases very often, and then there's the deterrent effect.

Now, in the hard to assess scenario you would think that the damages should be somewhere linked to the actual damages, to the extent you can guess them, whereas in the deterrent context you can argue, well, no, there doesn't need to be a link between what we might guess roughly the actual damages would be and the number that is in fact imposed.

The problem is that -- there are two problems with the statute, one is the notion of willfulness probably doesn't do the work that it's supposed to. If I copy something willfully, but actually think I have a

fair use defense, and the courts in the end -- let's say it was a fairly, a close call and the court decides, no, it wasn't fair use, well this was willful copying. So I think that this notion of willfulness probably, as a notion that leads to a multiplier, a five-time multiplier in fact might be reconsidered. I would much more prefer something like, you know, repeated infringement or at least blatancy, you know blatant infringement, egregious is at least some courts have said.

The other issue is basically that Congress has left the work almost entirely to the courts. When the range is $200 to $150,000, Congress is basically telling the courts, Do something and we're not going to tell you very much more. And the problem with the 150 is that it's appropriate in some cases, let's say a willful, but egregious, blatant commercial scale infringement, that's probably the right number, in which case it actually is something that almost gets closer to an adjunct or a criminal penalty, as well. But for an individual, it may have chilling effects to think, Well, if I lose this fair use case, I might be on the hook for 150, 150,000.

So again, the notion of willfulness probably is asked to do too much and may not be the right tool.

And, second, the range is such that if you're a court, you can't really look to Congress for guidance here.

MS. CHAITOVITZ: That leads to the next question -- well, your comment, as well as --

MR. GOLANT: I think John -- Right. I was going to say we'll switch off and --

MS. CHAITOVITZ: Right. Because this -- we'll still get to you, but you can incorporate this because both what Ben said about the 9th Circuit in their jury instructions and what Professor Gervais said about this long range, at least a lot of the commenters, including RIAA, suggested guidelines for the courts when awarding statutory damages, so they had some guidelines where to set the damages within the range. So if you-all when you're talking could also say, you know, what do you think of the idea of having guidelines and what would you put in the guidelines?

MR. GOLANT: So John and Steve react to what was said so far, and anything new you wanted to add with regard to what Ann said?

MR. BEITER: Okay. Well, I agree with Steve that each case is fact intensive, but I wouldn't want there to be some implicit suggestion that because an infringer is an individual, that they're somehow less -- even a noncommercial infringer, that

there's somehow less culpability because they're an individual, or there's less damage because the infringer is an individual. It's the same damage, and the question is -- I think the distinction between the willfulness conversation that Professor Gervais was mentioning, I think Nimmer attempts to distinguish between knowing infringement which is, I know I'm doing this versus willfulness, which is I know I'm doing this and I know it's wrong. So I think, you know, at least Professor Nimmer has attempted to make that distinction.

When there's conversation about consumers out there, and I know that that's a concern about consumers, but I have to say from a practical standpoint when I think of a consumer, I think in common parlance, when I think of a consumer I think of somebody who has essentially paid for a good or a service. And when we're talking about infringers, they may well be consuming but, you know, that they're consuming without any remuneration.

Our focus is on the creators and, you know, the founding fathers determined that the best way to encourage innovation was to see that the creators are compensated, and that is the focus. And when we start talking about recalibrating statutory damages, it

sounds to me like what we're really talking about is recalibrating the rights of the creator because the remedy -- the right is only as strong as the remedy. And my guess is that when we talk about recalibration, we're talking about recalibrating downward, although I think recalibrating upward might be a reasonable conversation, as well. But recalibrating damages to me means recalibrating the right, and taking away from the right.

MR. GOLANT: Thanks for that. I think we have Steve Marks and, Ben, do you have your card up? Rick, and then Steve Tepp.

MR. MARKS: I think with regard to individuals, I've heard two different things so far. One has focused on the two cases that were part of our anti-piracy program, which I would categorize as something very different than, for example, a case of an individual who thinks that they're engaging in fair use and it turns out to be on the wrong end of a decision if it goes all the way to court. And I don't think that the conversation should be driven by the former. It's a little bit like the tail wagging the dog, especially when you look at what happened in that program.

And getting back to Aaron's comments, you

know, a lot of what we found in the course of that program was that educating people, having them understand what was right, what wasn't, what the rules of the road were was really an important core component of that, and it's something we've brought to other initiatives such as our agreement with ISPs for the copyright alert system and the formation of CCIs as part of that agreement. And we should focus more on those endeavors so that the conversation is about education and you don't have the reactive nature as a result of two outlier cases.

In terms of the guidelines, obviously we support them doing something like that and having a conversation about it, as we said in our comments. I don't have a specific proposal to make here, but would certainly look forward to engaging in that kind of conversation.

MR. CARNES: Yes. I'd like to go back to something that John said about a right is only as strong as the remedy, and also something that Steve was talking about, about two outlier cases. Actually, if the right is only as strong as the remedy, as an individual songwriter I basically have no rights because I have to make a federal case out of one person stealing my song on the internet. That is

prohibitively expensive not just for me, but for all of my members. We can't take individuals to court. I mean, the RIAA perhaps has enough funding to do that, but we don't as individuals.

So the copyright law is basically broken, as far as I'm concerned. I can go on the internet and pull up hundreds of infringing examples of my songs, but I really can't do anything about it but just look. But, as opposed to the RIAA, you know, saying that they don't have any specific suggestions, I have a very specific suggestion about what we need to do about that. I think, and the Songwriter's Guild has submitted to the copyright office a proposal, or at least support for their proposal for a small claims court.

In the case of a small claims court, which would be a double opt in, I mean, you know we're not trying to change the federal court system, or anything like this, we're just trying to set up some sort of mediation where I can take individual infringers, private persons to court and try to defend my property. I mean, you know, if my neighbor steals my chain saw, I can taken him to court, but if he steals my song, I've got nothing, okay?

So I think that, and we will hopefully be able

to submit a statement in support of a small claims court, but I really don't see any other actual deterrent effect. I mean, you know, as Steve said, we've got two cases that went to court. Two. Okay? What percentage is that in terms of deterrence of the number of files that have been stolen versus the number of people who've been sued? That's not deterrence at all.

But if I could literally take hundreds of people to court for the hundreds of infringing cases that I see, I might actually -- you know, if you had thousands of songwriters doing that, defending themselves -- as the actual copyright owners, by the way, we are the copyright owners, I would point out that everyone else is just leasing, you know, but we own. So we should be able to take people to court. So that's my statement.

MR. GOLANT: Steven.

MR. TEPP: Thank you. We start with the question of a scenario in which an individual offered copyrighted works online with no commercial or personal profit motive. That scenario is precisely the case that led to Congress in 1997 enacting the no-electronic theft act to create criminal penalties for that type of activity. It would seem perverse to turn around and

reduce civil liability for precisely the same behavior. And it would be two years after the Net Act, as it's known, Congress increased the potential maximum of statutory damages again with, precisely with reference to the need to deter online infringements.

I think we also need to keep in mind, and earlier speakers have alluded to this, that the compensatory aspect of online infringement need not be tied back to the nature of the individual or entity posting the works illegally, and an individual can destroy a market for work almost as easily as a major corporate entity.

In terms of the public opinion question, I would simply note that in the two cases that were mentioned repeatedly this morning, every single one of the awards was a jury verdict, a jury of their peers who heard the information and found that this was a fair and appropriate level of compensation and perhaps some deterrence, as well.

In that vein, I would note that the finding of willfulness under the statute does not require an enhancement of the award for statutory damages. It's entirely permissive. And even if the decisionmaker, whether it be the judge or the jury chooses to apply an enhancement, that enhancement need not even go beyond the

30,000 maximum for non-willful infringement, such was the case in most, if not all of the jury awards in the two cases we've been discussing.

And, final note, in terms of the notion of guidelines, I would note that there's already substantial guideline in caselaw that if people take the time to look at it, does provide some useful benchmarks. Thank you.

MS. PERLMUTTER: So, let me ask a follow-up question. We've heard a number of people explain why they believe that the results in these cases were appropriate and that the law provides sufficient flexibility and factors for judges and juries to arrive at a good result in applying statutory damages.

We've also heard both on this panel and in some of the comments that we've received concerns about the potential volume, the maximum volume of statutory damages as applied to individual file sharers. So I suppose I would ask in particular those who feel that the law as it stands is appropriate and does provide sufficient tools, whether they think there's any need to deal with the perception, whether it's a public perception that the potential damages could be overly high or potentially judicial concerns about it because

a number of courts have expressed concerns about it and there are those who think the concerns about the potential level of damages might affect some of their analysis of the legal issues in the cases.

So again, the question, you know, is there any need to try to address these concerns even if you think the law as it stands is appropriate and the decisions have been appropriate? And if so, how would one go about doing that?

MR. SHEFFNER: Shira, actually the second part of what I had planned to say actually addresses your question exactly, but I just want to elaborate on something that I touched on in my previous statement about why the law shouldn't categorically distinguish between individuals and corporate entities. And, Steve touched on this a little bit, but on the internet you actually have this sort of perverse situation in certain contexts where a noncommercial actor, an individual actor can actually cause greater damage than a profit-seeking entity.

I mean, if you imagine two situations, one is, you know, a single mother offering files to anybody connected to a certain peer network for free, and then at the same time you have a commercial entity saying, You can get this song for 49 cents. It's actually

likely, more likely that the individual is gonna cause more damage because when you have free competing against 49 cents, people are going to tend to go to free, even though she may not be seeking to pocket any money or sell advertising or doing anything that would commonly be thought of as commercial. So again, the actual status whether the person is trying to take in money doesn't necessarily tell you very much about how much damage that person or entity actually causes.

And then to get more directly to Shira's question about whether public -- whether we need to change the law because of public perception. Again, to emphasize something that several other people have said, the two cases that we've been talking about, and just for the record we're talking about the Jammie Thomas-Rasset case and the Joel Tenenbaum case, they're literally two of tens of thousands and we should be really careful in this whole proceeding not to make policy or to legislate based on anecdote.

Those are literally the two cases that we keep on coming back to, and the public perception that Professor Perzanowski referred to is in some way shaped because of people who don't particularly like copyright in the first place, continually referring to those two cases. It's fine to talk about them, I've talked about

them and everyone's talked about them, but they need to be put in the context of two out of tens of thousands. It's a tiny, tiny percentage of the whole.

MS. PERLMUTTER: And just to clarify or elaborate a bit on my question, not necessarily whether the law should change because of public perception, but should anything be done to counter it? I mean, that might be one possibility, there might be other possibilities.

MR. SHEFFNER: Well, I think there's certainly room for, you know, quantitative empirical research on, you know, how these cases actually come out, and again I think what it would show is that these cases with actual large jury verdicts are in some sense outliers, they just don't happen very often, which in some cases, in some sense is why we pay so much attention to them. I mean, we pay attention to the .0001 percent of planes that crash, not the 99.999 percent of planes which land uneventfully.

MR. GOLANT: Thank you. Alex, I think you had your card up for a while.

MR. CURTIS: Sure. I mean, thank goodness we're not talking about plane crashes because that would actually involve people dying versus infringing. And I think the two cases that we're

talking about are the example of the deterrence rate. We're talking about the outliers where a claim was staked and setting out -- here, if you actually do this activity, here's what you could be held liable for, regardless of how, what your intent was or if you were a commercial actor, or a noncommercial actor.

I think to a certain extent we may be talking about a historical blip, right? If we talk about surveys today about people file sharing, as compared to the number of new subscribers to services that exist today, lawful services that exist today that allow both users to listen to any song that they want in the same way that they could listen to any song that they wanted when they were infringing in the '90s, late '90s, early 2000s, the options are so much more available to legally listen to music that maybe we are talking about something that may not be a giant impact anymore in the same way that, you know, several thousands of cases that were filed against alleged infringers at those times and settlements that had happened in the past 10 years.

And so, but I do want to kind of point out about the range of statutory damages were meant to be -- initially were meant to be minimums and maximums, and at the time when these original amounts were set,

250 to 10,000, those were dealt at times per infringement and didn't really contemplate the technology that we have today where one making available of a song equals hundreds of thousands of possible infringements, in the same way that the picture that I took this morning on Instagram led to 5 to 10 different copies of that same image being posted multiple times. If it were an infringing picture, it could be, each one of those could be an instance of infringement.

And so to the extent that we're talking about minimums and maximums, my concern is that the guidelines for a jury today -- it would be helpful if the guidelines for a jury today would help them understand the context in which these laws were initially written to serve as minimums and maximums, and to take into account the impact of how technology works today. Anytime you take a picture, whether we're talking about music, whether we're talking about a picture of something digitally today, that implicates so many more copies than was originally even thought of in the 62 act, and the 76 act.

MR. GOLANT: Thank you. And I think John, and then Aaron.

MS. CHAITOVITZ: And then were going to

go to the --

MR. GOLANT: Yes. And then we'll move on to the next question at the end.

MR. BEITER: I simply want to say that I think that the concern about public perception ultimately is resolved in the court of public opinion. We've got interested parties who have viewpoints who have substantial ways of getting their thoughts out to the public, and in one person's eyes this is a single parent who's, you know, sitting in the bedroom, to another person it's a willful infringer who's reeking all kinds of havoc.

And those points of view, regardless of the outcome of the case, those points of view are put out there in the court of public opinion and will be dealt with, and whoever makes the better case, you know, wins. And I don't know that that's necessarily a concern to be dealt with otherwise.

MR. GOLANT: Excellent. Aaron.

MR. PERZANOWSKI: Yes. So I wanted to come back briefly to this question of what do we make of these two case, right? And I agree that we have a really small data set here, either an unfortunately small data set where perhaps depending on what you think of the outcomes of these cases, it's an

unfortunately small data set, right? So we can't think about these as two of 10,000 cases. And in some sense that's true if we're thinking about the universe of cases that were filed, but they're the entire universe of cases of this nature that were decided by juries, right? So in some sense we're looking at 100 percent of the data set.

What do these two cases tell us? One thing I think they tell us is that we should be a little bit skeptical of treating a jury decision as some sort of stamp of approval on the entire statutory damages regime, right? Juries are presented with the statute, right, and the statute gives them this enormous range. And for the most part what juries do is they kind of pick a number in the middle because that feels safe, right? Because that seems like, well, we're doing sort of what Congress has intended for us to do.

That doesn't say anything about whether the jury thinks that the range is appropriate, it doesn't say anything about whether the jury has any reason to form such an opinion, right? Juries are sort of groping largely in the dark here. Sometimes they are given guidance, sometimes there are factors that are helpful. That's not always the case, right? And so if we think these factors are useful, maybe one thing that we should

do is talk about building those factors not into jury instructions, but building them into the statute.

MR. GOLANT: Thank you. Steve. And then we'll move on to the next question.

MR. TEPP: Just a few reactions to some of the things we just heard. With regard to things like pictures shared on Instagram, I would note that one of the built-in limitations on the availability of statutory damages in the first instance is that they're available only to copyright owners who have registered their work with the Copyright Office prior to the infringement or within three months of the first publication of the work. So I'm assuming, Alex, you didn't quite register your Instagram picture this morning, though you could.

MR. CURTIS: Not yet.

MR. TEPP: You could. But as a practical matter, to the extent that what you're saying is that there's this widespread problem, I would offer the suggestion that most people are not registering those pictures and so statutory damages isn't even available to them if they chose to initiate a federal lawsuit, and if that subsequent distribution was found to be infringing, which I think is a fair question to ask.

The question was raised about the per

infringing work method of calculating statutory damages, and of course as I'm sure the USPTO staff are aware, back in the 19th century that wasn't the way it was calculated in U.S. law, it was per infringing copy that was produced. And that changed over the course of years I think culminating in the 1909 act, which brought us into the per infringing work calculation that we have now. I think as we look back at it, that was probably a decision by Congress because for the same reason that statutory damages have been in U.S. law since the very first copyright act in 1790 that infringement damages and harm is often difficult, if not impossible for the right holder to prove.

In today's environment the number of infringing copies made is difficult or impossible to prove, and so if that was an element of calculating statutory damages we would be back to an unworkable system. And that's also why we need a very broad range from 750 to 30,000, or even potentially 100,000. I don't view that as a punch by Congress, I view that as a recognition that there is a wide range of circumstances behind infringements, and we want to give the triers of fact the ability to apply what they believe is just as to those particular circumstances.

