

GREEN PAPER ON COPYRIGHT POLICY, CREATIVITY, AND
INNOVATION IN THE DIGITAL ECONOMY

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UNITED STATES PATENT AND TRADEMARK OFFICE

DEPARTMENT OF COMMERCE
INTERNET POLICY Task Force

PUBLIC ROUNDTABLE PANEL DISCUSSION

ON

GREEN PAPER ON COPYRIGHT POLICY, CREATIVITY, AND
INNOVATION IN THE DIGITAL ECONOMY

Wasserstein Hall
Harvard University Law School
1585 Massachusetts Avenue
Cambridge, Massachusetts

Wednesday, June 25, 2014

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1 Wednesday, June 25, 2014

2 P R O C E E D I N G S 9:00 a.m.

3 MS. PERLMUTTER: For anyone who's joined
4 by webcast, just to say we're here in Cambridge, and
5 we will be starting in a few minutes. We're just
6 giving it another few minutes for people to arrive.
7 Thanks.

8 (Pause)

9 MS. PERLMUTTER: Okay; why don't we get
10 started.

11 Good morning, everyone, and welcome to
12 the second of our series of roundtables on digital
13 copyright policy issues. We are delighted to be
14 here at the Harvard Law School, and I'd like to
15 thank the Berkman Center for Internet & Society for
16 hosting us today; and of course welcome to all of
17 you who are joining us remotely by webcast.

18 I'm Shira Perlmutter; I'm the Chief
19 Policy Officer of the Patent and Trademark Office.
20 And this roundtable is part of an ongoing process
21 that was started by the Department of Commerce's
22 Internet Policy Task Force, through last year's

1 Green Paper that we issued on Copyright Policy,
2 Creativity and Innovation in the Digital Economy.

3 The Green Paper, among other things,
4 identified a number of issues on which the task
5 force would undertake further work going forward,
6 and three of those issues are the subject of today's
7 roundtable.

8 The work on the Green Paper has been led
9 by the Patent and Trademark Office together with the
10 National Telecommunications and Information
11 Administration, NTIA, and we've also been consulting
12 with the Copyright Office.

13 We started off last December with a
14 full-day public meeting in Washington, in which all
15 of these issues were discussed by panels. We've
16 also received written comments from a wide range of
17 stakeholders and the public on these topics. And we
18 had our first in this series of roundtables in
19 Nashville, Tennessee, last month.

20 So the purpose of the roundtables is
21 really to broaden and deepen the conversation, and
22 we've come here to Cambridge to hear from the

1 community here. We're very glad that we were able
2 to accommodate everyone who wanted to participate
3 today; and as I said, this is the second of four
4 roundtables.

5 We're traveling to locations around the
6 country, in particular places that are centers of
7 copyright activity and conversation, so that
8 includes not just Nashville and Cambridge, but also
9 Los Angeles and Berkeley next month.

10 And, of course, each roundtable is
11 likely to involve stakeholders from different
12 copyright communities and different copyright
13 industries, which is very helpful.

14 So our goal in all of these roundtables
15 is to try to have interactive discussions rather
16 than prepared presentations. Since we've already
17 had submissions, one-way submissions, we want to
18 make sure that there's some debate and conversation.

19 So we'd ask all the participants to keep
20 their comments short so that we can have active
21 engagement by all the participants, and we'll be
22 asking a number of questions to keep the

1 conversation going, and also to elicit some of the
2 information that will be helpful to us as we
3 continue to consider the issues.

4 So as I said, there will be three
5 issues.

6 The first one we'll discuss is the legal
7 framework for the creation of remixes. And in the
8 Green Paper, we posed the question of whether or not
9 the creation and dissemination of remixes is being
10 unacceptably impeded by legal uncertainty, and if
11 there is a need for any new approaches in this area.

12 We'll then have a coffee break and then
13 come back and talk about the appropriate calibration
14 of statutory damages; and to be specific, we're
15 looking at how statutory damages are calculated in
16 two particular contexts.

17 One is in cases against individual file
18 sharers, and the other is potential secondary
19 liability claims against mass online services,
20 services that are making available very large
21 numbers of copyrighted works.

22 So we would like the panel, the

1 participants, to focus on those two specific issues
2 rather than the value or application of statutory
3 damages generally, which we're not going to be
4 getting into in our recommendations.

5 And then the third and final topic today
6 will be the relevance and scope of the first sale
7 doctrine in the digital environment. Our goal here
8 is really to try to dig a bit deeper than just a
9 debate over whether the answer is yes or no, the
10 doctrine should extend to the digital environment or
11 should not.

12 In the Green Paper, we asked whether
13 there's a way to preserve the benefits that the
14 doctrine provides in the analog world, whether we
15 can preserve those benefits or carry over those
16 benefits into the digital world.

17 So what are the benefits? Will, or has,
18 the market developed to provide them? If so, how?
19 And if not, what type of solutions would be
20 appropriate, which might or might not involve the
21 use of the first sale doctrine per se?

22 So with that, let's begin.

1 If any of the observers in the audience
2 today or online has comments or questions, there
3 will be a segment of time immediately after each
4 discussion that the floor will be opened for them to
5 raise them. And for those who are here, if you can
6 go to the microphones in the aisles and identify who
7 you are and who you represent, that would allow us
8 to preserve your comments for the record.

9 And for those who are watching the
10 webcast, you can go to [cyber.law.harvard.edu/](http://cyber.law.harvard.edu/questions/uspto)
11 questions/uspto. And we've provided that link also
12 on the copyright page of the PTO website next to the
13 link for this webcast.

14 At the top of the page you'll see
15 something that says Post a Question. If you click
16 on that, type in your comments and then click
17 Submit, we will read the comments in the order that
18 they're received.

19 So at the Nashville roundtable last
20 month, we had a very vibrant discussion with helpful
21 ideas and constructive back-and-forth among the
22 participants and helpful answers to some of our

1 questions. So we very much look forward to learning
2 more again from today's conversation.

3 So let me give the floor to John Morris,
4 who's Associate Administrator and Director of
5 Internet Policy at NTIA.

6 MR. MORRIS: Great. Thanks, Shira.

7 I just want to add just a brief word of
8 welcome to Shira's welcome.

9 I head the policy office at NTIA, which
10 like PTO is housed within the U.S. Department of
11 Commerce. Just as PTO is the lead agency within the
12 executive branch on intellectual property issues,
13 NTIA is the lead agency on Internet telecom policy
14 issues.

15 So we're very pleased to join with the
16 PTO in continuing the work of the Internet Policy
17 Task Force and the Green Paper.

18 Now, in the Green Paper, the goals
19 espoused in that Green Paper of ensuring a
20 meaningful copyright system that continues to
21 provide the necessary incentives for creative
22 expression while preserving technology and

1 innovation, we think those goals are goals that can
2 and must be achieved in tandem.

3 So we're here to join the conversation,
4 hear from the three panels that are coming up.
5 We've obviously already received significant
6 comments in writing, and look forward to hearing
7 what we are going to learn today.

8 So let me turn it over to -- is it Ann?
9 I think Ann's next.

10 MS. CHAITOVITZ: Good morning, everyone.
11 I'm Ann Chaitovitz; I'm an Attorney Advisor at the
12 Patent and Trademark Office, and I will be asking
13 our distinguished panelists here questions about
14 remixing.

15 So advances in digital technology have
16 made the creation of remixes or mashups easier and
17 cheaper than ever before, providing greater
18 opportunities for enhanced creativity.

19 Now, the Green Paper defines the term
20 "remixes" that we're going to discuss here as,
21 quote, "Creative new works produced through changing
22 and combining portions of existing works."

1 The types of remixes we are discussing,
2 often user-generated content, are a hallmark of
3 today's Internet, in particular on video-sharing
4 sites; but because remixes typically rely on
5 copyrighted works as source materials, often using
6 portions of multiple works, they can raise daunting
7 legal and licensing issues.

8 There may be considerable legal
9 uncertainty, given the fact-balancing required by
10 fair use and the fact that licenses may not always
11 be easily available.

12 So my first question for our panelists,
13 and what worked well in Nashville is, if you want to
14 say something, put your placard like this
15 (demonstrating) so I'll know, and I'll try and
16 respond to everybody in order, but if I mess up the
17 order, help me out, and forgive me.

18 So, many commenters, both the owners
19 and users, point to the large number of remixes
20 and conclude that fair use combined with marketplace
21 mechanisms function.

22 So my question is, is the creation of

1 remixes being unacceptably impeded by legal
2 uncertainty?

3 And that was good, because everybody
4 went in order.

5 (Laughter)

6 MS. CHAITOVITZ: So, Jay?

7 MR. ROSENTHAL: Thank you, Ann.

8 The issue of --

9 MS. CHAITOVITZ: Oh, could you introduce
10 yourself?

11 MR. ROSENTHAL: Oh, of course. We're
12 going to do that? Sure.

13 My name is Jay Rosenthal; I'm a senior
14 vice-president and general counsel at the National
15 Music Publishers Association, and in addition to
16 that, in prior life and to a certain extent in
17 existing life right now, I represent artists, and in
18 particular some pretty important international
19 deejays.

20 MS. CHAITOVITZ: Jay?

21 MR. ROSENTHAL: Yes?

22 MS. CHAITOVITZ: Can I just put you on

1 hold for a second? Because I realize we should have
2 had all the panelists introduce themselves before we
3 start.

4 MR. ROSENTHAL: I thought of that; sure.
5 Go ahead.

6 MS. CHAITOVITZ: So you finish with your
7 introduction, though, and then everybody can --

8 MR. ROSENTHAL: I'm introduced.

9 (Laughter)

10 MR. COURTNEY: I'm Kyle Courtney; I'm
11 Copyright Advisor for Harvard University. I guess
12 in my prior life, I was a full-time librarian; now
13 I'm putting on the lawyer hat.

14 MR. BROWN: My name is Christopher
15 Brown; I'm an attorney at the law firm of Brown &
16 Rosen here in Boston. I have been representing
17 artists for 16 years, including songwriters that
18 have had some of the most downloaded songs of the
19 millennium, including Lollipop, as written by Darius
20 Harrison; I've represented several Grammy award-
21 winning artists, including Fred Hayman; Yolanda
22 Adams.

1 And I notice from our previous
2 discussions that the gospel community has not had
3 much to say, so I'm going make that correction
4 today.

5 MR. HERLIHY: Good morning. My name is
6 David Herlihy; I am a professor at Northeastern
7 University in the music industry program. I also
8 have my own intellectual property/entertainment law
9 practice, which I've maintained for twenty years;
10 and prior to that, I was a singer/songwriter in a
11 band called O Positive. We had a major label deal,
12 so I appreciate sort of this from a wide spectrum of
13 perspectives.

14 MS. GILLILAND: I'm Ann Gilliland; I'm
15 the scholarly communications officer at the
16 University of North Carolina Chapel Hill.

17 My job mostly concerns copyright
18 consultations for faculty, staff and students. Like
19 Kyle, I'm a librarian-lawyer combination.

20 MR. ADLER: I am Allan Adler; I'm
21 general counsel and vice-president for government
22 affairs for the Association of American Publishers,

1 which is the national trade association representing
2 our nation's book publishers and journal publishers.

3 MS. CHAITOVITZ: So, Jay, we'll go back
4 to you now, and you can answer the question. Sorry
5 about that.

6 MR. ROSENTHAL: Okay. I think the
7 question, I believe, is, does legal uncertainty
8 arise because there is no governmental, let's say,
9 interaction with this particular form of artistic
10 expression?

11 MS. CHAITOVITZ: Actually, the question
12 is -- I'll just clarify -- are remixes being
13 unacceptably impeded by legal uncertainty?

14 MR. ROSENTHAL: Same thing.

15 (Laughter)

16 MR. ROSENTHAL: The issue really here
17 is, are we going to try and move towards a
18 compulsory license system, or are we going to have
19 the government involved some way or another in
20 setting a rate for this kind of work so that the
21 users of these works don't have to go out and get
22 approval from the actual artist who had created

1 them, but actually just maybe take out a license and
2 go out and do it.

3 I can tell you the one certainty, and
4 that is that if the government is going to be
5 involved in a ratesetting process, the value of the
6 property will immediately go down. It will be
7 immediately undervalued; it will be below fair
8 market. And that is, I think, the real, I guess,
9 example that other compulsory licenses should bring
10 to this discussion.

11 I could go on and on about how Section
12 115, which was for the mechanical reproduction
13 right, was set at 2 cents in '09 -- excuse me, 1909,
14 was 2 cents in 1975. It is 9.1 cents now and could
15 go down because of those promoting that, hey, we
16 should take the compulsory down even further.

17 The answer to all of this is in the free
18 market. There is an already preexisting business
19 out there, business model, whereby you can license
20 this material, but one can say for user-generated
21 product, it's tough. There's no doubt about that.

22 But there are also examples already in

1 the free market where you can go for user-generated
2 content and people get paid for their rights.

3 The prime example is the YouTube deal.
4 Publishers have entered into -- and albeit out of a
5 litigation settlement -- a license with YouTube
6 whereby publishers grant the rights to YouTube so
7 that people can use, in a user-generated fashion,
8 their music, and they are paid for that. There are
9 now over 3,000 publishers who signed up for this
10 deal.

11 There are big issues of Content ID, no
12 doubt about it. You have to -- you link the sound
13 recording and you link the musical composition with
14 the owners. That's a tough thing, and they're
15 fixing that and they're trying to get through. But
16 the reality is that it is out there, and that's the
17 answer to it.

18 Now, one last example, and then others
19 can talk here, I think that is very instructive.
20 It's something I didn't talk about during the last
21 panel that we had on this months ago.

22 There have been examples of smaller

1 collectives being created to allow people to do
2 mashups. One in particular that was created out of
3 Washington, D.C. that I was involved in as their
4 attorney was something called outer-national music,
5 which stems from ESL Music, which is a very high-end
6 electronic label. The main act on this label is
7 Thievery Corporation.

8 They decided to offer to a collective of
9 deejays the right to take all of the ESL releases,
10 which were maybe 150 at that point, of 12 to 13
11 different acts that they have signed to their label
12 to allow these remixers to do whatever they want
13 with these works: mash them up, remix them,
14 whatever, add new material to them, give them back
15 to the label.

16 The label goes out to try to monetize
17 this by placing them in commercials or movies, and
18 then it's a 50/50 net split with the original
19 remixer and the label itself.

20 This was a free market mashup
21 collective, and I think that this is the kind of
22 free market innovation that we have to allow to

1 happen before we have the government come along and
2 say, well, this is going to be two cents, and that's
3 going to be a little micro-penny, and this and that.

4 To me, that is unworkable, and we
5 shouldn't be going down that road.

6 Thank you.

7 MS. CHAITOVITZ: Thank you.

8 When you were working with this
9 collective, do you know, are there others like that?
10 Do you know how many kind of collectives are there?
11 And are there collectives that represent lots of
12 different works? Because this was, I know, Thievery
13 Corporation was the label.

14 MR. ROSENTHAL: Yes.

15 MS. CHAITOVITZ: But did it include --

16 MR. ROSENTHAL: We never went out and
17 did a survey. We heard other deejays that were
18 thinking the same thing, and anybody we talked to
19 about this thought it was a great idea, and there
20 might be other situations where it could be done.

21 But the point is it could be done on a
22 massive scale as well. You could have a collective

1 doing this, and the whole point is the original
2 copyright owners grant the rights, and Creative
3 Commons does this. This is a Creative Commons
4 approach, where you grant the rights to Creative
5 Commons, and we did this with two tracks of
6 Thievery.

7 They could do whatever they wanted with
8 it. And you will find artists out there who will
9 say, you know what? For half of my catalogue, for
10 ten songs, for two songs, whatever, here's the
11 music; have at it. Mash up, boys and girls, mash up
12 to your heart's content and see what happens, and we
13 could even monetize it and make some money from it.

14 That is a situation where the older
15 artists collaborate with the newer ones, and that is
16 the kind of innovation that we should have.

17 MS. CHAITOVITZ: Thank you.

18 And David, I think you were next.

19 I'm not forgetting you, but I think he
20 put his placard up first.

21 MR. BROWN: He was first.

22 MR. HERLIHY: Thank you.

1 Thanks for offering me the chance to
2 participate in this. I think it's incredibly
3 important.

4 One point that I want to make is, I want
5 to make sure that, in terms of the stakeholders that
6 we're talking about, that the public is involved in
7 this discussion, not merely as consumers, as sort of
8 was historically the case before digital technology,
9 but also as creators, and to really feel as if --
10 Jay talked about the marketplace, and I think we've
11 been waiting for the marketplace solution for a long
12 time.

13 And I think we can look back at what's
14 been happening, look at the successes that have been
15 achieved and also sort of the failures that have
16 occurred, and maybe develop some sort of best
17 practices based on experience. And I think now is
18 the time to codify those best practices.

19 I feel like the default should be for
20 free speech, and for more speech; and I think
21 copyright is a monopoly that is created ultimately
22 for the progress of creativity and free speech.

1 And I think it's time now to look back
2 at what's been happening in the last thirty years
3 and to try to figure out how we can push a default
4 that doesn't rely upon fair use as a mechanism to
5 defend yourself against infringement, because that
6 can be a fairly expensive remedy. But I think I'd
7 rather see something built into the law that
8 encourages these kinds of mashups.

9 MS. PERLMUTTER: When you say best
10 practices should be codified, do you mean codified
11 as a set of practices, or that there should be a new
12 exception put into the law?

13 MR. HERLIHY: I think we can look
14 back -- I think there are certain things, maybe a
15 combination of both, but I look back at things I
16 think that had worked in the past. I think that
17 collective licensing has worked; I think compulsory
18 licensing has worked.

19 As an entertainment attorney, I've seen
20 many mechanisms that, I think, have been
21 successfully used, including, say, royalty pools.
22 When you're starting a theater production, you have

1 royalty pools based upon certain percentages of
2 income. You can set aside maybe a sampled artist
3 royalty pool based upon what happens with the work.

4 And I also think that ASCAP, in much
5 sort of maligned consent decrees, have a
6 single-digit percentage of income that can be
7 absorbed by a company or even the Audio Home
8 Recording Act, when it's 2 to 3 percent of money
9 received as a pool to allocate, those kinds of
10 things, an affordable percentage for a follow-on
11 company to be able to accommodate, and also royalty
12 pools -- I think those kinds of things can be,
13 whether enacted by legislation, which may be
14 difficult, but I think there can be just some
15 embracing of the things that have worked; and we
16 need to figure out what the combination legislative
17 and sort of marketplace practice would be.

18 MS. CHAITOVITZ: Thank you.

19 I'm still not forgetting you, but I
20 think Anne, and then Allan, and then Chris.

21 MS. GILLILAND: So just to note, to
22 start with, in the communities that I work with,

1 remix isn't only music; it is very much
2 interdisciplinary multimedia projects, often
3 front-facing or to some degree front-facing, often
4 part of efforts to engage the public in scholarship.
5 And so they entail much more than only music.

6 I think the part where work is often
7 impeded by scholars and students that I work with in
8 this area is what I would sort of call the
9 intermediate licensing situation; situations where
10 asserting fair use is not appropriate, for whatever
11 reason, but we're not talking about massive
12 distribution and situations where people can or will
13 pay large, large amounts for licensing.

14 And there's really a lack of sort of
15 small-scale licensing mechanisms in that area.

16 I am concerned about a lot of the
17 codification that David talks about, just because it
18 can very quickly grow stale; but on the other hand,
19 we need ways to be able to license content to put on
20 the Web for more than, say, six weeks. And that's a
21 very common response when we seek licenses.

22 Yes, you can put it up for six weeks,

1 but we're looking at much more long-term projects;
2 and it would be really, really useful to have some
3 more flexible ways to license when that's
4 appropriate.

5 MS. CHAITOVITZ: Allan?

6 MR. ADLER: Well, I'm here in part
7 because the people I represent aren't involved in
8 video and music content. And the fact is that
9 there's a great deal of concern in that community I
10 represent, whose works are primarily textual
11 literary works that involve illustrations, graphical
12 material and things of that nature.

13 It's not just the legal uncertainty
14 question with respect to whether it's impeding
15 people in engaging in the creation of mashups and
16 remixes, but it's a question of whether or not those
17 actions of creation are themselves creating legal
18 uncertainty within the existing framework of the
19 Copyright Act.

20 And what I mean by that is, as Anne just
21 made clear, there's nothing that limits the notion
22 of mashups and remixes to video and music material.