And so finally with regard to the question of

how do we address the public I think misperception that statutory damages is too high, I would suggest that certainly through educational efforts and not through statutory amendment. And I say misperception because a finding of willful infringement and an award of the minimum of $750 dollars per infringed work of statutory damages is entirely consistent with the statute. So to say that that is necessarily too high doesn't seem to me to be a fair characterization.

MR. GOLANT: Thanks for that.

MS. CHAITOVITZ: And I'm now going to switch a little bit from individual file sharing to secondary liability. Commenters, a number of them have made a range of suggestions about how to recalibrate statutory damages for secondary liability. Suggestions were made, for example, for a total damage cap, providing courts with flexibility to award less than minimum damages, if there are a large number of infringements underlying the case, changing the innocent infringement criteria and limiting statutory damages when there's a good faith belief that the use is non-infringing.

So I was just wondering what you, like your comments on these various proposals that have been made.

MR. GERVAIS: Well, as I said earlier, I certainly, and we heard it from a number of other speakers, the idea that both the commercial impact but the belief in the good faith or fair use defense should be factors that courts consider. I think that makes perfect sense. The thing is, of course, that the statute says nothing about that right now, so it's up to individual judges and circuits. And so that might be an issue.

In terms of intermediaries in secondary liability, there's so many issues. One is, we're asking fair use to do a heck of a lot of work right now, and that may or may not be a good idea. There are uncertainties that come with that, there's litigation that comes with that. So I think the reason we have statutory damages issues is partly because we're looking at this from a litigation angle very often. And so if a court has to decide it's fair use or not that has implications for how creators are paid. If you don't have the resources to litigate, that's saying you have issues for new players potentially. And even, you know, you find it's fair use, then it limits the uses so that pushes beyond fair use into more litigation, perhaps.

So I'm answering I guess indirectly by saying

we need to perhaps look at other ways to avoid, whether it's reconsidering the safe harbors or the licensing options, so that statutory damages and fair use and litigation generally has less of a central role to play than it does now.

But basically to answer the very specific question, I think, yes, whether you think what you're doing is fair use, it should certainly be one of the factors if it's a credible defense, I mean, culpable whatever you -- it should certainly be a factor.

MR. MARKS: A couple of points just to echo what Daniel said. I think, you know, when you're talking about rights and remedies that exist for copyright owners, I understand we're here to talk about one subject, and one subject only, and there are other discussions going on, but we really do have to take a step back, I think, and have a more holistic view about what other remedies are available and how those other remedies are working if you're looking to try and find the right balance or to strike the right balance.

And I think it's well-known that, you know, we for example do not think other parts of the law and the remedies that are available to us under the DMCA and the safe harbors are working very well, for example. And so we think -- you know, setting aside the procedural

way we need to have discussions, we should be having discussions that look at these, you know, more holistically and, you know, not un-tether them from each other and just talk about what the problems might be with one without looking at everything together.

The second point I wanted to make is that when I read a lot of the comments that came in supporting some of the ideas that were part of the question, there seemed to be this theme of chilling innovation, and this has really been a popular refrain, but one that I don't think there's really evidence for. It was something they argued in the Amicus briefs in the Grokster case, and yet after the Grokster case, which was a 9-0 decision by the way, there was a 50 percent increase in venture capital spending in the music space, for example.

And if you look at everything that has happened since that time, there's been a tremendous amount of investment in the music space. There's been some that have sat out for other reasons, complications and licensing, and those are discussions that we'll have in other forums as well, but the idea that everybody in Silicon Valley is hunkered down and afraid to create or put out a product is just something that I don't see, you know, day-to-day in our industry or just

as a consumer.

And I think we also need to get away from this creation on the one side and technological innovation on the other side because they're juxtaposed against each other too much, when they should be talked about as not only interdependent, but there should be a recognition that technology companies create things and are creators, and creative companies engage in, you know, technological advances.

And the amount of money that is spent on the creative side, you know, in our industry, you know, tens of billions of dollars, you know, over the last decade trying to -- or creating sound recordings, tens of millions more paying royalties, etcetera, there is a lot of innovation, and music drives innovation in a lot of cases. You have car commercials that are not about a $50,000 luxury car but, you know, a music ap that happens to be available in the dashboard in a 30-second commercial where the car company is paying a lot of money. Phones, tablets, social media. Nine out of the top 10 accounts on Facebook are recording artists, nine of the top 10 Twitter accounts are recording artists, 28 of the top 30 You-Tube videos of all time are videos that were created by recording companies for a recording that was released.

So we need to get away from this, you know, creation and creators over here, technological innovation over on the other side and recognize the reality of what's really happening in the marketplace and, you know, answer questions and have discussions with that perception in mind.

MS. CHAITOVITZ: I didn't see the order they were put up.

MR. SHEFFNER: So I just want to spend a minute talking about why it's important to have the availability of statutory damages in the secondary liability context. There are a lot of bad actors out there on the internet whose sole purpose -- who setup services whose sole purpose is to help others commit direct copyright infringement. I think everyone can list all the names over the last 15 or so years from Napster, to Grokster and Kazaa, several cases we litigated more recently against services called isoHunt and Torrent Spy. All of these were dedicated to helping others commit direct copyright infringement.

At the same time they didn't want to get caught. One of the features of many of these services is that they intentionally try to minimize the amount of data that they would store for the purpose of, one, making sure that their own users didn't get in trouble

and, second of all, for making sure that they didn't get in trouble if they got caught. But the one thing that third parties, including copyright owners can see is the works that they're making available on the internet. That's easy to count. It may not be easy to count, for example -- or it's actually impossible to see, for example, on a peer to peer network the individual songs or movies or television shows being transferred between individual peers. All you know is the number of works available on the system.

So if you were to have a system which some have advocated in the written comments that you would eliminate statutory damages -- eliminate the availability of statutory damages in the case of secondary liability, you truly wouldn't be able to have the evidence necessary to prove actual damages. And you can go back to Supreme Court cases for many, many decades, the very reason that we have the availability of statutory damages is there's cases that are difficult or in some cases impossible to determine or calculate the amount of actual damages. And that is even more true today in the case of these internet services that are dedicated to piracy and that intentionally obscure or delete or make impossible for third parties to see the actual transfers or

distributions or downloads that are taking place. You need statutory damages in order to address that situation.

MS. CHAITOVITZ: Thank you. And we have the 10-minute warning, so I'll ask people to speak briefly, but one other thing because -- my question wasn't about eliminating statutory damages, it was about re -- or the possibility of recalibrating. You know, for example when you ask for a billion dollars in damages, maybe there should be a cap on the total, or if there are 250,000 counts, maybe there should be flexibility for the court to award less than minimum damages per count, or something like that.

MS. PERLMUTTER: Yeah. If I can just add to Ann's comments made. So if we assume that statutory damages still exist, and the Green Paper certainly underlines the importance of statutory damages in our system, and we assume that in the context of secondary liability claims against these online services there is a need for deterrence for the bad actors, so I suppose one way to put the question is, is there any other basis than the current per work basis with the current maximums that would still provide sufficient deterrence?

I mean, if you are starting to look at

services that are making hundreds of thousands of works or maybe even more available and you had the maximum count for each one, so the zeros, you know, really add up very, very quickly, at what point -- are there other ways that we could calculate it, whether it's through a cap or through changing the basis and no longer having it be per work, that would provide adequate deterrence in this particular context.

MR. GOLANT: I know people have had their cards up early, but just to make it easier, especially since we're running out of time here, we'll start with John, and end with Steve.

MR. BEITER: Okay. Two quick points just adding to what Steve had said a while ago, in our joint comments submitted we also noted a 2011 study which stated that 89 percent of investors in music services who were polled and said that they preferred the current U.S. copyright regime, including statutory damages, to other European style regimes that did not include statutory damages. So when we're talking about hobbling innovation, I'm not quite sure that that's really, really the perception of the people making the investments.

Secondly, the idea of putting caps, I would just note that given the technology today there is the

potential for much more infringement being done by fewer people, and therefore much greater damages involved, and so I'm not quite sure the point of some absolute caps.

MR. GOLANT: Thank you. Daniel.

MR. GERVAIS: So to that specific question, I don't know that cap is the right way to think about this. Now, the problems of course in the statute we've moved, as Steve was saying, from per infringement to per work, and you can make a list of pluses and minuses of both systems, and there are problems with both. Now, we have the per work, which doesn't work very well if you've infringed, you know, a large number of works, but there are issues as well with the per infringements. So if you were to have either guidelines or statutory criteria to help courts, we've mentioned a few already, this would be on my list of another applicable criteria.

I also very quickly want to react to something that Steve said when he was talking about innovation in the music industry. I was going to say exactly because, you know, music licensing makes brain surgery look easy, but it exists. It exists, right? We have -- I mean, when I want to be mean with my students, I ask them to read 114, but -- 112, 114, 115. We have a

system, it more or less works, but in other areas we're very much relying on fair use to have innovation. And that's what my point was, it was in fact you can compare music to other sectors.

MR. GOLANT: Thanks, Daniel. We're going to go over a little bit because we want to get everyone's comments in. But, Aaron, you're next in line.

MR. PERZANOWSKI: Yeah. I'll be really brief. I just wanted to point out that this question about measuring harm to innovation is necessarily sort of a counterfactual inquiry, it's a really hard thing to do, it's a really hard thing to think about. So maybe investment did go up 50 percent, but maybe it would have gone up 70 percent or 80 percent absent those decisions. So it's a really hard thing to go back and figure out retroactively.

One piece of evidence, and admittedly sort of a small anecdotal piece of evidence but I think something worth considering, Michael Carrier wrote a paper called Copyright and Innovation, The Untold Story, where he goes out and talks to VCs, talks to people in the startup world, asks them questions and, you know, those responses are certainly suggestive that the statutory damages regime does have an impact on

innovation.

MR. GOLANT: Thanks. Rick.

MR. CARNES: Yes. When we talk about innovation in the tech space, we should stop just for a second and talk about innovation in the music space. Music is innovation in and of itself, okay? Every day as the smallest business person in the world I have to sit down and face a blank page and I either innovate or vegetate. I mean, that's what's going to happen, right? And the entire value chain starts from the songwriter, okay? I mean, without the song, you don't need the iPod or anything to deliver the song, right? Okay? So absent the songwriter, the entire value chain starts to break down.

When we talk about damages, I think one of the things that's always absent in this discussion is compensation for the victims, okay? I mean, that's part of what this is supposed to be. Not just deterrence, but actually getting some money back into the pockets of the people whose pockets were picked. And I can tell you personally, and I'm sure Eddie can tell you the same thing, we have not gotten anything like what was stolen from us out of any of these court cases, okay? So if we're talking about damages, we need to find a way to actually compensate the victims

and that would not include anything about lowering damages, okay? Thank you.

MR. GOLANT: Thank you. Alex.

MR. CURTIS: Having two young kids, I have this appreciation of trying to modify behavior, and when we talk about deterring infringement versus trying to encourage good behavior, I'd like to see something almost like a switch in motive for statutory damages instead of just focusing on compensating the infringed and deterring infringement; something that also puts an eye towards encouraging licensure and legal licensing.

And so to the extent that there are innovators out there really concerned that they won't ever be able to attain a lawful license, yet they have this amazing innovation that could end up changing the market, it would be great to see some sort of policy, and I'm not exactly sure how that would be constructed. But, you know, and as Daniel talked about, licensing music is, you know, akin to brain surgery, if there were something easier that would encourage more licensing and less litigation and hopefully address the problem that Rick talks about, about actually getting creatives paid, a lot of this doom and drama and cost of litigation could be applied towards compensation instead of litigation.

MR. GOLANT: Thanks for the comment. Eddie.

MR. SCHWARTZ: I just wanted to, I do want to support Rick's comment, the innovation we call music creation is, without that there would be no conversation going on here today or any of these businesses would exist, and that is overlooked time and time again, how difficult it is to create music that has value. It's easy to create music, anybody can pick up the guitar, most people, and just bang something out, but creating a song that actually ends up having value in our culture. And I just want to say, by the way, I really would love to never hear the word "content" again. I don't get up in the morning and make content, I make coffee, and then I make what I'd like to think is culture, if I really do my job properly.

So maybe we should talk about culture creators because content, I don't know if there's any value in content. I do know there's a lot of value in our culture and I wonder if we can't substitute those two words. They're very similar, they sound similar, but culture and content are two very, very different things.

Let me, I just want to comment about something

that Professor Gervais said, and that is the safe harbor situation. I just don't know how we can have this conversation without talking about safe harbor. And I would push back a little bit on this notion that there are individual infringers and that we should be suing them. Not that I don't totally agree with the damages and the range of damages, I support those, because you need a stick. We need to have a stick, and of course we need to develop some carrots, too, but I won't address the carrot side of it right now. But the reason there's no individual infringers, because they couldn't, no individual could infringe millions of times without millions of partners.

In other words, for every sender -- if we're talking about people who mass infringe, there are millions of people on the other side of the transaction and they're also culpable, as well. So that this is not an individual problem, it's 1, 2, 3, 100, 1000 people. Again, I support the levels of infringement we're talking about, or the damages, but it's a systemic problem and unless it's addressed in a systematic way, I don't think there's really much hope for us to move forward. I don't think deterrence has worked at this point. And I wish I could say that it has because I think we're all on the same side as far

as that goes, but I think we can realistically look at it and say, well, deterrence really hasn't, you know, paid off for us.

So coming back to safe harbor, there is a system in place which makes a lot of people a lot of money, and they are all, you know, driving the getaway car, so to speak. They all enabling this system of infringement we have. And until things like safe harbor are addressed and we have some way of approaching this in a systematic way -- and, you know, I think some people made this point before and I'll make it and then I'll stop talking, but it's not that our work isn't being monetized, our work is being monetized every single day, as I think Rick tried to allude to, it's just that the guys who make the music, the people who make the music, they're not getting any of that money, a lot of other parties are, including infringers. So I think that's something that really has to be carefully looked at. Thank you.

MS. PERLMUTTER: So, and let me invite you to participate in our multi stakeholder forum on improving the operation of the notice of the takedown system, which is at least part of that equation with the safe harbors.

MR. GOLANT: John, I think you had a

question?

MR. TEPP: I wasn't giving up my spot, but John can go first, that's fine.

MR. BEITER: I have no comment.

MR. GOLANT: So at this point in time --

MS. PERLMUTTER: Steve wants to --

MR. GOLANT: Oh. Sorry about that. Steve.

MR. TEPP: So the question that was posed about a cap on statutory damages I think is probably not the right approach because in order for that cap to be at a meaningful level and not just be so high that it never got hit, you'd run the risk of not just reducing the deterrent effect, but you'd actually run the risk of undercutting the compensatory aspect of statutory damages that's already been alluded to, more than alluded to.

With the range of statutory damages currently in the statutes, 750 as a minimum for ordinary infringements, that leaves the court a tremendous amount of flexibility. And you posited a claim for a billion dollars of statutory damages. A court that was inclined to apply a $750 per infringed work damages assessment would have to be facing an infringement of over 1.3 million works in order to get to that billion

dollar level.

So what I'm trying to illustrate is that the statute already provides sufficient flexibility for courts, judges or juries who are interested in keeping statutory damages below certain levels, or find certain levels to be unjustified, the ability to do that without a cap, and that a cap has a downside that could undercut not only the deterrent effect, but the compensatory element of statutory damages.

And, finally, just pulling the lens back a little bit, the whole context of statutory damages and secondary liability, I think what this ultimately boils down to is a shifting of risk. You have services that are starting up, and as has been mentioned there doesn't seem to be any lack of ingenuity and startups. In order for statutory damages to apply in those circumstances, one, they have to have chosen not to license the work, that they're going to use, and I agree with the comment earlier that we should be promoting licensing.

Two, they have to have been found to infringe, so presumably the key element was a fair use question, and they lost on that but they must have at least known that they were pushing the envelope. And, three, they must have failed to have the protection of the safe

harbors. And I'm not going to even wade into the discussion over the scope of the safe harbors, we've heard about that from this panel. Whatever it is, it is right now.

And so we're dealing with entities that by definition have failed those three safeguards, and to then turn around and say in spite of the fact that you didn't have a license, you weren't under fair use and you don't meet the statutory criteria for safe harbor, we're still going to reduce the statutory damages against you seems like it's shifting to the right holder the risk of starting up a legally dubious service, and I'm not sure that the justification for that has been made. The statute does have a complete remission of damages for close fair use cases, but Congress chose to apply that only to nonprofit entities, and that seems like a fair place to draw that line. Thank you.