1 And the fact of the matter is, the definition that
2 was provided by PTO in the Green Paper, creative new
3 works produced through changing and combining
4 portions of existing works, raises a lot of
5 questions.

6 There's no specific reference to
7 particular classes of works. Obviously, many
8 different classes of works under the Copyright Act
9 can fall within this.

10 When we're talking about creative new
11 works, that's an interesting phrase, which is not
12 the same as talking about a work of authorship or a
13 work of original expression.

14 And I take that to be deliberate, based
15 on the idea that the outcome of the creation of a
16 mashup or a remix may or may not itself be a new
17 copyrightable work.

18 I even think that the use of the term
19 combining portions of existing works leaves certain
20 vagueness in the sense of, it's not clear whether
21 we're talking about only combining those portions
22 that are themselves original expression, and

1 therefore the basis of copyright in the preexisting
2 works, or whether we're talking about a mashup or a
3 remix that takes facts and other non-copyrightable
4 aspects of preexisting works, which would give them
5 a very different cast.

6 But most importantly, we're concerned
7 that the phrases -- mashups, remixes -- are
8 themselves becoming sort of identifications of
9 certain types of works, certain types of actions
10 that have very significant copyright implications.
11 But this is being done in a way that the terms are
12 themselves taking on a kind of life.

13 I mean, there are people that we see in
14 the blogosphere and elsewhere who think that mashups
15 and remixes are by definition fair use per se in
16 their minds because of the way they're created.

17 And that's sort of like the unfortunate
18 result that occurred with use of the phrase
19 "appropriation art," which tells us absolutely
20 nothing about the copyright status of what is being
21 produced under that title.

22 And our concern is that the definition

1 of mashups and remixes has very, very strong
2 resonance with not only the existing definitions in
3 the Copyright Act of compilations and collective
4 works which needs to be explored, but also more
5 importantly the exclusive right of copyright owner
6 under Section 106 with respect to derivative works.

7 There's not much of a difference in
8 terms of the way mashups and remixes have been
9 defined here that distinguishes them in any way from
10 whatever a derivative work is.

11 And because derivative works, as a
12 general rule, subject of course to limitations and
13 exceptions like the application of fair use, but as
14 a general matter and as a matter of law, derivative
15 works are generally within the control of the
16 copyright owner to authorize their creation and
17 their use.

18 And so my concern here is that we not so
19 narrowly focus on the question of whether or not
20 there are legal uncertainties that impede the
21 ability of people to engage in the creation of
22 mashups and remixes, but whether or not the creation

1 of mashups and remixes themselves are creating legal
2 uncertainties with respect to existing concepts
3 under copyright law that affect the rights of rights
4 holders.

5 MS. CHAITOVITZ: Thank you.

6 Chris; and after Chris, Walter, I'll ask
7 you to introduce yourself.

8 MR. BROWN: Thank you.

9 I have to say, I agree with both Jay and
10 Allan for many reasons, and that is, as a
11 representative of a group of songwriters and
12 artists, it's important to have the right to say no.
13 And what we're doing here is we're eliminating that
14 right to say no.

15 One of the clearest examples that I've
16 had with this in my career actually occurred about
17 five years ago, and I'm not going to partake too
18 much in Jay's comments or Allan's, since I agree
19 with both of them. But this is the perfect example
20 of an artist's right to say no.

21 And that is Verity, which is now RCA
22 Inspirational, put out an album on an artist named

1 Crystal Aikin; and what subsequently transpired is,
2 unknown to my client or the record company, the
3 producer had included a sample of a copyright
4 associated with Linkin Park.

5 Linkin Park, in an attempt to protect
6 their copyright, they wanted nothing to do with the
7 song. They were actually opposed to having their
8 music incorporated into a gospel record.

9 Despite every attempt I've made to throw
10 as much money at them in order to solve the problem,
11 they said no. And they had every right to say no.

12 Did it cost my client hundreds of
13 thousands of dollars? Yes, it did, because we had
14 to go back to Wal-Mart and Target and every other
15 distributor and pull back every CD we had that
16 contained that infringing element.

17 It would have been much easier for me if
18 they wanted the money, but they didn't. They had
19 the right to say no pursuant to the Copyright Act,
20 and they did.

21 And I cannot be angry with that. They
22 have every right to protect their work and every

1 derivative thereof.

2 So with that being said, as someone who
3 represents creators, I oppose anything that's going
4 to further limit or erode the rights of copyright
5 owners to protect their interests.

6 MS. PERLMUTTER: Let me just say one
7 thing before we go further.

8 Just to be clear, for those who are
9 participating or listening, the Green Paper has not
10 proposed any particular treatment of remixes or even
11 to define remixes as a class.

12 It's really open for discussion, is
13 there a problem here? Is there not a problem? If
14 there's a problem, are there appropriate market
15 solutions or legal solutions?

16 So we're completely open; we're not
17 proposing any particular result or outcome. And
18 certainly the definition of the Green Paper is not
19 meant to be something that could be precise enough
20 to be a statutory definition; really more something
21 for discussion because it's been raised in a number
22 of forums.

1 So thank you. With that, I'll turn to
2 the next speaker.

3 MR. McDONOUGH: Hi; I'm sorry for being
4 late. I apologize. That's my remix.

5 I'm Walter McDonough from the Future of
6 Music Coalition. I'm also on the board of directors
7 of SoundExchange.

8 I think there's a broader issue here,
9 and to pick up on what Chris had to say, I also had
10 a very similar experience.

11 But we don't have continental style,
12 moral rights in the United States, but there's
13 something to be said for some artists that want to
14 preserve the integrity of their works.

15 And you can go to the Biz Markie case,
16 where I had a similar experience with Billy Joel and
17 Ice Cube, of all people, where some artists just do
18 not want the integrity of their works to be changed.

19 And unfortunately, as someone who has
20 worked with a lot of people who do a lot of mashups
21 and electronic dance music and such, there's a
22 cultural belief and aesthetic belief that really

1 this is a legal issue per se, but nonetheless
2 reflects the artistic community, which is that they
3 believe that there's a cultural yearning to have
4 access to everything. And that could include
5 several artists and composers that do not want to
6 have their work interfered with in any way.

7 That's the reality of the situation, and
8 I think that it's tough for the law to catch up with
9 that, because no matter the best intentions of
10 anyone, we're still going to have those types of
11 situations where people are going to create
12 brilliant mashups.

13 And I always make the distinction
14 between remixes and mashups, but people are going to
15 make brilliant remixes and brilliant mashups that
16 are going to be completely copyright infringements
17 that no one is ever going to be able to be clear.
18 And I think any number of attorneys who work in this
19 area, particularly the hip hop area, have one corner
20 of their office dedicated to all the things that
21 couldn't be cleared.

22 A long, long time ago I used to get to

1 hear a lot of people applying for clearances of some
2 of the clients at the law firm I worked at and
3 represented, the stuff was brilliant, and there's
4 just a file cabinet full of this stuff.

5 But I think that there's been a lot of
6 discussions with some of the publishers, some of the
7 labels, mind you, that this is kind of a unique
8 situation because there's too many copyrights that
9 have to be cleared.

10 I go back to the 1909 Act simply because
11 I think the past is always prologue, and when they
12 drafted the 1909 Act, at the time the player piano
13 was not just this historic anomaly; it was one of
14 the main forms of entertainment at that time. And I
15 think -- Jay, it was the Apollo case; correct?

16 And that case basically forced the
17 drafting and creation of the original statutory
18 license.

19 So the question becomes, can you craft
20 some form of statutory license that would allow
21 people -- and again, notwithstanding the fact that
22 you'd have to have a copyright board determine the

1 rates, et cetera, present evidence, the whole nine
2 yards, for a real vast array of copyrights and be
3 treating individual sound recording copyrights and
4 musical work copyrights as fungible goods as opposed
5 to having one copyright be worth another one. I'll
6 leave that to the economists.

7 The question becomes, really, can you
8 create a situation where people can voluntarily
9 enter into a situation where their works can be
10 used, sampled, remixed, used and mashed up, in some
11 form of statutory license? And can you sort of
12 combine that with an attempt to make that a system
13 where people can enter into that voluntarily?

14 I think that probably would be, for 2014
15 purposes, the best way of going forward; but I think
16 getting there isn't just a legal issue, it's a
17 political one.

18 MS. CHAITOVITZ: Thank you.

19 MR. COURTNEY: A couple things. I like
20 to listen first and then respond.

21 So Jay and I have been on a couple
22 panels together, and I don't usually agree with him,

1 but I do in this case with regards to the fact that
2 the concerns that led to the initial creation of
3 compulsory licenses really are not present as much
4 in today's marketplace. So I think further
5 compulsory licensing would be a bad idea.

6 I'll take it further, though.

7 MR. ROSENTHAL: You should stop there.

8 (Laughter)

9 MR. COURTNEY: I'm always concerned
10 about the proliferation of licensing as a detriment
11 to fair use.

12 Now, fair use is an area that we're kind
13 of dancing around a little bit, to a certain extent;
14 but I see sampling and mashups and stuff as an
15 expression of fair use, which is a right that we all
16 know about and we've talked about on many panels.

17 But the free thinking of ESL and this
18 community is not present in all of the music
19 communities. There are FanFiction communities,
20 movie communities, all sorts of stuff that create
21 mashups, samples of works, et cetera.

22 So, a, the chances of legislation in this

1 area was very slim, anyway, because Congress was not getting
2 that much done; b, nobody really wants compulsory
3 licensing in this area.

4 The idea of Creative Commons system
5 whereby artists are giving licenses -- free,
6 sometimes, mostly free -- for people to utilize
7 their music is an interesting feature. So you're
8 still retaining a certain amount of rights as the
9 artist, which is important, but you're also giving
10 that free-fold ability for future sampling.

11 Now, we haven't even talked about the
12 Bridgeport case and a lot of other cases that led to
13 this; but in my mind, the Supreme Court has said
14 there's an intimate connection between fair use and
15 the First Amendment, and we've had about twenty
16 years of fair-use litigation and transformative
17 fair-use litigation, especially in the last decade,
18 that has indicated that it is still a strong value.

19 So our system here that we're looking at
20 is interesting, and I want to go back to -- I mean,
21 this is the land of Folsom v. Marsh. There's a
22 statue of Joseph Story in the next building. And

1 the idea is that fair use was established here in
2 Massachusetts.