MR. GOLANT: Thanks. Anyone from the audience have any questions or comments they'd like to address to the panelists?

MS. CHAITOVITZ: Or our online audience, as well.

MR. LAPTER: There is one online question that we have received as of now. The question is: How

can anyone establish whether a defendant believes an infringement is fair use or simply saying so for the purposes of litigation?

MR. GOLANT: Anyone can go. Daniel.

MR. GERVAIS: Well, so there are a variety of ways to answer that question, but in the criminal context, copyright criminal context, the courts do it all the time. If the defendant has a, it's called credible fair use defense, they lack the intent to commit the infringement, then will typically be found not guilty.

I'm not saying that that's the right standard, but that's an example of courts saying, okay, you don't have a fair use defense, but it wasn't a -- or, I mean, that's not the standard either, but you know what I'm saying? There's a way for us to define that kind of standard, and my suggestion earlier was that standard should be part of the equation in determining the appropriate number. And as Steve said, there are cases where the right number might well be zero, but certainly it should be near the lower end of the range when you have a credible fair use defense. I think it needs to be objectively credible.

In the criminal context arguably courts will even look at subjectively credible, like people having

a genuine belief. I don't think that, civilly, that in the civil environment that's the right standard. So there are different ways to answer the question, I suppose.

MR. GOLANT: Anybody else want to chime in? John.

MR. BEITER: I would just say that this question is the question that's asked in every tort case where the, you know, what's in the mind of the perpetrator is at issue, and it's the same, it's done in the same way as other lawsuits. You look at actions, you look at communications, you conduct discovery and you are always I suppose facing the infringer saying, I'm innocent. But it's the same issue in every tort case where the mindset is at issue.

MR. GOLANT: Thanks.

MS. CHAITOVITZ: Can you please identify yourself?

MR. POMEROY: Thanks. Identify myself? Yes, I can. Dave Pomeroy. I'm president of the Nashville Musicians Association, Local 257 of the AFM.

So my question is, first just to say that I think Rick Carnes made a very salient point about when there are damages, where does it go? And so my question is related to the law, itself, not being as

familiar obviously as all of you are with the law, is there any part of the law that addresses the intellectual property rights of the musicians and/or singers who perform on a recording as opposed to just strictly the copyright owner? Is that issue addressed at all in terms of what happens, you know, when there are damages? You know, where do they go, I guess would be my question.

MS. PERLMUTTER: Professor Gervais.

MR. GERVAIS: I was afraid somebody was going to say, Okay. Wow. Okay. How do I answer that in one minute? So there are two places in the statute where musicians, the statute called "Performers", are protected. One is since 1994 there's a bootlegging protection, Chapter 11 of the statute, and then there is in the -- are you familiar with the SoundExchange?

MR. POMEROY: Yes. Of course.

MR. GERVAIS: Yeah. So the statute says that performers must receive 45 percent of the SoundExchange royalties, and background musicians actually, well there's a five percent -- basically you could say 50, if you wanted to. So those are cases where performers are identified as such.

In the statute the other -- the issue that really gets hard is performers are, I believe anyway,

authors of sound recordings, and so that gets into a lot of issues that I don't know how much time we have, but...

MS. PERLMUTTER: You could perhaps discuss it during the coffee break in more detail.

MR. GERVAIS: Yes.

MR. POMEROY: I was thinking more in terms of outside the SoundExchange realm. I mean, that is somewhat defined, but...

MR. CARNES: Can I ask Dave a question? Have you ever gotten a dime from any of the lawsuits?

MR. POMEROY: Not yet.

MR. CARNES: There you go. There's your answer. Even if you have the right, even if you're supposed to get, you're not getting any money. This is what we're talking about with damages. We're not seeing them, okay?

MS. PERLMUTTER: Yeah. And obviously this raises a number of different issues, including how damages are calculated, which is the subject of the panel, and then again how they're collected and distributed.

MR. CARNES: But, I mean, just effectively, it's zero, okay?

MR. POMEROY: Thank you.

MR. RICE: My name's Corey Rice. I work at Aristo Media, I do marketing and promotion for them. And one of the main things that keeps going through my mind throughout this whole discussion is that we're looking at infringers as kind of the enemy, when in my opinion I view them as an asset. I mean, they're going to be the biggest fans of music. There was a study in 2012 that said that infringers bought 30 percent more music, like file sharers, than non file sharers.

So I think it's really important to think about, especially when you're talking about statutory damages and how you're going to treat them and then how you expect them to behave in the future as, you know, music purchasers and consumers.

So I really agree with a lot of what Alex said and the fact that if you're going to have statutory damages, it might be wise to lower it so it's a way of encouraging them in, to participate in like licensing and music streaming. So if they're lower and they're actually like enforceable and it's something like a ticket, then maybe you get some money and it's actually more than just two cases.

And then lastly, you also have to think that this operating in a new marketplace where you might have the same product that is being given away for

free, streamed and sold, you know, with Pretty Lights, for example, who has built his whole career on giving his music away for free, but he also sells it. So it makes it difficult to assess damages in this case because it's a new game.

MR. CURTIS: I definitely agree with that and I definitely think there's a lot of evolving business models and artists that are trying to take on those business models, whether they're independent or otherwise, but again I don't think it's the correct point of view to allow people to just illicitly infringe and I don't think that's the right way to go about it. There are so many more ways today to go about doing a lot of that legally, and I do think whatever we do here ought to have a taste of trying to encourage licensure so that those activities can't take place and that people can get compensated for their creativity.

MS. CHAITOVITZ: Okay. I think Rick and John have their cards.

MR. CARNES: Yeah. To address the idea of, you know, promoting your music by giving it away, this has always been allowable. I mean, you could always do this. It has nothing to do with copyright. You can always give your music away, okay? But I think

you made a really good point about getting a ticket, right? You know, if it's like getting a ticket as opposed to getting a $2 million judgment against you, it might actually be a deterrence.

And, you know, you talk about file sharers actually consuming more music. Well, you know what, people who love cars, like me, who have a tendency to get more tickets? Well, this is why the small claims court would actually help because we actually could have deterrence in the same way that knowing that if I put it in sixth gear, I'm probably going to get a ticket, so I'll keep it in fifth gear, right?

So that's the kind of deterrence that we're looking for, actual meaningful deterrence. And I think in a small claims court you would be able to look at it, you know, I could lose a couple of thousand dollars if I did this, you might actually pay the 99 cents. But if it's a case where two people out of a billion people are going to pay $1,000,000, there's no deterrence whatsoever. So small claims I still believe is the right answer for this.

MR. BEITER: To your point about infringers being potentially great fans, and I guess the assumption is that that there's other money generated maybe not through the recording, but selling

merch at concerts, I'd just point out, I'm sure Rick and Eddie could say this more eloquently than me, but songwriters, free-standing songwriters, you know, in their case they're not selling merch, they're not making money selling tickets, it's the song that they created and that is the source of their revenue. So, you know, that's a vital distinction. If you accept the premise that an infringer is still, you know, potentially an net moneymaker for an artist, that's just not the case with songwriters.

MR. SCHWARTZ: I think another word, another myth like content, this -- you know, it's a -- I think free is a complete myth. Nothing is free. I mean, if you're downloading music for free, you're paying Comcast $45 a month to get free music. So again, I think it's really important for us to start thinking about whether this notion of free is true or not. I think it's completely a myth that's been propagated by certain interests to hide the fact that they're actually making a lot of money, but they're sort of selling tickets to somebody else's show.

So I guess what we're talking about here is maybe if you're selling tickets to somebody else's show, the people who put on the show should get some of that ticket revenue, as well. So I think free is a

complete myth.

MS. CHAITOVITZ: Anybody else online?

MR. LAPTER: No.

MS. CHAITOVITZ: Okay. I think it's time for a coffee break for about 20 minutes, or so?

MS. PERLMUTTER: Twenty minutes, exactly.

MS. CHAITOVITZ: So we can start back at 11:00.

MR. GOLANT: Thanks, everyone.

(Recess.)

MS. CHAITOVITZ: All right. We're going to get started almost on time.

MR. GOLANT: Thank you everyone for coming back. We have a new panel now. We're going to talk about the first sale doctrine in the digital age. And as a reminder, when online you can have comments and questions, we'll address those after the panelists have made their case. And we'll do the same thing as we did before, we're going to have each person here introduce themselves for the record and their affiliation. And then of course just like the last panel, everyone who has a question over here will raise their plaque cards and we will address those questions when they come.

MR. GERVAIS: Daniel Gervais. I'm a

professor here at Vanderbilt Law School.

MR. HARRINGTON: Michael Harrington, composer, musician, I teach at Berklee, and music and copyright consultant.

MR. MARKS: Steven Marks, and I checked my e-mail and I'm still working, so I'm still with the Recording Industry Association of America.

MR. PERZANOWSKI: I'm Aaron Perzanowski, Case Western Reserve University School of Law.

MR. SHEFFNER: Ben Sheffner, vice-president of legal affairs, Motion Picture Association of America. The MPAA represents the six major motion picture studios here in the U.S., which are Sony Pictures, Paramount Pictures, 21st Century Fox, Walt Disney Company, Warner Brothers and NBC Universal.

MS. AISTARS: I'm Sandra Aistars, I'm the CEO of the Copyright Alliance. The Copyright Alliance represents 40 institutional members and 15,000 grassroots members representing the entirety of the creative spectrum.

MR. CURTIS: I'm Alex Curtis, director of the Creators Freedom Project, a project that empowers creators to take control of their own small business by merging today's technology and their creative spark.

MR. TEPP: Steven Tepp on behalf of the Global Intellectual Property Center of the U.S. Chamber of Commerce.

MS. PERLMUTTER: Just one housekeeping note, we are recording this event in many different ways, but one of them is a transcript, and so we've been asked just if everyone can make sure that you articulate as clearly as possible to help with that process. Thank you.

MR. GOLANT: Well, thanks everyone. I have an introduction about our topic today that I'll read out and then we'll get to our questions.

So the first sale doctrine as codified in the copyright act allows the owner of a physical copy of a work to resell or otherwise dispose of that copy without the copyright owner's consent by limiting the scope of the distribution right. This doctrine which originated to ensure a consumer's control over their tangible physical property enables the existence of the libraries and secondhand markets and records and books. But the copyright owner's remaining exclusive rights, namely the right of reproduction are not affected. As a result, the first sale doctrine in its current form does not apply to distribution of a work through digital transmission where copies are created

implicating the reproduction right, and the Copyright Office has concluded so in 2001 that the doctrine should not be extended to do that.

With that, my first question to the panel here and our guests is: From a practical perspective, is there a need for a secondary market for eBooks, online music, video and software analogous to the secondary market for physical media; why or why not?

Who would like to take the first stab at that particular question?

MR. PERZANOWSKI: I'm happy to get it started.

MR. GOLANT: Thanks, Aaron.

MR. PERZANOWSKI: So secondary markets are really important, right? And they're important because they put downward pressure on pricing and because they help lower barriers to access to creative works, and I think that's really important. There are a bunch of benefits of the first sale doctrine, and really kind of the broader complex of exhaustion rules in copyright law, right? So this isn't limited just to first sale, there are the other parts of 109, there's the stuff in 117, all of that is sort of important to keep in this conversation.

I think it might be a mistake to focus

exclusively on this question of secondary markets. I'm happy to talk about the value of secondary markets, but there are other kind of deeper benefits that come from the first sale doctrine that I think we need to keep in mind here, right? You know, copyright law is worried a lot, and understandably so, about incentives, incentives for creators. But first sale and exhaustion are also really important in understanding the incentives for consumers, right? First sale is crucially important as a way of motivating consumers to take part in lawful markets for copyrighted works.

We talked a little bit on the last panel about how infringement liability and statutory damages can be a stick to get consumers to behave in the way that we want them to, right? I think first sale and the sort of personal property rights that come with it are hugely important as a carrot in that conversation, right? When consumers have reliable property interest, when they have the right of alienation, when they have the right to resell, to lend the works that they buy, that's a pretty important inducement for them to participate and to spend their money, you know, in the lawful market for copyrighted works, as opposed to going out and getting things for free, which is awfully easy for them to do. So I think that is a huge benefit

to keep in mind here.

The other thing that I'd say really briefly is first sale is perhaps most important in that it helps reduce transaction costs. In particular, information costs for consumers. Consumers know what a sale is, they know what comes from a sale, they know what the consequences are. When we have a situation where works are subject to incredibly complicated licensing regimes, right, and I'm talking about licenses in terms of enduser license agreements, consumers have a lot less confidence and a lot less understanding of what they can do with the things they purchase, and I don't think it's a good thing for the copyright system if consumers have to parse through the say 15,000 words of the iTunes license agreement to understand the nature of a 99-cent transaction. That's not a good thing.

And so if we had clear rules concerning first sale and concerning exhaustion more generally, we keep those information costs low, and that I think is again important to getting consumers to participate in the copyright system in the way that we think they should.

MR. GOLANT: Thank you. We'll first call on Steve Marks to respond.

MR. MARKS: Thanks. I think, and I want to limit my remarks to music because I don't want to

speak on behalf of any other industry, but starting at kind of a 30,000 foot level, I think we have to recognize and acknowledge that in the case of digital, we're talking about something that is very different in kind than a physical good. I know as a consumer when I think of first sale and the opportunities that may exist to buy something new or buy something used, my choice is generally between something that, you know, is new and hasn't been degraded. If it's a CD, for example, there's no scratches on it, the liner notes and all the artwork and everything are in pristine condition, whereas if I choose to buy something used, you know, I'm giving something up in that respect because there may be scratches or there may be pages missing or somebody spilled their coffee on the booklet.

In the digital world we were talking about, and just setting aside the legal issues which I'm sure we'll get into later about reproductions and distributions, but when I think of, on the digital side it's really more if a transaction like that occurred and a secondary market, you know, were to exist like that, there is a more direct substitution because you're getting the exact file that the person had to begin with and which is being sold in the market, in

the primary market.

And for that reason I think at least in the music market, especially where the industry has gone to great lengths over the years to provide music at low costs, 99-cents, $1.29, whatever the price might be for example for a single, but also to allow people to enjoy that music without the attachment of DRM or other things like that for their very liberal personal use, that the pricing is more likely to go up than to go down because you would be asking the copyright owner to build-in what is the risk that some portion of those sales are gonna be sold at a lower price, whether it's a direct substitute. And so, you know, that's one thing that I would say about -- you know, when I'm talking about a digital market, it's just different in-kind when we're talking about first sale for digital.

Second, you know, with regard to abandonment, I'm not really sure how you prove abandonment. I mean, we talk -- in the physical world it's very easy because you're giving away the physical copy as part of that transaction. In the digital world, it's much more difficult to know whether that copy's been given away. I mean, as a technical matter we know it's not in terms of how reproductions are made, but let's again set aside the legal issues. I don't know how you would

even prove, I mean, are we going to have people give attestations, are we going to -- I mean, there's all kinds of privacy issues that are potentially involved in trying to make that determination.

And then, third, just building on one of the points I made earlier, I think you've got, there's much less of a need because of the way that the digital music market has developed. Let's face it, 20 years ago there were two ways to consume music; you listened to something on a terrestrial radio station or you went and bought a shiny disc or, you know, some other physical form of it. Today we have cloud services, locker services, on-demand streaming services, some that are subscription, some that are advertising-based, 2000 internet radio stations, customized radio.

I mean, there's just a very broad array of ways to access and enjoy music. And so you don't have the limitations that existed in the physical world, and you also have a trend, frankly, toward access and away from ownership if you're looking at the market. And for those reasons I don't think from a policy perspective in the music space, it's important like it may have been in the physical space.

MR. GOLANT: Thanks for that. Maybe Ben can answer a question with regard to -- do you have

your card up, or...

MR. SHEFFNER: I'm sorry, I didn't have it --

MR. GOLANT: Did you have your card up, Ben? I thought you might want to respond.

MR. SHEFFNER: Yeah, I think there were probably several other people before me.

MR. GOLANT: Oh, no, there were, but I just want to make sure that you respond, and since we've heard about music, how about movies and TV shows, and then we'll go down the line.

MR. SHEFFNER: The story is very similar. And I want to use this opportunity to respond to something that Professor Perzanowski said. And he was largely critical of a licensed-based business model, you know sort of extolling the virtues of an old-fashioned sale and, you know, saying, you know, we live in this world now where there's these long terms of service and that's necessarily a bad thing.

I want to stand up for licensing. I think licensing is a great thing. Licensing provides an incredible amount of flexibility. I mean, when you think about all the different ways that consumers can experience movies and television shows, I mean, everything from, you know, paying eight or nine dollars

a month for Netflix to have basically unlimited access to tens of thousands of works.

On iTunes they can either rent something for a 48-hour period for one relatively low price or spend, you know, I think it's about 5.99 to rent a movie for 48 hours, or you can spend, I think it's around $15 usually to acquire an actual download. That's all possible only because of licenses.

It would severely impact, if not kill those business models to be able to say, You know what, I acquired via license a motion picture or a television show or I rented one, and that I should therefore be able to somehow distribute it to others. That's a non-starter.

There's massive benefits to licensing even over the traditional ownership model. For example, it used to be the case that if I bought a DVD and somebody scratched it or I broke it or I lost it, I was out of luck, I didn't have any other option but to go back to BestBuy or Target or wherever and buy a new one. Well, you know what, if I have all my movies stored in the iTunes cloud or the Amazon cloud or some of these services like Ultraviolet or Disney Movies Anywhere, you know what, if my computer crashes, they'll let me re-download those for free.

So there's actual benefits to licensing and I don't think we should assume that because we're moving more to business models that are based on licensing, that are based on access rather than ownership, that that's a bad thing. I think it's actually mainly a good thing. And again, allowing the resale of these digital files would severely undermine those business models.

MR. GOLANT: Thanks for that. Daniel, you're up next.

MR. GERVAIS: Yes. So I have a lot to say on first sale, but I'll try to just answer the first question.

So, obviously first sale came from this idea that you own the physical product and the ownership rights are obviously important, so we were balancing the copyright interest with the fact that people actually own something which is a physical carrier of the work. And you can make the argument, maybe this is what we just heard, basically, well, this is a licensing transaction, you know, I have ownership rights so therefore first sale goes out.

I understand the argument. I think it's a little simplistic because I think the expectation of consumers isn't necessarily matching that

understanding. When people say, I bought this on iTunes, or whatever, it's hard maybe to tell them, yeah, but you don't own anything, you've paid for a license, or something -- I'm not sure.

And so I think there's three areas that are worth -- and one is the secondary market, but I think there are three that are really closely related. One is a device transfer, right, which I think consumers expect when they changed their phone, or whatever, that they can move the works that they have on it. The equi-system expectation which you can use this work within your, the devices that you use without paying again, at least for music that's quite common, but where it reaches the same point as first sale is when it's in the cloud, as many services are now working with cloud-based servers.

So if you own something, again I use own with quotation marks, where you've paid for something, it's in your account on this service in the cloud and you don't want it anymore, can you transfer it to somebody else's account? And that's another expectation that I think, and a lot of that -- so there are arguments based on the wording of 109, which is not very precise or very good wording, and I'm happy to come back to that.

All that being said though, I would be

generally -- I mean, there are things that need to be addressed in the statute and again I'm happy to come back to that, but I think generally the licensing services have responded to a lot of the needs, at least lately, of trying to respond to device transfer needs and those kind of things. So I don't think there's like a gigantic market failure there at this point for some of the consumer expectations, but it's also the case that some of these consumer expectations are not met right now. And certainly the idea for example of transferring this song from my account to this other person's account because I don't want it anymore, that's the harder one.

Now, we could have a discussion as to whether that's a legitimate expectation, but I will end with this, I think it's going to be hard to sell to consumers that they have to pay twice for something where in the physical world they would have only have paid once. I think that's a barrier that is still significant.

MR. GOLANT: Thanks. Michael.

MR. HARRINGTON: Yes. I would talk about some practical matters. I mean, I agree with what Daniel said about the idea of the license, that you're leasing something, you don't own it, like with software

is and what -- and user license agreements, whoever's read them and understood them outside of people maybe at this table. But sometimes if you purchase something digitally, you really don't know what it is you're getting. And I'll use examples of books. I bought a book because Apple was kind enough to give me 15 or 20 pages to peruse. It was good. It was okay. Of course, I should have known it was a social media book, which is one problem for me, but what happened was when I got the book there were no chapters. It was hundreds of pages that was very poor, and why am I stuck with this? Why can't I get rid of it?

And I'll use other examples of music, sometimes you want to get rid of some music. In my work I have to find evidence in copyright infringement cases to support my views. So I might need to buy 15 Haydn symphonies. Good, but I don't want them. You know, I'll buy them to listen to them, but why couldn't I sell them? And again the price point, it's gonna be less, but as Aaron had said earlier it's legal activities. You're encouraging people to purchase and repurchase. And I think it's just a matter of time before this happens -- because it has to be.

When you own things, you sell them. Everything, almost everything I've owned, I've sold, and I've

purchased used, and even though it's a strange context and a strange way of looking at it, how does digital reappear? Digital doesn't get scratched, deteriorate. But I think just the need for a transaction for space, hard-drive, those of us who don't want to -- I like clouds to an extent, but a lot of things -- I have too much music for clouds, I couldn't afford to put my music there, as well.

So it just seems something that has to occur, that you're going to have to find ways of using space better, and legally purchase items that you can then dispense ala a first sale doctrine.

MR. GOLANT: Okay. Thanks. Sandra.

MS. AISTARS: Thank you. I would like to add my voice to the comments supporting licensing as a very important and very consumer-friendly model for distributing creative works, and also to invite people to think about works outside of the audio/visual world and the music world which rely very, very heavily on licensing models for distribution. And I'm thinking specifically of the visual arts world. Photography and graphic arts and illustration rely almost entirely on licensing their rights in order to distribute works to clients.

And in those particular cases, while I, you

know, take the point that it's very important to consider consumer interests and consider what the effect will be on consumers of any particular policy decision that we might make here, and that pricing is certainly a very important consideration, particularly when you're talking about a situation where in a digital world if you are to transfer all rights in a digital image and essentially set up your client in a position where they are in a position to be able to compete with you essentially as a visual artist in further distributing your work to others, then it's a very different transaction that you're engaging in with your client and your pricing for that work is going to be quite different than what your offering to your client typically in a transaction nowadays as a photographer or as a graphic artist.

So, you know, taking the example of a photographer who may be, you know, licensing work, whether it's to a journal or to an individual who might have contracted with them and is not acquiring the negatives, is not acquiring the copyright, you know, you'll sit down and you'll negotiate particular rights, or the photographer will have a set, you know, contractual agreement pursuant to what he or she offers those rights. In this case, you know, you'd basically

be giving an all or nothing kind of deal to your clients.

And the pricing model in the discussions that I've had both with graphic artists and with photographers has been, you know, I would be forced to offer a basic work for hire type arrangement, or I would be charging the fees that I would charge for somebody who's acquiring all rights of my images, so, and essentially those would be 75 to 100 percent higher than what I normally charge for my work on any given day. So the effect would be not downward consumer pricing impact, but a very significant increase.

MR. GOLANT: Thanks for that. And before Aaron responds, I'll feed you the next question and that is: What would the effect be of extending the first sale doctrine to digital so far as it affects the income of individual creators?

In the record we had some comments from eBook authors who are very concerned about this, so I just want to keep that a question in mind about how each individual is affected in terms of their livelihood. But first, Aaron, do you want to provide your input?

MR. PERZANOWSKI: Yeah. Just a few sort of responses and clarifications, right? So the idea that digital is somehow different. First, yeah, it is

true that digital content or digital distribution is different from the sort of traditional analog way that we've distributed material to the public, but I think it's really easy to overstate that difference, right? And we also have to keep in mind the difference between short-term and long-term differences, right?

So the idea that we normally hear is well, you know, digital is perfect and digital lasts forever and these files are going to be floating out there and be sort of competing with our rights holders for sales in perpetuity and it's just not the case. In fact, analog is in many ways a lot more durable than digital.

I looked up yesterday because I was curious about this question, the oldest book in the library at this university dates back to 1300 right? We've got a book that's pretty damn old, right, in this library and people can go and they can read it and they can enjoy it. Try to run a computer program that's 20 years old, or 25 years old, or open up an audio file or a video file that's 10 or 15 years old. It's just not gonna happen, right? It's not gonna work. And so I think again it's kind of easy to overstate that kind of distinction.

On the point about pricing, right now I don't think it's fair to say that consumers are actually

getting much benefit of digital distribution when it comes to pricing. Again, yesterday I did a little bit of research, right? So think about it right now, you go out and you buy a physical copy of a DVD or a CD and there are a bunch of costs that have to be accounted for there, right? Manufacturing, packaging, shipping and distribution, the fact that this work can be resold on a secondary market, right? All of those things kind of contribute to price. So we would think that digital copies would be significantly cheaper, and it's just not true.

What's the sort of standard price for a physical video game, right, for being sort of a new AAA release, $60. What does it cost to download that same game from the PlayStation network or X-Box Live? The exact same $60. The difference is you can't resell that download, right, which really makes the price about 50 percent higher, right, if you think about a 20 or $30 resale value.

The new Michael Jackson CD, there is in fact a new Michael Jackson CD, I learned that yesterday, the CD cost 14.86, the MP3 version costs 15.99. You can't resell the MP3 version, right? The MP3 version didn't have to be manufactured, it didn't have to be shipped, you didn't have to pay for packaging.

The same thing with books. Gone Girl, Gillian Flynn, 8.99 for the paperback, the Kindle version 8.54, right? So you save 45 cents for giving up the right to lend that book to your friends or to sell it on a secondary market.

The other point I want to make real quick, I have no problem with licensing models, with subscription models, with rental models. I think those are important, they need to be there, they do in fact play a really important role in getting consumers access to content for a lower price. And oftentimes consumers aren't interested in owning things forever, right? But I think true ownership needs to remain on the menu. And I think if we're going to engage in licensing, we have to do so honestly, right? When I go to iTunes and I press the "rent" button, I know that I don't get to keep this forever, I know there are restrictions on what I do with it, right? When I pay the 14.99, it's not a shiny button that says license now, it says buy now, it says purchase now, it says own this. That means something to consumers.

And so if what we're really proposing is a transaction that says, well, you get sort of long-term access but you don't get to lend it to people, you don't get to resell it, we need a new word for that

because that's not ownership, that's not a purchase, that's not buying something.

So licensing has to be on the table. I think that's absolutely true. But the other option needs to be a genuine sort of sale that is consistent with consumer expectations.

MR. GOLANT: Thanks. I think Steve Tepp, you're next.

MR. TEPP: Thank you. So in the introduction to this topic you mentioned the Copyright Office report on this issue back from 2001, and I just wanted to go back to that to revisit that analysis, having been the primary drafter of that particular section of the report. And some of these have already been alluded to, but I think one in particular could use some further exploration today.

So first of course, as a matter of law, as was stated, the first sale doctrine has always been a limitation on the distribution right and not on the reproduction right, but the transmission of data that results in the production of a new copy is well accepted to be a reproduction. And so that would be a dramatic expansion, an unprecedented expansion of the first sale doctrine. Certainly the Copyright Office found that.

Second, the forward and delete model has significant challenges in terms of enforcing it, and whether or not indeed we could be certain that the sender did not retain a copy, or that other copies didn't somehow leak.

But the third part goes to the practical considerations, and most directly to the question that was asked in terms of the effect of a forward and delete model becoming statutorily permissible on the creator of that, the copyright owner. In addition to the substituting effect of digital copies in the secondary market for the primary market, which has already been described, albeit with some qualifications in terms of format changes over time, the other aspect of this is the information and transaction costs that traditionally limited the practical effect of the first sale doctorate.

In 1908 when Bobbs-Merrill was decided, and we all know that's the case that gave rise to this doctrine, if I had a book that I wanted to, or was willing to part with, I had to find someone who was interested in having it and then physically deliver that to them. Those information and transaction costs are reduced dramatically, if not to zero in the digital, and but more importantly interconnected age in

which we live. And the Copyright Office focused on that in its 2001 report not to say that we like transaction costs, but to say that it does dramatically change the impact of a first sale doctrine on the legitimate interest of creators and right holders.

So I think that's important to keep in mind that going down this route would in fact likely, almost certainly have a much more negative effect on the incentive to create that underlies the entire copyright act.

One other point I wanted to make is to tie-in what may at first seemed like a completely different issue, but in fact isn't. There are fair use cases out there on things like mass digitization that are extremely controversial and they're on appeal. But if they are in fact upheld, that mass digitization projects are fair use, then those are tens of millions of copyrighted works of which lawfully-made copies exist. And as we all know under the 1976 act that term, lawfully made copy, is the trigger for the first sale doctrine notwithstanding the fact that there may not have been an actual sale, the misnomer of the name of the doctrine continues, if those are lawfully-made copies and we have a forward and delete model enacted into the statute, what is left of copyright law?

Thank you.

MR. GOLANT: Good question. How would Steve address what you've heard so far?

MR. MARKS: Yeah, I just wanted to respond to a couple of the previous points. On the benefit to consumers and the expectations of consumers, again in the music world I guess I'd go back to where we were 20 years ago when you had maybe, you know, a robust first sale or secondary market, and where we are today. You had two ways of accessing music and today you have tens of ways of accessing music for, at a variety of different price points. You know, one of the things that we do is negotiate rates for mechanical licenses, what's paid for the musical work. We've created 17 new categories in the past five to eight years when there were two in the previous hundred.

So the expectation I think right now among consumers is much more about how can I get, you know, music easily and at a low price. It may be a $10 a month, you know, for every recording that's ever been released, it may be something for 99-cents. There's just a variety of different models out there. And so I'm not sure that I see that expectation of needing to have this first sale in the music space.

In terms of the pricing, I just, I don't know the Michael Jackson example and what's included in the digital that may or may not be included in the physical, but as a general matter digital albums have been sold at lower prices than physical albums were before then and it brought prices down on CDs, you know, as a result.

But, more importantly, I just want to make sure that we debunk this myth about manufacturing and distribution costs as somehow being, you know, something that has paved the way for greater profits for record companies and the other creators that participate in making sound recordings because they've been replaced by other costs of digital distribution that exists that may not be as obvious as, you know, printing new CDs in a physical plant that exists, but nonetheless exist in terms of, you know, turning your digital files into the right codex and transferring those. The licensing departments that have had to be built from scratch in order to license, you know, hundreds of new services that exist.

So they're just different costs in the digital world that are substituted for costs that existed in the physical world.

MR. GOLANT: Thanks. And before I go to

other people, I'm just going to shape the question and the comments accordingly, and it goes like this: How do existing or planned online business models provide consumers with the benefits such as the ability to give a book to a friend or the ability to buy a cheap or a secondhand copy of a textbook? So as you think about these things, try to address those particular issues in your comments.

And I think I'll start with Ben, and then Alex, and then Aaron.

MR. SHEFFNER: Several people were before me.

MR. GOLANT: Okay. So how about Sandra, and Alex, and then we'll go from there.

MS. AISTARS: Sure. And I think you had asked originally the question of what the impact is on individual creators --

MR. GOLANT: Right.

MS. AISTARS: -- as a result of considering a digital first sale doctrine, so I'll speak to that for a moment.

One thing that I think people have shared is that, you know, more people are willing to take a risk on a low-priced rental of an Indie film or an unknown author than they are to take a risk and invest the, you

know, full on, acquire every right imaginable purchase price. And so I think the, you know, fairly obvious risk to particularly the Indie side of the marketplace is that those types of creators are more likely to be squeezed out of the market and find fewer people willing to publish them, willing to invest in them. After all, you know, regardless of how interested a particular, you know, label, studio, publisher may be in the type of creative work that they're putting out, they're still businesses and they make decisions about, you know, who they invest in and what they publish based on what they expect the, you know, market will respond to and will return. And that's, you know, only understandable. So that's my expectation.

But as to the effect on individual creators, I mentioned also the particular impact in the visual arts space on having to raise your prices to accommodate a, you know, what feels like a work for hire kind of situation, or an all rights acquired kind of situation instead of a normal licensing situation, which that type of creator has always operated in. The result of that is likely to be, you know, fewer people willing to engage in that kind of a transaction, which while you might be getting more per transaction, you're likely to have fewer clients, you know, interested in engaging

with you in that transaction. And those clients then also have the ability to compete with you, you know, once they have those rights to the works, so you've cut out your secondary market for the work.