3 Learned Hand also said, "Even when there
4 is some copying, that fact is not conclusive of
5 infringement. Some copying is permitted. In
6 addition to copying, it must be shown that this has
7 been done to an unfair extent."

8 How much is a sample, a two-second,
9 three-second clip done to an unfair extent?

10 Bridgeport, which I assume some people agree is not
11 a great decision, has basically said that a three-
12 second guitar riff with a loop that's about seven
13 seconds that appears seven times in a song is too
14 much, and that any sampling should be copyright
15 infringement.

16 Now, I think that goes too far. What we
17 need to do is pull back from that, frankly. Other
18 circuits have pulled back from that, the 9th, 2nd,
19 11th, and declined to extend that.

20 But here you have up-and-coming artists
21 that want to sample two sentences, three sentences,
22 and mash them all together. You have bands like

1 Girl Talk, which I can't even imagine what the
2 clearance would be on that, if they could even get
3 clearance.

4 So we still need to provide room for
5 breathing for these artists who create and utilize
6 this, and I think this is best expressed in the
7 actual case law itself and through the enforcement
8 of fair use.

9 So that's kind of where I'm at right
10 now. I know Jay is going to respond.

11 MR. ROSENTHAL: Okay; thank you. Girl
12 Talk: That just started a whole thing going off in
13 my head.

14 Okay, first of all, I want to talk about
15 David's points.

16 We have to parse out -- and I know that
17 we're talking about what to do about this. This is
18 the prescriptive kind of panels on, where do we go?
19 Do we go down this road of free market? Do we go
20 down the road of more government intervention? And
21 you spoke about the compulsories, and I'm going to
22 address that in a second.

1 But I do really support the idea within
2 the free market of this collective voice that is
3 dealt with in licensing in Europe all the time.

4 We are the only -- there are two
5 countries in the world, us and Australia, that
6 continue to have a compulsory license for mechanical
7 reproduction. The rest of the world has moved
8 towards a collective process.

9 So it can work, and it is the preferable
10 way to do it, because you are dealing with real
11 market valuations here.

12 We have come out, the NMPA has come out
13 for the abolition of Section 115. We have done so
14 mainly because of the way the courts over the years
15 have ruled on the value and the rate that's being
16 paid for this.

17 This is the biggest major problem. You
18 talked about the Aeolian Company and 1909. All the
19 publishers back then loved the reproduction right.
20 They hated the compulsory, and they fought against
21 it for years until -- it wasn't until Marybeth
22 Peters came along and said about ten years ago, it's

1 time to get rid of this anomaly; you're always going
2 to be undervalued. So collective licensing is the
3 way to go.

4 Fair use? It's hard for me to grasp a
5 fair use under the Girl Talk scenario of, we have a
6 sound recording and musical compositions that are
7 listened to for entertainment purposes, turned into
8 sound recordings and musical compositions listened
9 to for entertainment purposes. I see no repurposing
10 whatsoever in that context.

11 So I think you might find fair use
12 cases, that they might go down this road. I really
13 hope not.

14 There is one aspect of this, and people
15 can say, oh, we're not yet there in terms of the
16 music publishing community or the labels. There is
17 one interesting movement going on that I think could
18 help, and that is the microlicensing movement. And
19 that is the idea that for big companies -- the
20 Sonys, the Universal Publishings, the
21 Warner/Chappells, and well as the labels, and we're
22 working with the labels on this -- will develop

1 effectively a system whereby you have rate cards
2 that are given to the publishers by the owners
3 saying that I will allow you to license immediately
4 my works on these particular terms, the term being,
5 let them use it; or the term being, don't let them
6 use it.

7 And the major publishers are really
8 creating the IT infrastructure to allow this to
9 happen not just through the collectives and the
10 societies, but for them directly.

11 Now, are they doing this because they're
12 thinking we're going to pull out of ASCAP and BMI?
13 Maybe. Maybe that's part of it. And I don't even
14 want to get into that, because I don't think the
15 Justice Department is here, but you never know.

16 (Laughter)

17 MR. ROSENTHAL: But the bottom line here
18 is that technologically, publishers and labels can
19 handle this kind of collective licensing approach
20 without having the courts look at this; and if
21 anybody -- and Walter, you and I have known each
22 other for years, we have clients that are very

1 similarly situated.

2 Think about the different ways digital
3 samples are used. A little bit, a little more, a
4 loop, it has vocals, it doesn't have vocals.

5 Are we going to go through a process in
6 a rate court proceeding or a rate court itself
7 trying to figure out what rates for these things --
8 this is why we want to get rid of Section 115,
9 because we've had to create all of these different
10 crazy categories, and we can't fit new services into
11 them.

12 And I think this is the lesson that
13 should be learned in this context, that it should be
14 done in the free market.

15 Collectivizing, I am all for it. I
16 think it's a great thing to do, but we should really
17 look at what's happened already and the problems
18 under the compulsories and think, there's got to be
19 a better way.

20 MS. CHAITOVITZ: Okay. David, and then
21 after David, I'll move on to the next question.

22 MR. HERLIHY: I just want to say that I

1 see a lot of value in what people are saying about
2 non-governmental solutions and collectives and
3 trying to come up with some solution that doesn't
4 involve trying to figure out the quality of the
5 sample, whether it implicates the underlying song.
6 I agree, that's definitely a real thicket to try to
7 get into.

8 One thing Walter said about the idea of
9 opting in, which I really like the idea of an opt-in
10 for, say, a sample library, but I would be curious,
11 who should exercise the opt-in? Would it be the
12 artist who creates it, who would actually like to
13 see her work sampled? Or would it be the record
14 label, who doesn't necessarily have that same
15 interest?

16 And I think as an artist, one thing I
17 would also like to emphasize is, whatever solution
18 occurs, I would like to see another sort of best
19 practice we talked about maintained, is what
20 SoundExchange does and what the PROs do, that
21 roughly half the money from whatever happens flows
22 right back through to the people who invented this

1 stuff in the first place.

2 So I'd like to have a voice for the
3 creators, have the creators get paid, and I think --
4 where is the fulcrum? Where does the balance lie?
5 And I just want to make sure that there is a voice
6 for the creative class who have done this, not just
7 at sort of a corporate level, but I think from the
8 artist's perspective.

9 And I also want to value the artist's
10 perspective moving forward in creating these mashups
11 and remixes.

12 MS. CHAITOVITZ: And that actually leads
13 into the next question pretty well, because our
14 discussion in Nashville yielded some possible ways
15 to address the issue.

16 A number of participants suggested a
17 combination of fair use guidelines which would go to
18 this issue you just brought up, as well as at least
19 in music licensing collectives, which we've just
20 been discussing here.

21 So right now, I just want to go to talk
22 a little bit about the issue of voluntary guidelines

1 because we've been focusing on licensing
2 collectives.

3 And a lot of people thought that
4 voluntary guidelines, like the ones that have been
5 issued by AU, and best practices are helpful. Or
6 that even -- I think you suggested in your comments
7 a Copyright Office brochure to better enable
8 reliance on fair use.

9 So do these guidelines help, and would
10 more guidelines or a brochure be useful to new
11 creators?

12 MR. ADLER: Yes, we did suggest, in
13 fact, that we believe that as part of the notion of
14 the Register's "next great Copyright Act," she's
15 also talked a great deal about the importance of
16 linking that with a 21st Century Copyright Office.

17 I think that in a 21st Century Copyright
18 Office we need to make much greater use of the
19 expertise and experience of the Copyright Office and
20 the processes that it has, which, compared to those
21 of the other forms of government that act upon
22 copyright law and influence and reshape it, is much

1 more transparent, it's much more deliberate, it's
2 much more participatory.

3 I think the voluntary guidelines can be
4 very, very useful, but I must say you made a
5 reference, Ann, to the guidelines that have been put
6 out, best practice guidelines by American University
7 through the project that Peter Jaszi and Pat
8 Aufderheide had worked on.

9 The problem we have with that is that
10 when you read those guidelines, one of the hallmarks
11 of those guidelines is that they express the view of
12 current general practices within the community of
13 users. They have deliberately not sought out the
14 views of rights holders. They say that in the
15 guidelines, almost proudly.

16 And then what you end up with is simply
17 a kind of self-confirmation that your own practices
18 should be widely viewed as legitimate and
19 sufficiently authorized; and that just simply
20 doesn't work.

21 I think that we all recognize that it's
22 difficult to develop guidelines through hosted kinds

1 of forums. I think back -- this is going to date me
2 tremendously -- to CONFU and the difficulties we
3 had then, but at least in CONFU, everybody had the
4 opportunity to participate and they had the
5 opportunity to make their views known and to share
6 them, and there was a real opportunity for dialogue.

7 So I would hope that when we talk about
8 the possibility of best practices and voluntary
9 guidelines, we don't follow the model of those that
10 are being produced through the process at American
11 University because they're not sufficiently
12 inclusive, and basically they beg the question at
13 the end of the day over whether or not people can
14 safely rely upon those guidelines in order to avoid
15 liability.

16 MS. PERLMUTTER: So can I ask a
17 follow-up question, which is, if there were
18 guidelines that were produced with input from all
19 sides of the debate, would you think that would be
20 useful?

21 MR. ADLER: I think they would be
22 useful. I don't for a minute discount the

1 difficulty involved, because as I said at the
2 outset, this concept spills over into a number of
3 other areas of existing law.

4 You know, the fact that when -- again, I
5 don't mean to harp on the definition so much,
6 because I know it was just an expression and not an
7 attempt at a legal definition. But in talking about
8 creative new work produced through changing and
9 combining portions, well, you could just hear the
10 mindset: Changing and combining; gee, we didn't
11 want to say recasting, transforming and adapting,
12 because that's already in the law and that's the
13 definition of how you create a derivative work.

14 And in the area of fair use, which is
15 what we're talking about, as one of the basic
16 frameworks for trying to help people engage in
17 mashups and remixes legitimately and without fear of
18 potential liability, or infringing on the rights
19 holders of the works that they use, one of the
20 problems we have here is that we're going to be trying
21 to apply an area of law which itself is becoming
22 increasingly more complicated and vague, and perhaps

1 unmoored from its origins in the sense of the way
2 the transformative use doctrine is now being used to
3 make, ultimately, fair use determinations.

4 I've even pointed to one of those
5 American University best practices documents where
6 they have referred to the notion of transformative
7 use as essentially collapsing the four codified
8 factors of Section 107, Fair Use, down to one
9 question, which may work for their community.

10 But again, it's not going to be an
11 approach that I think can be sanctioned in any way
12 as addressing this problem, certainly not by
13 Congress and certainly not by the courts.

14 MS. PERLMUTTER: And I suppose it's fair to
15 say that any guidelines at whatever level would have
16 to take into account the fact that the law on fair
17 use does keep evolving.

18 MS. CHAITOVITZ: So, Anne, I think
19 you're next. Or, we'll work this way: from Jay to
20 Kyle to Anne.

21 MR. ROSENTHAL: You're the moderator.

22 Real quick; I will be quick on this.

1 First of all, the issue of best
2 practices, you've raised the issue of how they're
3 developed. I think that really the key to develop
4 it is the process and how you do it.

5 Let me give you an example of something
6 that I have really bought into, and that is orphan
7 works and the creation of best practices as it
8 relates to what is a due-diligence search.

9 We have been in favor of orphan works
10 under a condition that everybody in the room who is
11 creating these best practices of what is a
12 due-diligence search must be a stakeholder, and
13 really from the user's side as well as the owner's
14 side.

15 And we're going to be comfortable if we
16 have a say in, okay, if you're looking for an orphan
17 work, if you want to make sure you find the owner,
18 this is what you do. You look at this, you look at
19 the Copyright Office, you look at the ASCAP, and on
20 and on and on.

21 So I think the process in the creation
22 of these best practices is very important.

1 And, Shira, your point about the
2 constant development of the law means that you have
3 to have a group that consistently reappraises and
4 reformulates the best practices.

5 So I think that's the way that you can
6 take that concept and put it into this context of
7 making sure that everybody is there to create that.

8 The issue about the artists, the smaller
9 artists and songwriters getting paid, this has come
10 up in the context of Section 114 and SoundExchange
11 as well as with the publishers and ASCAP and BMI.
12 And I think that we're seeing here a real
13 development that I think is very positive.

14 In SoundExchange, when some of the
15 labels pulled out their rights, they agreed that
16 they will still send the artist's share through
17 SoundExchange.

18 Okay; if you want to pay them directly,
19 we don't want to mess with that. We want to cut her
20 a better deal than you can because we want to go
21 into the private marketplace, and the artists will
22 benefit, but here's the money. It will help pay for

1 the admin costs, everything.

2 Publishers are doing the exact same
3 thing. When publishers withdrew recently under this
4 great controversy of the PROs and the publishers
5 withdrawing their rights, they agreed that the
6 songwriter's share would continue to flow through
7 ASCAP and BMI.

8 And I think that they are cognizant that
9 it is a tough road from a public relations
10 standpoint, that, okay, I want all those rights
11 back, and yeah, I know ASCAP is paying the writer
12 directly, but I don't want that anymore. No,
13 they're going to buy into that.

14 Now, I would phrase all of that as a
15 best practices because I will never tell Marty
16 Bandier what to do, but I will suggest what to do.

17 So I think that there is a way to solve
18 this problem of what happens to the artist and what
19 happens to the songwriters in a collective context
20 or even when the publishers of the labels have their
21 rights and they're granting the rights to a
22 collective.

1 MR. MORRIS: Can I jump in and just ask
2 a clarifying question of Jay?

3 You talk about orphan works. I'm trying
4 to understand. You said that those at the table
5 must be stakeholders. I'm trying to understand who
6 would be at the table who aren't stakeholders. I
7 mean, aren't even individual users, individual
8 researchers, stakeholders in the access of the work?

9 MR. ROSENTHAL: Sure, I think there are
10 user groups that are involved in our world that have
11 represented the perspective of the user, consumer
12 groups, for instance.

13 I have no problem with a very expansive
14 group. I just want them to be knowledgeable and
15 informed and don't walk in and talk about, you know,
16 themselves.

17 (Laughter)

18 MR. ROSENTHAL: Let's talk about a group
19 of something.

20 But no, I want to hear from the user
21 groups on orphan works.

22 The libraries have to be there to tell

1 us what are their particular problems and what kind
2 of best practices should be involved with them? And
3 I do believe that they are a special group that
4 should be given greater deference than others who
5 are just doing it for commercial purposes.

6 Those are the stakeholders I'm thinking
7 about.

8 MR. ADLER: They'll have no problem
9 finding their way into the room.

10 MR. ROSENTHAL: Oh, I'm sure they will.

11 And we are doing this at the Library of
12 Congress, so they're kind of there anyway.

13 MR. COURTNEY: I'm going to be the one
14 to defend the guidelines here.

15 Guidelines are an expression of the
16 users that are in this community. AU has not only
17 put out guidelines for our fair use in archives and
18 libraries; documentary filmmakers, a number of
19 folks.

20 I understand that not everyone can be at
21 the table all the time. CONFU was a disaster. The
22 Orphan Works Roundtable even got hot.

1 So not every user group is going to
2 think, well, here we are as the users of these
3 materials of these works, looking for some guidance;
4 and as far as that there's this idea that the record
5 is unclear regarding transformative fair use, I say
6 balderdash.

7 There has been fifteen years of pretty
8 well established decisions starting off with a remix
9 case. 2 Live Crew was a remix, a sampling case.
10 Since then, we've had the law come down with a clear
11 set of guidelines, mostly in the Second Circuit,
12 some in the Ninth Circuit, that says what
13 transformative use is and is not. We have a common-
14 law established record which is grounded by that
15 Supreme Court decision.

16 So creating something new, creating
17 something with a different purpose, that's kind of
18 what we're talking about here.

19 What a remix does, whether it's video,
20 audio, et cetera -- let's say it's music. There may
21 be resequencing, vertical restructuring, pitch
22 altering, lyrics, new content, new message. That's

1 exactly what the fair use, the transformative fair use is
2 designed to emphasize. There's some kind of new meaning
3 or expression there.

4 So if we have a set of guidelines that
5 says how do you interpret these, I think that's
6 good, because not everyone can read the statute,
7 read the law clearly. We have user groups and
8 communities that are just trying to create something
9 new, create something different.

10 Guidelines have existed amongst their
11 own communities for a long time. The UCC was a
12 series of guidelines between merchants on how
13 they're going to do business. The idea of
14 malpractice, what would doctors do that are in the
15 country, what would doctors do that are in the city?
16 Same thing: To compare the groups and what they're
17 doing, and make reasoned determinations of them.

18 And the American University guidelines
19 aren't just one statement; they are carefully
20 crafted. You have a firm statement, then you have
21 limiting statements underneath, and then you have
22 guidelines and stories about how the community is

1 using this.

2 Those are good. Those are good fodder
3 for the community to work with, to realize how they
4 can express their rights.

5 But the guidelines also say, be careful
6 with doing this. This goes too far. Here's what
7 you want to consider. And they always, I believe,
8 come within the confines of the law.

9 And the intent there is to make your
10 average user, the public, aware of what rights they
11 have when they're working with these materials.

12 So I do like guidelines. I do like the
13 idea that we can have guidelines for this,
14 guidelines for some sort of action that takes the
15 law into account with regards to music, with regards
16 to remixes, with regards to video remixes, no matter
17 what medium.

18 I know we're focusing on music here, but
19 I think the FanFiction community produces as much
20 video mashups and literary works as does the music
21 EDM community. So just to defend that there.

22 MR. McDONOUGH: But I think it's

1 important to note that --

2 MS. CHAITOVITZ: Walter? Is yours --

3 MR. COURTNEY: He didn't know.

4 MS. CHAITOVITZ: We'll let you go.

5 MR. McDONOUGH: I'm sorry.

6 MS. CHAITOVITZ: So I'll go to Anne, and
7 then Allan, and then you.

8 MS. GILLILAND: I think that the
9 guidelines, for example, the guidelines that
10 American University has put out have a purpose and
11 they have a use. For the most part, I think one of
12 the most useful things that they do are the stories,
13 that there are communities, lots and lots of
14 communities -- of course, everyone at UNC is
15 terribly well-informed because they have me --

16 (Laughter)

17 MS. GILLILAND: -- that I work with
18 where people are either far, far too cautious, in my
19 opinion, or far, far too incautious.

20 And one of the things that some of AU's
21 projects have done is given stories that have let
22 people who aren't that practiced in taking a set of

1 abstractions and applying them to an actual
2 situation, it breaks that down a little bit for some
3 communities.

4 Yes, there are limits to what the best
5 practices can do, but in those situations they can
6 be very, very helpful to people, and sometimes on
7 the side of helping to advise people to maybe pull
8 back a little bit.

9 I think that there are always, as
10 everybody has noted, huge, huge problems with the
11 sort of mass stakeholder discussions. That doesn't
12 mean that they shouldn't happen, can't happen.

13 And I think in some cases, what is most
14 useful about them for the, you know, average, naïve
15 person is the discussion, the chance to think about
16 what this means, and again, taking the abstractions
17 and applying them to what they're actually wanting
18 to do.

19 In some cases these people are very
20 bright people, but they think very narrowly in terms
21 of their own research interests and their own
22 subject area. And anything that includes a story a

1 lot of times really is the best way to touch those
2 people and make them think more about what they're
3 doing in a broader context.

4 MS. CHAITOVITZ: Allan, and I'm going
5 to -- because I have one question for you.

6 MR. ADLER: And I won't spend a lot of
7 time on a point-by-point rebuttal to what Kyle
8 said --

9 MR. COURTNEY: We can do that over
10 coffee.

11 MR. ADLER: Since we're operating with a
12 record, so it's important that the record reflects,
13 I think accurately, what the situation has wrought
14 in the land generally, which is that there is very
15 little agreement that there has been orderly
16 progress in the development of the transformative
17 use doctrine.

18 Certainly pointing to the 2 Live Crew
19 decision as its origin is fraught with all sorts of
20 peril because the court did not say anything about
21 mashups or remixing, or even before those terms were
22 even known, didn't address the concept. They

1 focused on the fact that it was a parody.

2 And the reason that fair use was so
3 important to it being a parody was the fact that,
4 generally speaking, you're not going to typically
5 find rights holders who will grant permission for
6 somebody to borrow large portions of their work in
7 order to make fun of it or to criticize it.