So for instance if as an artist you have relied upon the ability to be able to use your work for multiple purposes so, you know, you're licensing for a news-related purpose and then also putting out a coffee table book of your photographs, that secondary stream may be cutoff to you because it won't be valuable or you won't have all of the necessary rights in the work, you know, anymore. So that's yet another impact on the individual artist's income stream.

I also note the comments that Steve made with regard to, you know, the focus on the physical product rather than on, you know, the cost to produce the creative work, itself. That hasn't changed. And so regardless of what the cost is to actually distribute the product, the cost of creating the work is, you know, remains the same.

And if you're talking from an individual artist's perspective, the individual artist is still going to have to be working with the distributor, so whether that distributor is a traditional media company or the distributor is an online intermediary of some sort

that's, you know, kind of beyond the individual artist's control what that distribution cost is. So it's a little unfair to tar(sic) the individual artist with, you know, why aren't my costs going down, you know, and require that entity, the, you know, the creators to kind of bear the risk of a digital first sale doctrine kind of as a, you know, as a result of that.

MR. GOLANT: Thanks. Alex, I think you were next up.

MR. PERZANOWSKI: Thanks. I think it's really important that this discussion is actually happening through the USPTO and the NTIA because they are, in themselves, housed in the Department of Commerce, so, and to a certain extent it enables us to have a different conversation, almost from a different perspective than say from the Copyright Office whose mission is more towards promoting creativity. And I don't think the thing, they're necessarily in conflict, but I think it gives us a unique perspective, especially when we're talking about secondary markets and economic analysis.

You know, if we're talking about before digital, talking about first sale doctrine, generally 109 deals with distribution only. It doesn't really include any other right besides distribution. In the

digital world distribution doesn't actually exist. All distribution is in the digital world is copying, reproduction.

And so to the extent that we're talking about the equivalent of analog and digital, besides the extension in I think 117 dealing with specifically for software and making reproductions in software in the same way that you do kind of first sale doctrinee for distribution for physical goods, that doesn't extend to any digital media, it only extends to digital software -- I'm waiting for the card to go up to see if I'm correct or not correct -- but to the extent that we're talking about transferring to another -- a digital media to another device from the same owner, you can imagine how that happens, changing my record player, you know, record to a different record player in the same house, but in a digital world I don't necessarily have that right for the media. I might actually have it for my software that plays the media, but I don't actually have it for my media unless I'm granted a license to do that through EULA.

And so I think there are great impacts that EULAs can have to extend past what we're actually, the rights that we're actually given as users say with 109. There are concerns though when EULAs go past the rights

that a copyright owner actually has, and that actually works counter-intuitively and against what consumers can do in many cases, can extend past what a copyright owner, the rights that a copyright owner can even have.

And so I think to address specifically the secondary market issue competing with artists having to compete with their same works as the secondary market, I think that's actually where licensing can come into play because first sale only deals with distribution and maybe hopefully if we extend it to reproduction in the digital realm, EULAs can actually give a copyright owner its unique ability to finally dice a right and grant that right to a user at a far lower cost than it could be for say a secondary product.

So I'm trying to explain something that I haven't quite perfectly understood in my head, I was kind of just writing some notes, but the issue is in the physical world say I've got a, buy a used CD and that costs half of what a new CD costs, however my right to that CD is only to that copy, to that physical copy and my right to do with that is only to distribute it, at least under 109. Because copyright owners hold that full bundle of rights, they're able to dice that in whatever ways they want and able to give consumers a slice of that right at a much lower cost, perhaps even

lower than what I would get if I bought a secondary, you know, a used version of that, whether it's digital or physical.

So I think actually in many ways licensing defeats the problem of competing on price in the secondary market for digital goods because they own the whole bundle of rights and they're able to slice that more finely to give people very precise rights at lower costs. And so, you know, licensing works out really well except for when it extends past what their bundle of rights actually gives them.

MR. GOLANT: Thanks.

MS. PERLMUTTER: Let me follow-up on what Ben had asked earlier. We've talked a lot about consumer expectations and also the extent to which licensing can either fulfill or undermine those expectations, and what some of the benefits or costs might be of proceeding solely on a licensing model as opposed to a pure ownership model. And I would also like to hear a little bit more about things, ways that market approaches are developing that allow consumers to do some of the things that their positive expectations about the first sale doctrine were designed to allow them to do.

So in particular, as Ben said, you know, are

there -- we gather from some of the submissions that there are market approaches that are being developed to allow consumers to give to a friend in some way that doesn't involve actually the exercise of a first sale doctrine, but that there are ways to sort of mimic the results or to allow people to try things before they buy. And I'd like to hear a little more about the extent to which those approaches actually already are operational and then in what arenas and to what extent do people think they're satisfactory or have the potential to be a positive contribution to this discussion.

MR. SHEFFNER: Sure. So the companies that the MPAA represents, like all companies, care a lot about what their consumers think, what they want, and which way the markets are heading. So they do a lot of research, and what they tell me is that over the last several years there has been a definite shift and that increasingly what consumers are interested in is access, not necessarily ownership.

And anyone can read the trades, they can look at various reports that consulting firms put up and they'll show all these charts, and what they'll show is that the sales of physical goods look like that and the sales of, or rentals or licensing of digital files look

like that.

In our industry the lines haven't quite crossed yet. Steve will correct me if I'm wrong, but I believe in the music space they've already crossed on the recorded music side. So the trend is definitely towards consumer interest and access, not ownership.

At the same time, you know what, there are people who still want to buy DVDs, and although I'm a little bit hesitant to make predictions what the world is going to look like 5, 10, 20 years down the road, no one's talking about getting rid of the DVD. So for those consumers for whom ownership is especially important, for whom the ability to go and resell their copies is important, they still have that option.

To respond to your question, Shira, about sort of how these new license-based business models fulfill some of the desire to do the things that were permissible under the physical first sale doctrine, I think a lot of these models do exactly that. And I mentioned before services like Ultraviolet, which is a cloud-based service that allows you to basically access movies and television shows on multiple devises and by multiple people within your family.

So of course it used to be, I mean, in the physical world you would buy a DVD and of course you

could share it among your friends and family. In the world of online licensing, cloud services, you can do approximately the same thing. And again, consumers drive where the market is gonna go. If there's a demand for a particular type of use or a demand that works be available on particular types of devices, it's of course in the interest of the copywriters to fulfill those consumer desires.

And just to close and as sort of an example of how consumers shape these markets, many of you in this room probably spend a lot of time on the, you know, the copyright blogs. A couple weeks ago there was a big kerfuffle in the legal academic publisher community, or the law professor community. One of the major legal publishers had announced sort of a new business model, and they said basically, and I don't know all the facts, but as I read on the blogs they were basically going to say that students would get a physical copy of a particular book for the semester or for the year and they were allowed to mark it up, but at the end they had to give it back. They didn't really own it, it was provided to them pursuant to a licensing model.

There was -- frankly, the consumer reaction, or the professor reaction was not good. It was largely negative. There were petitions organized and all sorts

of outcry on the internet, and you know what, within a couple weeks the publisher responded and they modified the business model and clarified exactly how it would work.

So when copyright owners try to do things that undermine these rights that people thought they enjoyed for over a century since 1908 and the consumer reaction is bad, they're not going to do them. And that I think goes for whether it's the book publishing industry, or the motion picture industry or the music industry, the consumer is ultimately going to drive where the market goes.

MR. GOLANT: Thanks. I was just going to add, I think that was a real property book that was -- so we're gonna go with Aaron, Daniel and Steve.

MR. PERZANOWSKI: So I want to come back to this Aspen-connected casebook example in just a minute. But, so I want to point out I think what are some of the worries that come with these sort of licensed simulated secondary market kinds of solutions, right? And companies have been out there working on these kinds of technologies. I've seen some patent filings from Apple and Amazon who are trying to sort of put together these little eco-spheres that sort of allow consumers to do some of the things that they

expect to be able to do, but in a very sort of tightly-controlled way and I have some worries about that kind of approach.

One big worry, and one of the benefits of exhaustion and first sale that I didn't talk much about earlier is that it helps drive platform level competition, right? It lowers switching costs for consumers, it reduces lock-in for consumers, it allows them to say, you know, right now I want to read all my books on my, you know, on my Apple device, but maybe I get sick of Apple and I want to switch over to a Kindle, can I take my Apple books with me to a Kindle? It turns out, no. Although, you can do it the other way, right? You can read your Kindle books on your Apple device. But first sale helps reduce those kinds of switching costs.

I'm not sure, I can't say for certain, but something tells me that when Apple launches it's Lend Your Book To A Friend Program, they're not going to let you lend things to people who are using a Kindle, right? So it's going to keep consumers siloed and it's going to kind of create this simulation of a secondary market but without one of the really important benefits.

The other thing of course about all of these

solutions is, is that they are licensed solutions and copyright holders, content creators can pull their content if they so choose, right? If lending gets too popular and maybe book sales go down as a result, as book sales undoubtedly have gone down in the analog world due to lending, then maybe those books disappear, right? We all remember the episode a couple of years back where Amazon decided to start remotely deleting people's books that they purchased, including ironically George Orwell's 1984. A bad, bad choice from a marketing perspective on their part.

This Aspen-connected casebook thing is a really interesting example. I take sort of a somewhat different lesson from it, right? The outcry there and the quick response from the publisher had everything to do with the particular nature of the market for legal casebooks. I'm a law professor, I choose what book is required in my course and my students have to go buy it. So I have a lot of concentrated power. My decision influences the purchasing decision of however many students are enrolled in my copyright class, right? Forty or fifty students.

The other thing that I think kind of sets that market apart is that I'm incredibly well-informed about these issues, right? I'm not the average consumer. So

it's not the case that the lesson that we can take from this example is that the market is always going to sort itself out in a way that we're going to be happy with.

What Aspen was trying to do was to kill not only the sort of nonexistent secondary market right now for digital copies of their books, they're trying to kill the existing secondary market for tangible copies, right? Their plan was, Give us the same $200 you always pay and we'll give you your book, we'll give you a digital copy that you're free to read as long as our servers are up and running, which is like not exactly any guarantee -- we've seen lots of services shut down over the past decade -- and then at the end of the semester give your book back and we're going to recycle it, right? Recycle, being a euphemism for pulping these books.

I think that shows just how deeply opposed to secondary markets, to first sale, to exhaustion publishers still remain today, right? They still have the same attitude they had in 1908 when Bobbs-Merrill was decided. They want to get rid of these markets and the sort of digital transition is a really good and sort of powerful tool for doing that. That's my concern.

MS. CHAITOVITZ: Thank you. We are

wrapping it up, we're in our final five minutes, so I think there are five placards up, so you guys are going to get like one minute each before we're going to throw it out to the commentators online and in here.

MR. GOLANT: So, Daniel, go ahead.

MR. GERVAIS: Okay. Well, to answer Shira's question, I think the market has responded reasonably well to people who want to reuse something within a particular technology environment, say Apple, for example. It hasn't respond all that well when people want to transfer, as Aaron was saying, between environments, and it certainly isn't at least as of yet responded very well to the issue of one user to another user. And I think the debate's been very instructive.

There's a normative point of disagreement, rather people who say first sales' purpose, normative purpose is to allow the recognition of ownership in the physical product. And then there's the other view which is that first sale, which is partly a misnomer as Steve was saying, is a recognition of an expectation that you can repurpose something you no longer want or need. And I think that point of disagreement is sometimes misunderstood, but I think that's where it stands.

And the problem is if -- people understand the

concept of rental; you rent a car, you can't sell it. You rent it for a weekend, you can't sell it. People get that. But when you download an eBook or a song, it's not like you typically have a fuse on it, it's yours. So the expectation is if I don't want it anymore, and I paid for it, why can't -- I think that part of the equation is not really something that the market has responded to just yet. Whether it will is, I guess time will tell.

MR. GOLANT: Thanks.

MR. MARKS: I'd just reiterate in the music marketplace I think the market has responded. I mean, we are -- we look to the consumers and what they demand because we're working in a context where they can get anything they want pretty much any way they want, legal or not. So that's the world we're living in right now, and I don't think any of the issues that have come up are true limitations within the music market.

And I think you're right, Daniel, about this last issue, I was going to raise it, as well. Format shifting is not a first sale issue. I mean, you know, the first sale issue is the, you know, I have something, I have a right to dispense with my tangible property. But we've gotten muddled here a little bit

with format shifting. That's not really an issue in the music world but -- just because of the uses and the way music can be moved around -- but I don't think it's really part of the doctrine that we're talking about.

And again, in music in terms of sharing I would just say, you know, if you want to share music, so to speak, you can send a link to a, you know, a YouTube video to your friend and say, Hey, I've got this really interesting song that I discovered that I think you should listen to, and they'll get it and be able to listen to it from a licensed service. So all of those kinds of issues I think are being addressed in our market.

MR. GOLANT: Thanks. We're wrapping up, so the last couple of commenters here can spend a minute, and then we have a couple of online comments.

MS. AISTARS: Yeah. My only comment was that we've been talking a lot about the Aspen-connected casebook issue, and we don't have anyone from the publishers here that can actually speak to it. The publishers are a member of the Copyright Alliance and my understanding from them was that there was always an option to have a normal, you know, pulp casebook that you could keep and retain, and that the kerfuffle over this was over the connective casebook option which

would require you to return the pulp casebook at the end of the year, but would give you the rights to retain an eBook version of the casebook with note taking and highlighting capabilities after the semester concluded. So that's also what the Aspen law publisher's website reflects. So I just urge you to look into what the facts are rather than relying on what I'm saying or any of us since the publishers aren't here.

MR. GOLANT: Thank you. Steve.

MR. TEPP: Thanks. I think it's appropriate that the question of forward and delete versus licensing essentially pits those two against each other, at least I take it that way, and I think it does. I think a forward and delete model is essentially outlying in practice certain licensing models, and I don't think that's the right way to go.

Licensing offers choices. It offers the creators and the copyright owners options about how they're going to offer their works. They may offer works, copies of works to be precise, at a lower cost, nontransferable way, or they may offer them alternatively at a higher cost to transferable option, and the consumer can make the choice as to which they'd prefer.

That probably hasn't had time to flush itself out in all the different markets. Some of the markets, like eBooks are still relatively new. We've had the technology for eBooks for a long time, but it took a while for consumers to get excited about them.

Copyright owners are in business to generate revenue and it's counterproductive for them to offer their, copies of their works in ways that consumers like. So that's not to say that every consumer will love every way in which every copyright owner chooses to make copies of their works available, but I don't think that's a justification for undermining the legal rights that copyright owners -- creators have earned and copyright owners have either earned or purchased, and that essentially mandate only the higher priced transferable option in the marketplace.

MR. GOLANT: Thanks for that. And we have a couple of online comments that AlaIn will read.

MR. LAPTER: So there's actually one comment and one question. The comment was: The lending issue is solved if a reader lends their loaded Kindle or Nook to a friend or a family member, which is no different from physically handing a paperback to a friend. Moreover, Amazon has a very generous period for unwanted or defective eBooks, and furthermore

Amazon often allows persons who share a credit card or account to share the eBooks on the account, itself.

That was the comment. So I don't know if anybody wants to respond to that comment.

MS. AISTARS: The only thing I'd add is that I know as an Amazon prime user I get to borrow books also from their eBook lending library. So that's yet another option you have.

MR. CURTIS: And additionally, that's great for Amazon customers, but not for Apple customers or any other customers, as well. So just because one entity allows those sharing capabilities doesn't mean that everybody else does.

MR. MARKS: And we'll find out whether those others decide, you know, that they need to offer those kinds of services. That's the market at work.

MR. LAPTER: And the question we have online is: Given that Amazon, ReDigi and Apple have patents on digital resale markets for digital content, would there be a monopoly of resales?

MR. PERZANOWSKI: I think it's really hard to say without understanding the details of those patents, which frankly I haven't spent enough time studying to weigh-in with anything approaching authority. But, you know, there are a lot of different

ways that we could structure resale markets, and I don't even think they all necessarily have to include technological solutions, right?

ReDigi, for the disapproval they have so far faced from the courts, I think there's something to be said about ReDigi's approach, right? ReDigi right now, sure, their technology isn't perfect, sure, it is not necessarily foolproof, but ReDigi is doing more to prevent the problem of extra copies floating around than the used bookstore or the used record store or the used video store ever did, or ever could do, right?