8 So I think we just have to deal with the
9 fact that this is an area where there's tremendous
10 disagreement about what the law is, what the law
11 should be, whether or not the law has been
12 consistent, whether or not the law is clear, and
13 whether there is a clear path to follow in taking
14 that area of the law and attempting to apply it
15 here, especially in the form of voluntary guidelines
16 where we can't even agree on the way in which those
17 guidelines would be created, through what kind of a
18 process.

19 MS. CHAITOVITZ: I just wanted to ask
20 you, Allan, because we've been talking about a licensing
21 hub, and I know that CCC is a licensing hub for
22 text.

1 But does it -- and I'm not sure -- does it
2 give you -- can you license through CCC remix, rights to
3 mash up things, of the kind of multimedia that Kyle
4 just mentioned?

5 I was just reading in The Times about
6 some musical performance of a Gertrude Stein
7 autobiography. And I just don't know; are those
8 available through CCC?

9 MR. ADLER: Generally speaking, again,
10 this gets back to the concept of compilations and
11 collective works and people who want to use CCC as a
12 means of being able to license and authorize use of
13 portions of their work in compilations or collective
14 works, that can be done.

15 Right now, with respect to textual
16 materials, CCC tends to be the only game in town,
17 and it was a privately created entity and has no
18 government charter. It stands in contrast in that
19 sense to many of the other kinds of collective
20 management organizations in countries around the
21 world.

22 The marketplace I think can produce, as

1 was indicated by your question to Jay, I think the
2 marketplace can produce a number of outlets for
3 people to be able to have third parties represent
4 them in licensing their works and authorizing the
5 use of those works.

6 But again, I think that definitionally,
7 we have some real issues to grapple with at the
8 outset before we can even understand how such a
9 process would work in terms of what we're talking
10 about as a remix or a mashup and how that relates to
11 derivative works and how that relates to the notions
12 of compilations.

13 MS. CHAITOVITZ: Walter and Chris and
14 David had their cards up for this past question, and
15 then I'll move on to the next question after this.

16 MR. BROWN: If I may, I just wanted to
17 chime in. Actually Allan beat me to it, because
18 those are my same sentiments in regards to the issue
19 of these guidelines. I think we have to have a
20 real-world approach here.

21 Music is not like the medical industry.
22 In music, we have millions of people entering this

1 field daily. In my email, I receive thousands of
2 mashups, remixes, from various individuals seeking
3 to work with my clients who have already engaged in
4 the work. And they're not just local; we're talking
5 about across the world.

6 So to imply that these guidelines that
7 we make may reach these individuals in their
8 attempts to create new works, it's just not real.
9 It's just not going to happen. They're not going to
10 understand it. Some of them don't even speak the
11 language, but they speak music.

12 So as long as we keep attempting to
13 create guidelines, they're in no way going to limit
14 or eliminate litigation. We're better off letting
15 the free market economy just go ahead and deal with
16 those issues.

17 MS. CHAITOVITZ: Walter, and David.

18 MR. McDONOUGH: This reminds me of one
19 of my favorite quotes, which I can't remember if
20 it's Nietzsche or Wittgenstein; they asked him about
21 the exclusive control over his work and people's
22 right -- should people have the right to copy his

1 work and alter his work, and he said, if we allow
2 unfettered access to our work, we'll create a
3 society of very clever mimics.

4 I thought that was funny, personally.

5 But, no, I agree with what Chris said;
6 and just to build on it, I think one of the things
7 we lose sight of is, the lawyers are the referees.
8 The people who are actually doing the work are the
9 ones who really need access to guidelines.

10 And we can understand this stuff. I
11 mean, people know what the statute is, and their
12 background has a lot of experience. And I think
13 everything that's been said here is extremely valid,
14 but I wonder how this stuff gets filtered down to
15 the people who are actually doing the creative work,
16 because there's nothing worse than somebody putting
17 their heart and soul into something, and then it's
18 never going to be used except when they break it out
19 at a party or 3:00 in the morning for their friends.

20 But we need more of that type of work.
21 Maybe, you know, moving towards a collective society
22 mitigates a lot of that. I'd like to footnote that

1 and come back to that at some point, because there's
2 one point I wanted to make about collective
3 societies.

4 But I think the problem is that -- and
5 I've read the American University stuff, and I think
6 it's very well-intentioned; but I think that
7 especially in the music realm, not to exclude the
8 other subject matter, but just in the music world, I
9 think that we need to have something that's broader
10 and easier for people to understand, because for the
11 most part we're dealing with kids.

12 MR. HERLIHY: I'd just like to weigh in
13 on what Kyle said and also to a response that Allan
14 had made.

15 Kyle referred to the development of fair
16 use and how he feels it's been fairly illuminating.
17 Although it can be subjective, you have these four
18 factors and other considerations taken into account.

19 But I think the importance of fair use,
20 I think one thing Allan tried to distinguish in the
21 2 Live Crew case, that was about parody; but I sort
22 of want to make a big step back and say that parody

1 is just a form of speech. And if we're talking
2 about speech, we have to address this conflict
3 between copyright and the First Amendment and free
4 speech.

5 So I think that to recognize the
6 importance of sort of facilitating expression, I
7 think that's where we have to incorporate that
8 dynamic as we're looking at the law in the future,
9 and not -- control once was a sensible mechanism.
10 In the 20th century, it was easy to control a
11 material object. I give Walter my CD; then I don't
12 have my CD, and Walter has that CD now.

13 It was relatively easy to balance the
14 interests between expression and production and
15 societal good and remuneration.

16 So all of these things were more easily
17 accomplished through control, but I think now we
18 must not lose sight of the fact we're talking about
19 speech, and the widest possibility of speech should
20 be I think accommodated.

21 But I also think that it's supremely
22 important that the creators whose works are being

1 built upon must get compensated.

2 So I want to focus on the fact that, to
3 look at it from a larger perspective.

4 MS. CHAITOVITZ: I think --

5 MR. COURTNEY: I would say that recent
6 scholarship shows patterns and predictability in
7 some of the fair use cases.

8 Now, there's going to be cases we like
9 and cases we don't like. I was surprised by the
10 Swatch fair use decision, which recently came out,
11 where somebody recording a business meeting, which I
12 thought was private, and then it became -- had a
13 newsworthy exception, because we're talking about
14 criticism, comment, scholarship.

15 And that's what users do when they're
16 remixing stuff; at least some of them believe they
17 do. Now, there's going to be cases where it's
18 absolute copying and they're trying to build off
19 someone else's market, and the fair use factors and
20 the courts will weigh that out.

21 Lawyers can forecast likely outcomes
22 where there are precedents that have analogies; that

1 does exist.

2 So contributing to predictability is
3 what fair use best practices does to a certain
4 extent.

5 But as everyone has kind of said, and
6 we've kind of danced around this, the greatest
7 credit for healthy fair use belongs to the users;
8 right? Absolutely. That's who's doing the work
9 here, large and small, who invest their thought and
10 time into this kind of stuff; and that's furthering
11 the constitutional objective of copyright with
12 expression flourishing, flourishing greatly.

13 So I would agree; the Supreme Court has
14 stressed the intimate connection between fair use
15 and the First Amendment, absolutely, speech, even if
16 we backed up for parody, backed up further and
17 further.

18 But I think that we're using the fair
19 use guidelines not so much as the defense by which
20 it actually is an affirmative defense, we're using
21 it as a litmus test in order to think about, can we
22 do what we need to do?

1 And again, I do believe that scholarship
2 has shown you can use that to make predictable
3 outcomes of fair uses.

4 And we've seen the Google books case.
5 We've seen the HathiTrust case. We've seen fair use
6 being used in ways that aids communities that is
7 blind, they can't read, they can't access the
8 materials.

9 But when we get into the remix culture,
10 we're talking about using smaller snippets, which I
11 think under the four fair use factors is usually an
12 important one. How much are you using it?

13 Remixes tend to use less and less. If
14 they're using too much, then absolutely, they should
15 be going over that line, and I think guidelines
16 would indicate, no, you would be stepping over the
17 line at this point and there is law that you need to
18 comply with.

19 But I do believe that they will be
20 useful to the users, translating what we say up here
21 into common parlance, if you will.

22 MS. CHAITOVITZ: Thank you.

1 And Jay, can you --

2 MR. ROSENTHAL: Real quick.

3 I think just as a fair use issue, the
4 fourth factor of fair use, which has always been the
5 most important, at least to the courts, has been
6 that are you taking the market; are you basically
7 ignoring a market that is there to the detriment of
8 the copyright owner?

9 And the answer is certainly in this
10 case, yes.

11 Is it a practical matter that Girl Talk
12 can go out and license hundreds -- you know, I don't
13 care about Girl Talk, to be honest. I think that's
14 not really the issue here. Girl Talk is not the
15 artistic expression that we're all trying to defend
16 to a large extent.

17 What we talked about when we were
18 talking about the First Amendment, there was also
19 the word "exclusive" in the copyright laws. And
20 there has got to be a moment where this idea that we
21 would take away from the exclusive right and turn it
22 into a non-exclusive right, there are constitutional

1 implications there.

2 I said this at a Copyright Office panel
3 yesterday, and I'll say it again today.

4 If we as a music publishing association
5 view, if we see an expansion of the compulsory
6 license, really in any significant way that impacts
7 us, we are seriously considering a constitutional
8 challenge, as a regulatory taking as well as a
9 violation of the copyright laws itself, because
10 there has got to be some meaning to the word
11 "exclusive."

12 And this is where we're dancing around.
13 Where do we lose that exclusive right and we turn it
14 into a non-exclusive right through some kind of
15 collective approach legally under the copyright law?
16 We need this to be a licensing approach, and that's
17 why we totally promote the idea of creating a
18 collective version of this.

19 So while it would be real fun to do a
20 constitutional takings clause case, and if the
21 songwriters win, it could be their best day since
22 Shanley, when the player piano was recognized as a

1 mechanic reproduction that deserved a payment.

2 Nevertheless, I'd rather not do that.

3 I'd rather work on the collective approach through
4 licensing.

5 MS. CHAITOVITZ: Thank you.

6 I was being flashed our time limit. So
7 we now have ten minutes for people to make their
8 comments, respond to any of the questions asked or
9 issues discussed.

10 We have two microphones here, and there
11 is a way to do it online. The site is right next to
12 the site for the Web link on the PTO -- on the
13 copyright page of the PTO site.

14 (Pause)

15 MS. CHAITOVITZ: Wow; we didn't even --
16 too early? Are you guys still sleeping?

17 MR. ROSENTHAL: No emails from Girl
18 Talk?

19 (Laughter)

20 FROM THE AUDIENCE: Supreme Court
21 reversed, 6 to 3, in Aereo, an opinion by Justice
22 Breyer.

1 MR. ROSENTHAL: Really.

2 FROM THE AUDIENCE: Nothing else
3 matters.

4 (Laughter)

5 MS. PERLMUTTER: Let's ask one other
6 question, and then obviously if anyone in the
7 audience, either here or on the webcast, wants to
8 weigh in, we will stop and take your question.

9 So one issue that came up in the
10 discussion at the Nashville Roundtable was the extent
11 to which there should be distinctions in this area
12 between commercial and non-commercial uses, whether
13 it's the commercial nature of the person who's
14 making the remix or the entity that's making the
15 remix available.

16 So I guess one question is, how should
17 the element of commerciality here be defined, and
18 what should be its relevance? And I guess another
19 criteria could be whether there's commercial harm as
20 opposed to commercial use.

21 Obviously it's an issue that comes up
22 all through copyright; but particularly in the remix

1 context, are there any specific aspects that people
2 have thoughts on?

3 MR. ROSENTHAL: I'll start, if no one
4 else wants to jump in here.

5 I think it does have a role. The idea
6 that we should be viewing non-commercial uses -- I
7 gather you're talking about user-generated content
8 and things like that? Is that what you're really
9 thinking about? Okay.

10 I think certainly the idea is out there
11 that it might be a different form of licensing
12 approach, and I'll get back to the YouTube
13 situation.

14 The YouTube situation that we entered
15 into was for user-generated content where there is
16 no commercial usage by the user. The commercial
17 usage actually is by YouTube. And if YouTube goes
18 out there and gets advertising to throw up on their
19 user-generated site called YouTube that they would
20 somehow share it with the publishers.

21 That's an interesting economic model,
22 but it brings into play the user-generated content

1 creators who really are doing this for fun, a hobby,
2 whatever you want to call it.

3 So I think that that can be kind of
4 brought into the conversation, and I think rights
5 holders would be much more interested in granting to
6 a collective the right for their works to be used in
7 a non-commercial way than in a commercial way.

8 And like I said before, with our little
9 collective that we created, if in fact we could
10 commercialize it, we could share that with the
11 original owners as well. But it's still got to be
12 through a license process.

13 But I think it's a very important
14 consideration to take, and I think there should be
15 some more leeway to use it for non-commercial uses.
16 I see there's benefit there.

17 MS. GILLILAND: So in the worlds that I
18 work in, the commercial/non-commercial distinction
19 is not as bright as one would think a lot of times.

20 One of the truisms I say a lot is that I
21 talk to someone about a project that he or she is
22 doing at some length, pulling from a lot of

1 different sources, a lot of different media, they
2 want to do this, they want to do that; and then they
3 casually add at the end, "And I think we're going to
4 want to sell this eventually."

5 Oh, no; now we start all over again.

6 And that line is often not clear. I see
7 it a lot in the biomedical sciences particularly,
8 but in other places as well.

9 And so it's not something that in my
10 work is as bright as I would have thought it would
11 be, a lot of times.

12 MR. ADLER: Again, just to emphasize
13 that there are, of course, definitional issues
14 associated with the question of how the term
15 "commercial" is used.

16 When we're talking about a commercial
17 use, we're talking about the status of the user as a
18 commercial entity or the use itself being in
19 commerce. There's always the question of whether or
20 not simply the fact that the availability of this in
21 a non-commercial way has commercial impacts on
22 people whose business it is to make similar works

1 available commercially.

2 So I think that particularly, again,
3 talking about the notion of the application of fair
4 use, when it applies in a commercial context, we
5 have to be cognizant of the fact that again, the
6 question of how mashups and remixes mesh with the
7 concept of transformativeness is important, because
8 part of the potency of the transformative use
9 doctrine is the willingness of the courts to say
10 that if they find the transformative use, that can
11 even overcome the fact that it is a commercial use
12 which has harm to the commercial market of the
13 rights holders of preexisting works.

14 MS. PERLMUTTER: Other thoughts on this?

15 Alain, did you have someone?

16 MR. LAPTER: There is a comment online
17 from Laura Quilter.

18 "Case-by-case fair use judicial
19 determinations would solve this problem if statutory
20 damages were not so chilling. Damages reform would
21 bring more cases to the bench with fewer risks for
22 parties, providing evidence-based guidance in music

1 and other areas."

2 MS. PERLMUTTER: Any other comments,
3 questions, from the audience, either here or
4 virtually?

5 MR. LAPTER: That's the only one I have
6 so far.

7 MS. PERLMUTTER: Other thoughts on that?

8 MS. CHAITOVITZ: I want to thank
9 everybody -- oh; Walter?

10 MR. McDONOUGH: I think one thing that
11 needs to be said is that, if we want to move in the
12 direction of collective societies, generally
13 speaking, in addition to the ones that already
14 exist, but fashioning and creating collective
15 societies as potential solutions to specific
16 problems as we see it, I think that one of the
17 things we have to bear in mind is the experience of
18 our neighbors to the north, who pride themselves on
19 not only being the world's largest copyright
20 laboratory, for better or for worse, but also being
21 a playground of collective societies.

22 I mean, there are multiple, multiple

1 collective societies who cater to all different
2 kinds of uses. Some are based on language, but a
3 lot of it's based solely on the specific kind of
4 use.

5 And I think that it's important to note
6 that, if you're going to create a collective society
7 as a response to an issue, it has to work well. In
8 other words, the type of thing that David was
9 talking about, in terms of making sure people get
10 paid, is extraordinarily important, but it's a
11 logistical issue.

12 So if we really want to go into the
13 Brave New World to create collective societies,
14 which I totally support and supported for a long
15 time, and clearly I've been involved in collective
16 societies here in the States, I mean, the bottom
17 line is, we have to make sure that it's not -- once
18 these things are established, the problem is not
19 solved. We've created a new problem; that new
20 problem is administration of the works and paying
21 people.

22 And you can't underestimate the

1 difficulties of those issues or how they are of
2 paramount importance, not just so that the users are
3 being served properly, but also that the creator is
4 being paid.

5 Thank you.

6 MR. ROSENTHAL: And could I just add to
7 that, I think that Walter has hit upon the issue
8 that affects every single point in every single
9 panel that you could have, and that is the data
10 issue.

11 What we're realizing, even in the
12 YouTube deal, is that data isn't great out there in
13 terms of matching sound recordings to musical
14 compositions; and if you have a collective where
15 people are starting to join on new works of remixes,
16 you have to really come up with systems that
17 contract this stuff.

18 And the use of identifiers, special
19 numbers that you come with up, the IWSC numbers, the
20 RFC numbers, all of that is so vitally important to
21 making sure -- and Walter is right on with this;
22 like who cares if you give the rights if you don't

1 know who to pay at the end of the day? And
2 publishers are putting an immense amount of
3 resources into this issue.

4 There's a lot of politics in there, too.
5 As you know, Shira, with the GRD, there's a lot of
6 politics going on: Who's going to pay for it, who's
7 going to own it. All of that notwithstanding, we've
8 got to get through this to a point where systems
9 talk to each other and that we know who owns what
10 and so that people get paid. That will make a remix
11 collective culture much easier to handle.

12 MR. HERLIHY: I'd like to echo that. I
13 think Jim Griffin talks about the GRD having a sort
14 of global database, where all of the works are
15 listed in a way that can be used by any entities to
16 streamline those payments.

17 One thing I'd just like to advocate
18 again is that all works within this collective
19 system are treated equally. If the use is the same,
20 then the payment should be the same regardless of
21 whether you're Madonna or some unknown band, the
22 idea being that the work who's performed the most

1 will make the most; but the payments I think should
2 be equivalent to all comers.

3 MR. ROSENTHAL: There are some
4 differences of opinion on that point.

5 MR. HERLIHY: I know there are.

6 MS. CHAITOVITZ: Thank you all. I think
7 there's a coffee break, and then we will come back
8 for a panel about statutory damages.

9 MS. PERLMUTTER: At 11:00. Thank you.

10 (Recess)

11 MR. GOLANT: We'll be ready to get
12 started in a couple minutes.

13 MS. PERLMUTTER: This is the quietest
14 group I've ever had yet.

15 FROM THE AUDIENCE: Won't last.

16 (Laughter)

17 (Pause)

18 MR. GOLANT: Welcome back, everybody.
19 Our next panel will be on statutory damages.

20 My name is Ben Golant; I'm an attorney
21 advisor with the United States Patent and Trademark
22 Office.

1 Again, welcome back. We have a great
2 panel before us. What I'm going to do now is review
3 a little bit about what we're talking about in this
4 context, we'll have our panelists introduce
5 themselves, and then I'll start off with a question.
6 So here we go.

7 Statutory damages normally range from a
8 minimum of \$750 to a maximum of \$30,000 per work
9 infringed, with the potential to be raised to a
10 maximum of \$150,000 upon a finding of willful
11 infringement or lowered to a minimum of \$200 upon a
12 finding of innocent infringement.

13 We'll address two specific contexts
14 today: secondary liability for large-scale
15 infringements; and, two, individual file sharers.

16 With respect to statutory damages for
17 secondary liability, there are competing arguments
18 about the potential negative impact on investment
19 and the need for a proportionate level of
20 deterrence; and there have been calls for further
21 calibration of the levels of statutory damages for
22 individual file sharers in the wake of large jury

1 awards in the two file-sharing cases that have gone
2 to trial.

3 With that prologue, let's go from Jay
4 down to me to introduce themselves.

5 MR. ROSENTHAL: My name is Jay
6 Rosenthal; I'm the senior vice-president and general
7 counsel of the National Music Publishers Association
8 and also the president of the Girl Talk Fan Club.

9 (Laughter)

10 MS. KRIBBLE: I'm sorry; my title is
11 very boring in comparison to that.

12 I'm Meg Kribble; I'm a research
13 librarian here at Harvard Law School, and I'm here
14 in my capacity as chair of the Copyright Committee
15 of the American Association of Law Libraries.