Even in the analog world we had the problem of people selling their LPs to the record store after they copied them on a reel-to-reel tape. We had the problem of people ripping their CDs to their hard drive before they took them to the used CD store. There was no check on that behavior under the first sale doctrine.

In the digital environment there is some greater ability I think to account for and to keep track of these technologies. We actually already have an example that comes pretty close to a forward and delete system that doesn't have any sort of technological mandate in the copyright act already, right?

That's essentially what 117 does when it comes

to backup copies and archival copies, right? You can transfer your ownership even after you've made a bunch of copies as long as you don't keep any of them after the sale. Congress didn't insist on any sort of technological mandate there, the software industry certainly hasn't collapsed as a result of Section 117. So I think this sort of thing can be done even if we don't have sort of a perfect technological solution to the extra copy problem.

MR. MARKS: ReDigi's a for-profit company, right?

MR. PERZANOWSKI: I think they hope to be.

MR. MARKS: Right. I mean, they're not doing these things out of the goodness of their heart to enable first sale. I mean, they're trying to build a business in a profitable market, and I think that, you know, that's a very different kind of model than you taking your book to sell to somebody down the street or to a used bookstore.

MR. SHEFFNER: And just to quickly respond to this point about forward and delete, and this is a point that Steve Marks made much earlier, to the extent that we want to have some sort of system that would really check whether that song was truly

deleted from your laptop and your, you know, your desktop, and your iPad, and your iPod, and your wife's, and your kid's, think about the privacy implications of something like that.

And so, you know, we talk in theory about those kinds of deletion systems, but when it really gets down to brass tacks and thinking about how those work, I think those that care a lot about privacy are not going to be happy with some sort of spider checking all their devices.

MR. GOLANT: Thanks. I think we're done here on the panel, but I wanted to note --

MR. MORRIS: I think Steve had a comment.

MR. GOLANT: Okay.

MR. TEPP: In response to something that was just said, if I can just jump in for a moment.

MR. GOLANT: Very quickly, yeah.

MR. TEPP: The 117 issue, I wanted to clarify that. 117's treatment of first sale is actually narrower than 109 would permit. I think we need to clear up that the backup copies that can be made, the archival copies that can be made are lawfully made copies, and so but for 117-B, they could be distributed under 109 without limitation. You could actually keep the source copy. 117-B says, no, we're

not giving you a full application of 109, we're going to make you transfer the source copy with it.

That sounds like forward and delete, except forward and delete involves entirely new copies made strictly for the purpose of that distribution. This, like the traditional first sale doctrine, runs with the particular copies that have already been lawfully made. You can't under 117 make an archived copy and then e-mail that archived copy and make yet another copy. That would be a violation.

MR. CURTIS: But when we're talking about something that's on a hard drive there is actually no distribution of that original source code because there is no original physical thing, right? If someone were to download software and transfer that right of that original software, they don't actually pull the hard drive out of their computer and give it to somebody else, they send a copy.

Sending a copy may be -- what we think of when we think of physical may be distribution, but in reality that is actually copying, and I think that's what 117-B was trying to contemplate. We're trying to get rid of that original instance, but in reality that is actually copying, and anything you do to that will be a copy, a reproduction, not a distribution.

MR. MARKS: And I think they're doing both. There's a copy being made and they're distributing the creative work. That's the distribution right that exists.

MS. PERLMUTTER: I going to suggest that this very technical discussion of Section 117 continue over lunch and allow the audience's participation.

MR. GOLANT: Yes.

MR. POMEROY: Thank you. Dave Pomeroy, president of the Nashville Musicians Association, AFM Local 257. This is a very interesting conversation. There's certainly a tech angle to it, but I heard the phrase "I don't want this anymore, I'm gonna give it to someone" a number of times from a number of different people, and I would caution against buying into that as a very likely occurrence. I think that's definitely a minority thing.

The analogy we use a lot in my world is back in the days of records, if you had a record and you wanted to share it with someone, you loaned it to them. If you didn't get it back, which happened a lot, you went and bought another one. Whereas now it's not, I don't want it anymore, you have it, it's like, Hey, this is great, check it out. That's what's really going on.

And so I would just caution against the idea that, Oh, you know, I've worn out this digital file and I'm gonna give it to someone more needy than myself, I think is maybe not something to be overemphasized.

And I would also just say, I mean, the minutia of the law is also very, very interesting, but all of this must be accompanied by a change in the culture, and I don't pretend to know how you take the social responsibility aspect of this and the legislative and keep them on the same path, but I think that that's -- someday we're gonna have to figure out how those two things can meet because it's really getting people to understand just because you can take something, that it doesn't make it okay.

And, you know, it's sort of like, you know, a fantasy of digital permission, just because I can do this and, you know, it's okay. And it's really not. And I think in the beginning stages of this, the lawsuits and all of that, I think, you know, it was well-intentioned, but the perception was not, Hey, everybody, this is wrong, you can't do it. And I think it was perceived by the public as being very punitive.

And so I hope that along with the legislative angle there will also be an understanding of the social responsibility to our culture and to our arts and the

people who make it. So, thank you.

MR. GOLANT: Any other comments from the audience? Well, that wraps it up. It's 12:15 now, and so be back in an hour at 1:15 to start our panel on remixes.

MS. PERLMUTTER: Yes.

(Lunch Recess.)

MS. PERLMUTTER: Welcome back to the afternoon session. Now we're going to be discussing remixes. And advances in digital technology have made the creation of remixes or mashups easier and cheaper than ever before providing greater opportunities for enhanced creativity. The Green Paper defines the term, remixes, and I'm going to read the definition as "Creative new works produced through changing and combining portions of existing works."

Now, this should be distinguished from the way that the term, remix, is normally used in the music community to refer to a new mix, like a dance mix of a recording. That's not what we're talking about. It also does not include all derivative works, collective works, compilations or most synchronization situations.

So the types of remix content we are discussing, often user-generated content, are hallmarks of today's internet and in particular on video sharing

sites. But because remixes typically rely on copyrighted works as source materials and often combine multiple works, they can raise daunting legal and licensing issues. So a considerable area of legal uncertainly remains given the fact-specific balancing required by fair use and the fact that licenses may not always be easily available.

So I'm going to ask our panelists to do a quick intro once again. And we have one new panelist, and also we may have new observers, but if you could keep it quick, that would be great.

MR. GERVAIS: Daniel Gervais, professor here at Vanderbilt Law School. And I should have said it earlier, also director of the IP program.

MR. HARRINGTON: Michael Harrington, professor of music and entrepreneurship at Berklee. I'm a musician and composer.

MR. MARKS: Steven Marks for the Recording Industry Association of America.

MR. PERZANOWSKI: Aaron Perzanowski. I teach at Case Western Reserve University School of Law.

MR. STEHLI: Jim Stehli. I'm the director of licensing and business affairs at HoriPro Entertainment Group. We're an independent music publisher here in Nashville.

MR. CARNES: Rick Carnes. I'm a professional songwriter and president of the Songwriters Guild of America and co-chair of the Music Creators North America, and vice-president of the National Music Council.

MR. CURTIS: Alex Curtis. I run the Creators Freedom Project.

MS. PERLMUTTER: And, John, your name, introduce yourself.

MR. STROHM: Yeah. I'm John Strohm. I'm a music lawyer and I live in Nashville.

MS. CHAITOVITZ: Okay. So many commenters, both owners and users point to the large number of remixes and note that fair use combined with the marketplace functions well. So the first question is going to be: Is the creation of remixes being unacceptably impeded by this legal uncertainty? And please try and keep the answers succinct because there's a lot of follow-up questions.

MR. MARKS: I guess I would start by saying, no, and agree with the first statement that you made, that a combination of licensing and legal doctrines when applicable are working right now. Could there be things that are done to make maybe licensing a little bit easier, exploring micro-licensing options,

or things like that? Absolutely. We should discuss those kinds of things. But in terms of the legal doctrines and how the law applies, we don't see a need for change.

MS. CHAITOVITZ: I should say, is there anybody on the panel that thinks that the legal uncertainty is impeding the ability to make remixes?

MR. GERVAIS: Okay. Well, yes. I think the question is to what extent and what can be done about it. So the uncertainty I think for the time being at least comes in large part to the relative instability of fair use, the fact that there are cases that are in the pipeline that we're not exactly sure how they're going to come out. But the idea of transformativeness in remix and how they work together and how they should be allowed is certainly not -- if it's stable, please, someone tell me, I'd love to know because I'm having trouble understanding what is and isn't transformative enough.

But beyond that, and I don't know if that would be a question you want to address later, but the idea is there are things that I think we should allow as fair use for normative reasons, that you don't want to have licensed as a matter of principle, I'm thinking of parody, for example, you might want to allow that,

but there's a heck of a lot of licensing that can and perhaps should happen in the area of remix that doesn't achieve that level. And I'm not sure that that market is fully functional now, actually that's euphemistic, I'm pretty sure the market isn't working very well for certain types of commercial remixes.

There might be a way to have at least some of it covered by some sort of default licensing environment that would make it fairly easy to use. I'm thinking of, for example, a licensing environment for course packs, those kind of things. But again I think the border of what should be allowed as a matter of principle as fair use and what is licensable, and then beyond that which actually would be preventable entirely because copyrighters sometimes has the right to exclude but sometimes really just the right to get paid. I mean, all of this to me is quite unstable.

MR. PERZANOWSKI: So I would agree that there's a fair amount of uncertainty out there in terms of what kinds of creativity falls within fair use. And again, you know, trying to decide whether or not creativity is being inhibited either in terms of creation or in terms of distribution is a really hard sort of counterfactual question to answer.

But I actually just wanted to make a much more

general point that has to do with sort of the whole enterprise of trying to sort of pull this category of remixes out of the rest of the creativity that we're interested in in copyright law.

You know, at a certain level that definition that you just read of remix really could apply to creativity, right? All creativity builds on things that have come before. You know, there's a long list of people who we sort of hold out as these incredible, original creators who have drawn on lots of other sources. You know, Shakespeare, Jean-Luc Godard, Bob Dylan, these are all people who in some sense were engaged in this practice of remixing, and I'm just, I'm skeptical of the idea that we can have a conversation about this category of work without doing a lot more sort of deep thinking about what it is that actually makes something a remix.

MS. CHAITOVITZ: I see Michael and Steve.

MR. HARRINGTON: Yeah. I mean, building on what Aaron just said, remix, if you're a classical musician or you do jazz or blues, it's just a nod to the old. It's the way it's been. Bach, Beethoven, Brahms, Handel, Haydn, Schubert, they were influenced by technology and they were influenced by what was around them. It was considered what you do. You just

say you want to use some music and you vary it.

So a quodlibet -- I won't go too music history here on you, but that's an old form where you include other songs preexisting; Bach did it in the Goldberg Variations. So, and how musicians learn, a lot of musicians, a lot of styles, the way that we learn music is to break the copyright act. I was in my early 30's when I discovered that everything I took off recordings and played and played and wrote, and did all this stuff, Oh, that's a derivative work. Oh, that's illegal. Oh, I didn't know.

And most musicians are that way. The way you learn is just to approach it, and you imitate it and you incorporate it, you can't help but. I mean, I'm surrounded by foolish lawsuits. And remix is something -- it's also just to get to the, I think maybe realistic matter of it, it's not going away. It's really good. It's fun to do.

I was the expert witness in the Grey Album. That stuff was very, very well done. That was not just taking a really good work, a really good work and a mindless put it together and sync the tempo, it's using elements compositionally in a very creative way that shouldn't be -- I just think the law needs to be adapted.

I thought of an idea of a compulsory license to sample recordings that were say 10 years old or 20 years old. Not from the moment it comes out, but have a time period, and then have something worked out where you could do this and there'd be some type of payment system worked out, a length of the sample, so forth.

But I think things like that need to happen because it's the way it is, and if I as a professor of music composition, which I've been in life, if I say it's a good work, am I wrong? Is Beethoven wrong? Is Stravinsky wrong? I mean, it's just great music can be -- and then look at visualists what they do with collage, and so forth. So I think there needs to be a way for the law to be adapted, and licensing would be one way, I suggest.

MR. MARKS: So in the music context, and I do agree that maybe we need to break down things a little bit, but I was going by the initial question of, or the initial definition of using preexisting material such as, you know, as generally referred to as sampling, that that should require a license absent, you know, some fair use defense such as parody or any of those things. Obviously, those should continue to exist and be applied in the cases as the courts see

fit.

And, you know, maybe the thing to do here, because there is a lot of licensing that goes on in the industry, in the music industry, and there's a lot of licensing, you know, even for things like, you know, user-generated content where you can post something on You-Tube without a problem, for example, in most cases. But instead of defaulting to a compulsory license or something like that where you're talking away the ability of an author, the original author to say, You know what, I don't like the use of that in that particular work, may be a reason that they don't, or to be compensated for the creativity that they initially put together as part of, as used in another work.

It should be done to the extent that we need to help develop it, you know, by bringing together the users and the initial authors in a way that enables them to have the collaboration, conversation and discussions to license that, or to choose not to license that if that's their choice.

MR. STROHM: I'm really interested in the idea of a compulsory framework for sample clearances, and I've given it some thought because I've worked a fair amount on clearance on both sides and one thing I've noticed is that it really is, it's creating a

situation where you can clear samples if you can afford it. And it gets very complicated and, you know, I thought that it's fairly inefficient. And then what we see happening is if an artist can't afford to clear samples, then they may just go ahead and release the music anyway and sort of thumb their nose and, you know, dare anyone to sue them for the use. And there's some high profile artists who've been doing that for years without, you know, obvious consequences.

And the one thing that concerns me about that, which I would like to hear other opinions, is that on the one hand there's the idea of assigning a value to these clearances, and should there be a percentage of revenue, should there be some sort of guidelines. But then on the other hand one of the rights we have as rights holders is the right to turn something down if we just don't approve of the use for idealogical reasons, or for aesthetic reasons for that matter. And that's the stumbling block I always run into is how would you structure compulsory framework that still gave creators the right to say no if it was something that was truly objectionable to their ideology or aesthetic?

MR. STEHLI: Our position is that compulsory licenses, themselves, are really sort of

outdated at this point in time. And the concerns that led to the initial creation of compulsory licenses really are not present as much in today's marketplace. And we're actually for, you know, ideally the abolishment of a compulsory license, Section 115 altogether ideally.

So we're certainly against the concept of increasing compulsory licenses, adding compulsory licenses for remixes. As a publisher, we want to retain the maximum rights that we can rather than, you know, giving those rights away, having them restricted by the government, essentially. The licensing structure works better, I think it's been proven, under a free market system. There certainly is room for improvements as far as remixes at the moment but, you know, I feel that'll be ironed out by the free markets in a more efficient manner than through a compulsory license, an additional new compulsory license for remixes.

The answer, in my opinion, may be more of, you know, potentially marker licensing, licensing societies, obviously there's a need to ease, you know, the licensing concerns but, you know, I don't feel that a compulsory licensing is the solution.

MR. CARNES: Yeah. I have three points I

want to make real quickly. I'm not a lawyer. I've been a recording artist and songwriter my entire life, and when we talk about things like transformative use, I would have a lot of trouble determining whether or not a musical use is a transformative use. And I've taught songwriting at a university level, I've been to music school, I've worked in music my whole life, I wouldn't want to make those judgments, much less turn that over to a judge.

So transformative use -- you know, once a Supreme Court judge said that he didn't -- he couldn't exactly tell you what pornography was, but he knew it when he saw it, okay? Well, that's kind of like transformative use of a song with a remix of it. I don't know how you do that, so the legal framework for that is pretty dicey just to begin with.

But when we get to the idea of Bach as a remixer, I think that really gets into the question, musically, of what is first order of creation, okay? Creating a unique expression of an idea. That's first order of creation. Bach did that, okay?

Now, a lot of what we're seeing in remixes are not actually first order of creation, okay? They're really just a resequencing, vertical restructuring, etcetera, etcetera of an existing work. Now, where

does that become transformative? Where does that become an original work? That is in the eye of the beholder, so that's a very difficult situation.

So when we talk about a compulsory license for remixes, that gets into the idea, okay, well, what exactly is -- you know, it's permissionless innovation. I always feel it's a problem for creators. We don't have moral rights in this country. I can't keep people from putting any of my songs on a You-Tube video where somebody's getting hit in the crotch with a baseball bat for the 50th time, you know?

I think that since we don't have that right, if you're then going to turn around and give a compulsory license to use my work, I'm once again becoming less and less in control of first order of creation for the benefit of someone who's doing second order of creation.

And let me give you an idea of how first order of creation actually works better than sponsoring second order of creation. I had a song in which I -- I got a recording a the song, was about to get a recording and they wanted to use the samples that I'd done on my demo in the record? Well, one of the samples that I'd used was actually a clarinet part that I had retuned and changed the tempo, okay? And they

wanted to use that on the record. Well, it was somebody else's sample, so I had to go out and buy a jaw harp and learn how to play it, okay, and then rerecord it and put it on a sample and take that in.

So because I couldn't use somebody else's, I had to do the work myself. I had to go buy something, learn how to play it. I actually improved myself and created a new work, okay? I think if we look at a lot of remixing, it's just laziness. They just don't want to write something on their own. Go write your own stuff, you know, get your own copyright, it's better for everybody, okay? And the idea that it's just going to be faster and cheaper and easier for me to pick up somebody else's groove, you know, sample it, remix it, okay, I understand that, it's cheaper, okay, and maybe you can get away with it. But it's not first order of creation, and I think that it's better for everyone concerned, the economy as well as the culture, if we sponsor first order of creation.

MR. CURTIS: I would actually support what a lot of folks would say for promoting some sort of licensing scheme even some sort of micro-licensing scheme. I do think we have to balance that with the notion of asking whether we even need to get to the fair use analysis in a lot of these gray areas.

In the example of samples, if such small snippets are used to create a new work, whether its before you even get to the analysis of whether it's transformative, or not, I think you have to kind of question whether you can use kind of the de minimus argument in copyright, whether or not it's such a small segment of something that we even need to be considering a fair use discussion or even, you know, copyright in general. That kind of flies in the face of first order. But I do think it's a consideration that we don't usually talk about in copyright.

And for artists, say someone like Girl Talk who does -- you know, we talk about mashups, we talk about samples, we talk about remixes, I'm not sure exactly where, what discussion we're having here or just everything broadly, but someone who samples, you know, hundreds of samples, you know, tens of samples in a song, such tiny snippets at a time almost uses a percussion element, or what have you, you know, those elements alone for most people wouldn't even be considered a sample, just hearing them to their ears. It's just a sound. And then the question should be, I think as part of consideration, especially if we think about how to license things, whether upfront something ought to be de minimus, or not.

MS. PERLMUTTER: I know we've got a few other people who have their signs up, but just for those of you who are talking about a compulsory license, one question I would have is how you would deal with some of the "moral rights" issues that have been raised. Like what happens in a situation where an artist, a particular artist doesn't want to be associated with a particular message, whether it's political or commercial. Do you think that's something that should be taken into account and how would you do that in your scenario?

MR. GERVAIS: Okay. Well, isn't that funny I get a moral rights question. That's great. Well, it's interesting because we had a couple of interesting comments before where people say, Well, I want to be able to say no in context which, and of course the United States in theory at least is obligated to provide moral rights to both songwriters and performers under the Berne Convention and WPPT, but maybe we're not in full compliance.

But the point is beyond that, though, beyond the intuition that goes with maybe this moral right idea is the idea of a compulsory license. It's not compulsory license, or nothing, it's -- a compulsory license is probably not the right approach, but if you

have a voluntary license you can have opt-in versus opt-out, right? Those are two voluntary licenses. And we have examples of essentially, functionally, opt-outs in this country in collective licensing where if you don't want to be in, you're not. Plus, we have examples of licensing I mentioned a little earlier where each person sets her own price, so it's not necessarily one price fits all either.

So there are ways of dealing both with the "moral rights" component of this and the market component of this without having it a full, individual opt-in, you have to call that publisher for each song.

Like, Girl Talk would spend a lot of time on the phone with publishers because he, Gillis, you know, probably samples, what, 50 different, if not more, songs per recording.

Two quick other ideas. One is on the definition of remix, however you define it I think it's only relevant if we define something where the second user -- or let's call it the second author creates something that's separately copyrightable, and that is, itself, a copyrightable contribution, right? So we're not talking about just taking something and putting it on You-Tube, and I want to be very clear that at least that's the way I understand it.

Finally, one thing that no one's mentioned but that really strikes me, especially in the 6th Circuit where we are today is we have different rules for whether you can reuse a musical composition or a sound recording, right? So the musical composition is subject to de minimus, and fair use, and all that, but you can't take a single sound from a sound recording, at least not in this circuit. So there's no de minimus, that's the Bridgeport case.

Now, Bridgeport, if you look carefully the court issued the second opinion in which it said, well, we're not necessarily dealing with fair use here, I'm not quite sure, but the rule doesn't seem to be the same. And I've always wondered whether that makes a lot of sense, that there's much more flexibility in what you take from a song than what you take from the recording, so that's a question that might be worth asking.

MS. CHAITOVITZ: Okay. We can go, I guess John, and then Alex.

MR. STROHM: I wanted to respond a little bit about some comments Rick made. I think this is an interesting issue for one thing because the building blocks of creativity, you know, the elements that we just take for granted are not protectable by copyright,

you know, such as a 12 bar blues or a four on the floor drumbeat. You know, there's no conversation about whether somebody can protect those elements.

And I wonder, on the one hand we're dealing with literal infringements here when we're talking about samplings, just taking a recording and incorporating it into a new recording, so there really isn't an argument that you're taking something that should be in the public domain if it's a protected work. But I wonder if certain works that are commonly sampled, you know, become such cliches in that world that, you know, that they shouldn't be protected in the same way.

But the one thing that I find surprising is this idea that you can't look to some works and say, well, you know, that must be a transformative use, that it's just you're too lazy to create something to bring into your own work and you're relying on someone else's work.

I'm a fan of hip hop and, you know, both when you deal with, when you look at works that predate the, the era when everybody knew that they had to license work and come after that date, you find some incredible works that I think anybody who's a music fan would look at and say, well, that's an amazing transformation of

that work. Just listen to, you know, a Public Enemy record, you know there's amazing creativity going on there.

And so I think that my opinion is that it's certainly possible that there could be, you know, works being created that incorporate existing works that are, you know, creative gestures. I think to look at what, how to deal with the possibility that, you know, somebody would not want their work used in a certain way, I think you would have to have some sort of absolute opt-out so that, you know, we understand that these works have to be licensed. And, yes, there's no de minimus under Bridgeport.

So I think there would have to be an initial conversation to say, you know, are you willing to use it for this, you know. And maybe it's a work with an extreme ideology, maybe it's somebody that just can't stand country music, or something like that. But there would have to be that initial conversation, then I think some guidelines would come in to keep it from just being the Wild West.

One experience I've had that I've noted is that when you have these very high profile hip hop projects and they sample older, sometimes famous works, they have to go and, you know, give an enormous amount

of the copyright to clear the first sample and that leaves very little of the pie left for the people that actually might have contributed to writing the song. And I see that as an issue, you know.

I've seen situations where my client is a songwriter who contributed to the writing of the composition, and then the recording artist has to go give 80 percent of the copyright to, you know, to some, you know, classic rock band, or something like that, then there's only 20 percent left of the pie to split between the songwriters, and I see that as a problem.

MR. CURTIS: The only thing I was going to add was, you know, to the extent we're talking a lot about remixing and sampling and things like that, that we don't necessarily get too bogged down -- not necessarily too bogged down, but music isn't the only creative work that we're talking about here. And I know we're in Nashville today but, you know, in other works of authorship we quote, we quote lengthy portions in other aspects and take clips in different ways and we don't even talk about sampling in those contexts.

Yes, music can be different, in the same way that some artists use recording as their instrument. They do things very differently in ways, you know, that authors of words can't do. So I think a lot of that

has to be kept in the context, the medium, the type of creator, the type of creation. And, you know, of course we live in the U.S. where we have free speech which, you know, sometimes runs against moral rights and a lot of that we don't necessarily get to dictate what happens with our work.

MS. CHAITOVITZ: I want to quickly go back to the various licensing models that are available or being developed. I know that, Steve, the RIAA noted a number of models available, You-Tube, content ID, B to B sample licensing, and that you're developing a micro-licensing model. And then there was one suggestion that seems that it might be similar to what many of you are discussing in the comments which would be to eliminate transaction costs of individual negotiations by kind of setting up a transaction facilitating institution similar to PROs(sic) to get sample licenses. So I'm wondering what is, if you could explain the micro-licensing platform and if you envision that as maybe being this kind of transaction facilitating institution.

MR. MARKS: Sure. So let me just start by giving a couple seconds of background. A year ago last June RIAA and the National Music Publishers Association announced that we were working together on

a micro-licensing platform, that we were issuing a request for information to vendors who could provide services to enable licensing of small uses, uses that are not traditionally licensed by, you know, large, even medium or small companies or copyright owners because it's just too difficult and the cost may not be worth the effort or the resources that are needed.

And, you know, over the years we've been approached by a number of different markets for a license like this where they might pay whatever, you know, the market might bear, $50, $100 for use of, you know, recording in a wedding video, for example, wedding videographer, a life event videographer. And as we sat down and kind of looked at the array of things, you know, 10 years ago maybe wedding videographers and a couple of others were the only things that existed, but with online uses there are a lot more uses, and there are a lot more uses that, you know, five years from now we just don't even know about.

So we thought it was worth investing the time to try and build this, and we're in the midst of our companies and publishers talking to vendors about how to do that. And I think folks on the panel have touched on how some of those things might work. You

could have, you know, a set standard license where people opt-in and, you know, you know where to go in order to get this kind of license and see those terms and you can sign up for them, or not. Or you could have individual copyright owners set their own individual terms, but through something that's central so that, you know, it's very easy for somebody to go to an online, you know, destination in order to make the transaction and get the license that they need.

And that's something that's good for those who desire the licenses and need them because they're able to do so much more easily and in a cost effective way. It's good for copyright owners because they're able to, you know, have a license issued for something that may not otherwise get issued and also derive some compensation for the use. So we view it as kind of a win/win situation, and this is certainly something that could be considered in that context once we have that platform up and running.

MR. PERZANOWSKI: So let me start just by sort of applauding the efforts that Steve just talked about. I think these kinds of technologies could potentially be really beneficial. Not to like rain on the parade, though, I do think it's worth like acknowledging the relationship between the development

of these new licensing markets and the fair use conversation, right?

I think reducing transaction costs and making sure that people can obtain licenses where they are needed in an effective and efficient and low cost way is a really great thing, but one thing that we see and have seen historically is that as licensing markets develop and come closer to the sorts of uses that we used to think didn't require permission at all, right, an expanding licensing market can correspond to sort of a shrinking scope of fair use. And I think it's important to keep in mind that no matter how low the transaction costs are, there are going to be some uses, or there should remain -- it should remain the case that there are uses that don't require permission. And I just think there's -- we need to at least be sort of aware of that possibility as we talk about these new sorts of models.

MS. PERLMUTTER: So can I ask, I mean, I think we've been proceeding on the assumption that you could have, that obviously the fair use doctrine would still exist and would still be there for those who choose to rely on it, and the question is whether there's a way to have the option of something else for those who either didn't think they might qualify as

fair use, or might want more certainty. But I would be curious as to yours and any other panelists' views on that relationship.

MR. PERZANOWSKI: Yeah. I just think that it is more difficult in practice to keep those two questions separate. I think courts would have to be incredibly careful about how they think about the fourth factor, in particular. And I, you know, I'm not saying it's not a workable solution, but I'm saying it's something that we have to acknowledge that possibility and be thoughtful and careful about it as we sort of move forward.

MS. CHAITOVITZ: Can I just build on that because a lot of the commenters from various backgrounds discuss the difficulty that, especially artists, and others, but artists have in applying the fair use doctrine and wanting to better enable fair use. People pointed to voluntary guidelines like the ones that AU has issued and Best Practices, someone suggested a Copyright Office brochure. So I was wondering what you think about these guidelines, do they help? Would more guidelines be of use to let people know what, you know, what works are likely to be fair use, and not, and how to use this?

One commentator, Professor Menell, suggested a

fair use board to preclear certain uses or even to give them then immunity that it's close for, against statutory damages. So I was also wondering what you think of those suggestions. And again, it's not license or fair use, I mean, it's -- I think we could help -- it's not an either/or, it could be a both.

MR. GERVAIS: Okay. So, I -- well, first of all, I think they're great precedents for guidelines, the photocopy guidelines from, you know, 1978, '9 or so, the guidelines were -- they were just guidelines, but I'm not aware of any court that refused to apply them and said, No, no, it's infringement, I don't care what's in the guidelines. I think they do tend when they're well done, these guidelines, to carry a lot of weight. So what I think Peter Yousey(sic) and his team at AU have done I think is really, really important and I think the more of that we have, the more there'll be a signal from interested parties as to what shouldn't be licensed.

But let's also agree that there are cases that are close to the border and then the question is do you want to litigate or not. And Aaron's right that there's an interface between licensing and fair use there. I don't see it necessarily exactly the same way. I think, I mean usually people mention the Texaco

case in that context where 2nd Circuit said, well, look there is a licensing option, but it didn't say because there's a licensing option it's not fair use, that's not the point of the case. The way I read it is to say, well, it was reasonable to license in that context.

So the question I always add when I'm reading Texaco is are you asserting it's fair use just because you don't want to pay, or are you asserting fair use because there's another normative purpose you -- you know, you want to criticize this work, you want to parody this work, you want to do something else with this work where we would decide that this shouldn't be licensed.

So it's not a matter of money. And so, but there is an interface because if you don't want to litigate because you're afraid and you pay a license, I can see that, but I still think that for a lot of people there would be value in being able to proceed with their creation paying this license fee, if it's a reasonable fee, and not having to worry about being too, too close to the line. But, you know, I do recognize the cost, as well.

MS. CHAITOVITZ: I didn't see whose placard went up first, so you can both...

MR. MARKS: Okay. Yeah. I just wanted to emphasize that the idea of making something like a micro-licensing platform available is not a suggestion that license be the only answer here. We fully support fair use when it's, you know, applicable and that should continue to be the case. And, you know, the license shouldn't be a substitute for that. But there are a lot of benefits of having, you know, more efficient and easier licensing.

So that to address -- you know, a lot of the comments that we started this panel with, you know, the difficulty in getting the license, finding the author, the transaction costs necessary, etcetera, if we can remove that from the equation and makes things easier, you know, fair use can continue to exist in the right cases, but at least you've advanced the ball with respect to making, you know, the market work more efficiently. So I just wanted to clarify that we weren't putting that out there as a "it has to be done only this way."

MR. CURTIS: I'm just going to add I think that's great, I think it's a great movement to establish such systems. I think two points, so long as the licenses don't extend past the rights of the copyright owner. You know, issues worried about --

worried about EULAs might extend past the rights that the owner actually has to license the music would be a concern, as well as transparency, making sure that all parties know who's getting paid and when they're getting paid, especially the artists, themselves. They may set the rate, but to the extent that they get paid in due process, or they know when -- who is responsible for paying them, and when, to make sure there's accountability in that process I think is a big piece of that puzzle.

MR. CARNES: And if you can establish that in the music business for all of us, that would a be wonderful thing. I don't think we can ever get transparency in every one of the processes, but particularly in this situation he's talking about I can really see the difficulty, you know, because you have a work that's derived from another work that another license is being issued on, and by the time the songwriter even finds out about it, where did the money go?

MR. STEHLI: I don't really think that the fair use issue necessarily is or should be more significant for remixes than any other type of license. I mean, people can make fair use claims for a sync license, and if they think it's fair use, they can take

it and proceed accordingly or if they feel that it's a fair use they can go ahead and license it just to be safe. And with, you know, any type of licensing structure that may be imposed for remixes, I really don't think it's a different issue for that than it is for any other type of a license.

MS. CHAITOVITZ: In addition, some of the commenters made distinctions between noncommercial and commercial works, noncommercial and commercial remixes. Some even suggested a noncommercial safe harbor. Others in the comments noted that noncommercial works are often distributed via commercial services. So would a noncommercial safe harbor apply, or should it apply to the creator and also to the commercial distributor, or would a noncommercial safe harbor only apply to the creator?

MR. GERVAIS: Well, if you apply the commercial, noncommercial to the distributor what's noncommercial is not clear to me. But, I mean, I think these bright lines between commercial, noncommercial, professional, nonprofessional, for profit, not for profit, those bright lines are really getting hard to draw. And so I don't know how far you can go in terms of, especially of legislation, of putting these terms in the statute.

To me, they're factors. For example, in the fair use analysis they're relevant factors, but they're not something that can be easily legislated. You know, what is commercial is something that reasonable people can disagree about, but I think most of the intermediaries right now are commercial, and I think a lot of people who are noncommercial might -- not a lot -- some people who are noncommercial, maybe, or we would think of as noncommercial might actually like to be commercial, it's just that they're not there for one reason or another. So I'm a little wary of these distinctions.

MR. STROHM: Well, I think that is it possible that you could have a work that's ostensibly noncommercial that still harms the infringed work in a way that impacts its commerciality, thereby, you know, sort of, you know, affecting the factor four argument under fair use? It seems like that commercial, noncommercial argument is really pretty well addressed under, at least they're going to come into any coherent fair use argument, right?

MR. GERVAIS: I would echo that. I think the commercial harm test is something I understand, does it create harm to somebody who's clearly commercial, say, you know, a record company or a film

company? That to me is a test I understand much better than whether the user is commercial or noncommercial.

And then if you have a commercial harm, then perhaps it's harder to show fair use, for example. That's what I meant when I said it's a factor, I think.

MS. PERLMUTTER: I'll ask a followup question. Someone raised the issue of the cost of getting a clearance, and I suppose one question is with some of these remixes in particular where there may be multiple works being used, how do you deal with the fact that, how do you avoid having the costs become prohibitive if there are licenses in place, whether they're compulsory or collective or individual licenses?

MR. CARNES: Well, that's the marketplace. I mean, if you want to use several samples of highly commercial value, expect to pay for it or go create your own stuff, which by the way I suggest. I mean, you know, he mentioned a second ago about, you know, the songwriters on the song that had been remixed not making as much money because they had to go out and license the original work. Hey, get 100 percent by doing your own work.

I mean, I think that part of the idea here is to try to encourage first order of creation. If it

costs you too much to remix, you go out and make your own stuff. I think that's part of the process. I think that's a good thing.

MR. STROHM: I think you could make an argument that, you know, a truly innovative use of a sample could be first order of creation. But I want to echo something I said earlier which I think relates to that, which is I think one problem that we're seeing under the current, you know, licensing infrastructure for samples is just that the people who are able to innovate in that space are the people that can afford it, and it's very, very hard to afford to be able to play in that space. And that's what I see as an issue when it comes to, you know, I'm going on the assumption that there's real innovation happening in the space.

And I think it's a problem if the effect of the infrastructure that we have is that, you know, people like Kanye West can participate because he's a multi-millionaire, whereas some kid in his basement can't. But if you look at who the real innovators are in the history of, you know, all creative work, it's often, you know, the equivalent of the kid in his basement with, you know, some, you know, very, very basic setup doing something truly amazing that's gonna really drive the art and create new markets.

So I think that the difficulty of licensing could have an impact on the financial health of our industry for that reason. We need innovation, we need people to be thrilled about what's going on in the music space.

MS. CHAITOVITZ: I'm going to now throw it out for our -- I believe I got the note before that our time is up, so I'm going to throw it out for comments from our audience here and our online audience.

MR. SHEFFNER: Hi. Ben Sheffner with the Motion Picture Association of America. I just wanted to weigh-in on this question of commercial versus noncommercial and these proposals that I know are in some of the comments for some sort of compulsory license or safe harbor for so-called noncommercial mashups or remixes, etcetera.

And I think the discussion here highlights the difficulty in drawing the line between commercial and noncommercial. It's not as easy as it may seem on the surface, and just two things I think to keep in mind.

First of all, we had in the Napster case, what is it now, you know, almost 14 or so years ago, both the district court and the 9th circuit found that individual Napster users, people who were just

downloading and then sharing songs with others, even though they were not actually profiting from that other than receiving the music, they were found to be commercial users.

Second of all, the line gets even harder when you think about things like, well, what if I'm just say making a mashup and I'm not seeking a profit off it, it's just for fun, I just want to -- just for fun, I just want to share it with my users, but let's say I'm putting it up on a very well-known user-generated commerce web video site which is part of a multi-billion dollar corporation which is putting ads around it, which even if it's not putting ads on that specific page, sort of uses the availability of all of these noncommercial, and I put that in quotes, videos is indirectly profiting from the views that such, that such, you know, videos, homemade or amateur videos would make.

So again, I think it's very -- it might sound appealing to say that, well, fully noncommercial videos or music mashups or remixes that don't directly profit the individual maker should, maybe should be treated differently, but both the caselaw and just sort of the business practices show that those things aren't quite as noncommercial as they may seem.

MS. PERLMUTTER: Is there anybody online?

MS. CHAITOVITZ: Yes. We have one question coming.

MS. PERLMUTTER: I'll ask one thing meanwhile. So we've talked a bit about micro-licensing and a bit about collective management. We haven't talked much about intermediary licensing like through You-Tube. And I suppose one question I have is for those who are talking about licensing scenarios as the appropriate approach, or an appropriate approach to remixes, how do you see those different types of licensing levels intersecting with each other? Are they both useful in different contexts, and if so, in which?

MR. GERVAIS: I'm not sure I understand the question.

MS. PERLMUTTER: In what context would what types of licensing mechanisms be useful? Do we want wider availability of mechanisms through services like You-Tube that would be licensed through the intermediaries so that the individual doesn't, who's perhaps doing the remixing doesn't have to interact and get a license, itself, or micro-licensing platforms that allow the individual creator of the remix to license?

MR. PERZANOWSKI: I mean, I think it makes sense to have both of those options on the table and I think the, you know, the remixers, the creators are probably going to give us good information through their own market behavior which one of those works better for them.

Going back to the point I made earlier, there's an incredible number and an incredible variety of people who are engaging in this kind of creativity, and I think it's gonna be really hard to provide one solution that meets all of their needs. And I don't see much of a downside as long as we're talking about sort of a reasonable number of options on the table and we're not doing a bunch of sort of expensive duplicative work in getting these systems up and running, I would imagine that the market could probably support a handful of these alternatives.

MR. GERVAIS: Yeah. I tend to agree. If you go to one like a You-Tube and they provide the service and you're happy with that, let's say let that market work, but if you have a service that allows you to use several different sites to post your content which would be more pure licensing service, I would say why exclude that? There's really no reason that -- to me, it's not an either/or, and I just think that the

licensing market for individuals in that situation is underdeveloped as it stands.

MR. CURTIS: For music.

MR. GERVAIS: For music, correct.

MR. CURTIS: Right. And I think there's lots of examples of other types of content that could provide a lot of guidance there. I mean, I would agree with Aaron that all those types of licenses should exist to make available so that we can see how they play-out, but at the same time we do need more transparency. To the extent that a service like an online video site like You-Tube provides, you know, almost like a blanket license for whoever uploads what quote, unquote, insures that the artist who own the content gets paid, how do artists know that and how do artists know the groups that they're affiliated with are passing through that, that to them?

MR. CARNES: Yeah. If you have one of these nonprofit videos that goes up on You-Tube, supposedly noncommercial use and then it's monetized by You-Tube, shouldn't You-Tube be required to give you the metrics? Shouldn't they be required to say, okay, here's the money that was made, okay? And then at that point we can start looking at it and go, well, wait a second, somebody's making a lot of money off of this,

okay, then we can start talking about how it's divided up and whether it should be legal or not, to begin with.

But I think until we actually see how much money's being made on so-called noncommercial uses, it's hard to know. And I think that you really hit on something. Let's make it transparent. In fact, let's make You-Tube transparent, in general.

MR. LAPTER: So there's a question from an online viewer: Is there any possibility of a song made of preexisting songs to be viewed as a compilational work? It is not a random mixture of songs conducted by a machine automatically, but probably the outcome of creative choices made by an author, even though it could be seen as a cheap and lazy way of composing music; as long as there are some creative choices can remixes be considered compilation works?

MR. GERVAIS: Well, the answer -- I mean, the person asking the question probably has an idea what the answer should be because the person used the word creative choices, which makes me think of the Feist case, which makes me think, yes, if they're creative choices, you've probably passed the Feist test. But, you know, a poem is not a compilation of

lines, so could you create a poem by making it a compilation? I'm tempted to say I wouldn't exclude it.

So, yes, it's possible that a song could be a compilation, but to me that would be an exceptional situation. So that's the best answer I can come up with.

MR. MARKS: And I think even if it was, we still have the question that we've been dealing with most of the time on the panel which is, is a license required for the use of the component parts of that compilation? Maybe there's, you know, a new creative work there, but that doesn't mean that there's not a requirement to obtain a license for the uses of the individual songs that are part of it.

MR. POMEROY: Dave Pomeroy, president of Local 257, Nashville Musicians Association. You know, again, very fascinating. I do have to come back to what Rick said about first and second, you know, order of creativity. It seems to me that all of these discussions today have the common problem of poorly-defined definition of intellectual property and what that really is, and I wonder if at some point in the legislative process these things need to be spelled out on the front end a little better because it seems like it becomes a matter of interpretation.

But when you use the term creativity, and what was the re -- what was the other one? Oh, gosh, it went away now, but the -- you know, to rearrange someone else's work without a true understanding of where those building blocks came from is very problematic, you know, from -- you know, the things we deal with with the musicians' union are trying to identify musicians on the old Motown records that get sampled, and there are protections in our contract to protect the musicians if the music is used in a certain way by the original owner, but not in the secondhand sense.

And so I think again it's kind of a cultural problem, but I think it's excellent that this dialogue is happening and I appreciate everybody's input, but it's -- I think we really have to look at words like creativity and not just throw them around too easily because there's a real difference between creativity and, you know, grabbing something and doing something with it. You know, it's a very tricky thing. But I appreciate everybody's time and the interest in this. Thank you.

MR. HARRINGTON: I disagree very strongly. I've got to say that this bit of first and second order, nowhere in the copyright act does it say copyright protection exists in good works of

authorship. It's original. Who Let The Dogs Out, Who, Who, Who, Who, Who; now I got to something important, valuable expression with all those who-who-who-who-who's.

And also, we're talking about, I did mention earlier and it was brought up again that Bach wasn't so good if he built it on someone else. The training of classical musicians, anyway, for centuries is the way I was trained is the way Bach was trained, the exact courses, the exact work, and Stravinsky and everyone else. And one of the things I hated to do, but we had to do, is write the human(sic) variations. You had to take someone else's work and manipulate it. That's how you learn.

So if that's so bad or anathema to people in 2014 who write music that's more accessible, I think there's something really wrong there. And I'm glad copyright is not about good and out of focus photographs, it's about original. But original comes -- everything is -- a lot of things have been done. There are no original intervals, words, notes, a few cords perhaps, but I'm glad that this is -- this shouldn't be factored into how much of your work is drawn from someone else. Look at T.S. Eliot, for example, that idea of using, the compilation versus the

derivative.

MR. POMEROY: Can I respond to that? Can I respond?

MS. PERLMUTTER: Sure.

MR. POMEROY: I think there's a difference between source material and performance. That's really what I'm talking about, Michael, is -- yeah, you're absolutely right, that everything comes from what came before. But when a particular performance is involved, I think it takes it to a different, more complicated place. I'll just say that.

MR. CARNES: And if I may, when I was talking about first order of creation, I'm talking about the difference between creation and re-creation, that's where I draw the line, or recreation in another sense. You know, the difference between a professional who sits down and actually creates first order and someone who's a hobbyist and is putting together remixes, or somebody who's a professional who's putting together remixes.

Now, those are three very different activities. And I do see that there's first order of creation in a true, unique expression of an idea, okay? And if that includes a piece of some folk song, or something from Bach or some sample of an old Motown

record, I see the creativity there, I understand that, okay? But I think that there is a fairly bright line between creation and re-creation, okay?

MR. STROHM: Well, if you're a country songwriter, you're standing on some pretty big shoulders. You know, I mean, there's a lot of prior art that goes into writing a good country song, right?

MR. CARNES: Yes. But you know what, when you hear original country songs, you actually understand that the roots are what's, where the creation comes from, but it's not the expression, not the unique expression of a George Jones song. Even George Jones may have been derivative of works of Hank Williams, you can definitely hear the unique expression of art in George Jones.

MR. STROHM: I'd say the same thing about a good hip hop song incorporating samples.

MR. CARNES: I agree with you. You can incorporate samples if you make a unique expression, okay? But if you take somebody else's work and sample large portions of it and use that as your work, there's a copyright in that work and it needs to be compensated.

MR. MARKS: I think the perspective of non-featured artists is an interesting one, as well,

because a lot of the discussion here has been about the featured artist. And if you go too far in the other direction in saying, well, it's just a small piece of something that, you know, can be used, you know, you're taking a profession potentially of the non-featured artists and could potentially be ruining it, and what's brought to, you know, creating songs from that group of musicians.

MS. CHAITOVITZ: We have another comment?

MR. LAPTER: We do.

MS. CHAITOVITZ: Go ahead.

MR. LAPTER: So I'm gonna try to read this one as written and hopefully you guys can pick it up: Picking up on Alex Curtis's comment about writing instead of exclusively songwriting, when an author samples or remixes another author's paragraphs and incorporates those scenes into a new work, the remixing is called plagiarism. How would new remixing and sampling laws intended for music affect that which we now call plagiarism?

MR. GERVAIS: Well, plagiarism isn't, isn't illegal under federal law, for one thing. Plagiarism and copyright infringement, they are two different notions entirely. So you have the right to quote under federal law, you don't have the right to

quote without attribution under most plagiarism rules, at least at this university. But I think that's pretty common. So that they're two different notions. They may be morally connected, but they are legally quite distinct. So I'm not sure how to answer the question beyond that.

MR. HARRINGTON: I think it would also matter on how it was transformed. But you're right, especially the difference between copyright infringement and plagiarism I think was not, it didn't come from that question -- the person maybe didn't understand the difference. But also with being just how is it transformed, could you even tell where it's from? A lot of us do that.

MR. CURTIS: And commentary, and criticism in recording, all the rest.

MR. GERVAIS: A really interesting question is can you plagiarize music? Not the lyric, the music. Can you take something that -- we're not talking about the sound recording because Bridgeport says we can't. But let's assume you take a few, you know, a little part of the musical composition and decide that that's a quote the same way we would quote text without the attribution; can you say it's okay under copyright law? Well, yes, I guess if it's a

quote you might make that the argument, but then it might still be plagiarism, which is kind of -- if somebody's working in a music school is their music plagiarism as opposed to music infringement? It would be an interesting question. But the lyric is easier, I guess.

MS. PERLMUTTER: All right. Well, I think it's been great seeing the passion elicited in the creative community in these discussions about different types of creativity and different types of music, so I'm glad that we ended on this note, so -- no pun intended.

So what I'd like to do is just close very briefly and we'll end a little bit early. It's been a very interesting and instructive first roundtable, so it will be hard to make sure that the next three match this. We thank the panelists very much for all their contributions.

On behalf of both the USPTO and NTIA, I wanted to thank again Vanderbilt Law School and Professor Gervais for helping to set this up and the tech aid facility staff for their work. Also, just to thank our own PTO employees who have been here making this possible, so it's Hollis Robinson and Linda Taylor and Angel Jenkins. You don't know how this would not have

worked if it weren't for how hard they've been working to set it all up and make it run perfectly.

And I just wanted to give a few notes. The meeting's been transcribed if anyone wants to find out exactly what they said because they're not sure. The record will be available on our website in June. Our next roundtable on the series will be June 25th at Harvard University in Cambridge, and we look forward to continuing this conversation there and hearing some additional perspectives, as well.

If anyone wants to participate in or observe that next roundtable, there's no bar, you don't get just one bite of the apple if you want to do it again. If we're oversubscribed, we'll obviously favor people who haven't already had a chance. And it will again be webcast if anyone wants to tune-in and see where this conversation is going.

And then just one last point which is that if you haven't already, you can sign up for our copyright alerts, so we will push out to you information about what's happening with this whole process and what our timing is and what the next events are. And you can find that on our website, I understand if you go to the copyright part of the PTO website there's a very big red button you can click on.

So, thank you all again very much, and enjoy the rest of the afternoon.

(Hearing concluded at 2:33 p.m.)

CERTIFICATE OF REPORTER

I, Florence A. Kulbaba, do hereby certify that the foregoing proceedings were stenographically reported and transcribed by me; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, not financially or otherwise interested in the outcome in the action.

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