16 MS. GRIFFIN: I'm Jodie Griffin; I'm a
17 senior staff attorney for Public Knowledge. We're a
18 D.C.-based consumer advocacy group.

19 MR. HERLIHY: My name is David Herlihy;
20 I'm a professor at Northeastern University here in
21 Boston. I also maintain my own intellectual
22 property/entertainment law practice.

1 MR. COLEMAN: I'm Ron Coleman; I'm an IP
2 lawyer in New York, and I have a blog called
3 Likelihood of Confusion, where I write about
4 copyright and trademark and stuff. People find me,
5 and I have to do free work for them.

6 (Laughter)

7 MR. BORKOWSKI: I'm George Borkowski;
8 I'm senior vice-president of litigation and legal
9 affairs for the Recording Industry Association of
10 America. Before that, I was in private practice, a
11 copyright and IP litigator.

12 MR. GOLANT: Thank you all; wonderful.

13 Let's get started with a question on
14 individual file sharers, and it goes like this.

15 Should individuals who are engaged in
16 file sharing on a personal level with no profit-
17 making motive or commercial element be treated
18 differently than other entities for infringement
19 award purposes? Why or why not?

20 And as we did before, put up your tags,
21 and we'll call on you in order. So let's see.

22 Ron, and then David, and then George,

1 and then Jodie. Go right ahead.

2 MR. COLEMAN: My view is that they
3 should be treated differently. They should be
4 treated in concert with the purpose of statutory
5 damages, which is to provide a disincentive, which
6 may very well be out of proportion to the actual
7 damages suffered.

8 We understand that works that are
9 created by people who frequently don't have
10 resources to enforce their rights in copyright ought
11 to be protected, and that's the purpose of statutory
12 damages as well as the attorneys' fee provision of
13 the Copyright Act.

14 On the other hand, it's one thing to say
15 that a college student is being treated in a -- by
16 having an award levied on him or her that is
17 disproportionate to the damage to the copyright
18 holder, in the case of a file sharing of music, for
19 example, by imposing a tenfold, a hundredfold factor
20 for file sharing.

21 It's another thing to say that someone
22 should be put in the position of owing a non-

1 dischargeable judgment debt of hundreds of thousands
2 of dollars, perhaps even millions of dollars, for
3 personal file sharing.

4 If indeed it is the case that we're
5 talking about a person who is not part of some ring,
6 part of some conspiracy to circumvent the Copyright
7 Act, you can get a lot of bang for your buck and
8 send a very strong message without ruining people's
9 lives for file sharing.

10 MR. GOLANT: Thank you.

11 Next? David?

12 MR. HERLIHY: Thanks.

13 I would agree pretty much with what Ron
14 says there. I think that statutory damages do have
15 a significant deterrent effect, and it can help in
16 situations where it's difficult to prove actual
17 damages or expensive to prove actual damages; and it
18 does I think protect against maybe small levels of
19 infringement, where as a lawyer you can sort of send
20 a nastygram to an alleged infringer, and then settle
21 because of the specter of statutory damages. So I
22 think that's a useful function there.

1 That said, I think that if it's a
2 commercial ring or if it's somebody that's utilizing
3 copyrights without permission for a profit motive,
4 then I think that's absolutely the case where that
5 should be in play.

6 A non-commercial individual user, I
7 think there needs to be sort of a calibration there.
8 Maybe just keep it at the \$750 per work, so if you
9 have 28 songs times \$750, you're talking \$20,000,
10 not \$1.9 million.

11 So I think there is definitely room for
12 us to treat this, to maintain the mechanism that's
13 important, but also to calibrate that so that we're
14 not just crushing people with a life-ending verdict,
15 a life-ending decision.

16 MR. BORKOWSKI: The issue should be the
17 amount and extent of infringement, and not who the
18 actor is. There is a range of damages that Congress
19 has provided. It is an extremely broad range, and
20 it is the conduct of the defendant that should be
21 taken into account, and is taken into account
22 usually by the jury, which has to make the

1 determination, if it gets to that stage, of what the
2 correct damages are.

3 The First Circuit in this very
4 jurisdiction where we are sitting rejected the
5 notion that there should be a difference between the
6 profit motive and non-profit motive, the difference
7 between whether somebody is an individual or not an
8 individual; and Congress itself appropriately
9 rejected that by providing for this very broad
10 range.

11 The idea that individual infringement,
12 if it's egregious, should still nevertheless be
13 limited in terms of damages, I just don't find that
14 plausible.

15 Individual infringement is what feeds
16 these large intermediaries who are engaged in
17 widespread infringement. If it weren't for the
18 individuals, there would be no infringed secondary
19 liability for these infringing services who then
20 cause the infringement of millions and millions of
21 copyrights. So the individual is implicated in this
22 type of behavior.

1 Everybody's talking about lives being
2 ruined and being crushed by statutory damages.
3 That's all really nonsense, in my view.

4 There are two cases that came down in
5 which there were statutory damages awards. In both
6 instances, juries of their peers -- and in one
7 instance, three juries of her peers -- found these
8 people liable for infringement.

9 They were bad people. They
10 affirmatively lied; they spoliated evidence; they
11 made accusations against their family members which
12 were false. The jury saw them as being bad people.
13 And even so, the verdict that came down was well on
14 the low end of the range of statutory damages.

15 So it is not the case that statutory
16 damages verdicts are ruining people's lives.

17 Both of these people, by the way, they
18 were caught up in an enforcement program. They
19 could easily have settled for a couple thousand
20 dollars, but they were actually manipulated by their
21 lawyers, I would suggest, who had a larger agenda,
22 who threw them under the bus.

1 So I really don't have a lot of sympathy
2 for these two particular defendants, and there are
3 no cases in which people are getting crushed; and
4 it's not that it's nondischargeable; it is
5 dischargeable.

6 MR. COLEMAN: You heard that, right?

7 MR. GOLANT: Thanks for that.

8 Jodie, it's your turn, if you could
9 respond to what was said already, or if you have
10 something new.

11 MS. GRIFFIN: I agree with Ron and David
12 about the comments of how these kind of astronomical
13 statutory damages really can ruin lives.

14 We look at the Jamie Thomas case and
15 \$222,000. That does ruin lives, and I think for the
16 vast majority of Americans, that puts them into
17 bankruptcy. And we can't ignore that; we can't
18 pretend that that's just a little amount of money.

19 I understand the point about there was
20 infringement, there perhaps were bad decisions made
21 by the defendants because they were probably scared
22 because they were being threatened with millions of

1 dollars in damages; but I don't think that being
2 backed into a corner and making that decision means
3 that you should have to go into bankruptcy over it.

4 And I think also, when we talk about
5 statutory damages on individual file sharing, we
6 have to think about there will also be cases where
7 it's not clear the defendant is actually guilty.

8 And we have to think about the effect
9 the statutory damages would have on settlements
10 where people, maybe it wasn't -- they had an open
11 WiFi number and someone else did it, or somebody
12 that they just got the IP address wrong or something
13 like that, and the person being accused is not
14 guilty.

15 But nevertheless, when they're faced
16 with millions of dollars, they're not sure how the
17 litigation is going to come out, so they say, "Fine,
18 I'll take a \$5,000 settlement," when they did
19 nothing wrong; and that's pretty serious, too.

20 And I think that can encourage kind of
21 an arbitrage industry to arise around seeking out
22 settlements, even in cases where the case may not be

1 very good in court.

2 I think that when we talk about the jury
3 awards, one solution I think would be if we had laws
4 that provided more guidelines to how the statutory
5 damages should apply for different cases, because I
6 think the way that juries have been using statutory
7 damages now don't really go and fall in line with
8 what they were originally intended to do,
9 particularly the upper limits.

10 I think that originally we were talking
11 about a law that says, in no event should you ever
12 go above X number of dollars; and now I think that
13 juries look at the range of statutory damages and
14 they think, well, if here's the lower end and that's
15 the higher end, we'll pick something that's right in
16 the middle award. That will be \$20,000 per work,
17 and we'll award that.

18 And I think that that leads to really
19 skilled lawyers who are advocating for their clients
20 and they can manipulate the juries into awarding
21 these damages that really just are not reasonable
22 and aren't tethered to the actual damage caused to

1 the plaintiff.

2 MR. GOLANT: Thanks.

3 Jay, you had your card up.

4 MR. ROSENTHAL: I think it would be
5 instructive to review a little bit about what the
6 RIAA did, and not the public relations part of it,
7 which was a tough one, with all of the lawsuits.

8 But the vast, vast majority of those
9 cases settled on amounts that did not ruin anybody's
10 life per se. It was a good slap on the wrist, and
11 it was a deterrent that was out there. It was the
12 ones that were fought for whatever reason, good or
13 bad; whether the defendants were well-informed or
14 not on the ramifications is a big question in my
15 mind.

16 But the reality is that I don't think
17 anybody with the individual users wants to get out
18 there, including the labels, certainly including us,
19 want to get out there and ruin people's lives; but
20 we want a strong deterrent.

21 And I think that one thing that I think
22 I have learned from what the RIAA did, which is,

1 again, it was a tough PR moment for them; and for
2 the artists who I represent, it's like why are we
3 suing our fans? That kind of thing.

4 I think that really a whole generation
5 of kids did learn more about copyright law and the
6 rights of the artists and the songwriters because of
7 all of this, and I worry about this idea that we are
8 going to limit damages, as how it relates to the
9 deterrent aspect of it.

10 I can see the tweet right now. Damages
11 are lowered; let the infringements commence!

12 Not in my mind a great message to send
13 out to those folks who really are on the edge of,
14 what should I be doing here in this world? I think
15 we want this deterrent to be maintained, and I don't
16 think that the companies and the individual owners
17 are going to be going out and trying to ruin
18 anybody's life anymore.

19 MS. PERLMUTTER: So let me ask a follow-
20 up question.

21 For those who were saying the damages
22 should be -- statutory damages should be calibrated

1 to take into account the circumstances of individual
2 file sharers, do you think that the existing law
3 already has sufficient flexibility to permit that to
4 be done, or are you suggesting that there be some
5 change in law or guidelines to courts and juries?

6 MS. GRIFFIN: I don't think that the law
7 currently gives enough guidance; and I think,
8 particularly for jury instructions, including
9 information about what was the damage to the
10 plaintiff, what was the position of the holder --
11 or, I'm sorry, the defendant, and was there a
12 good-faith argument that there wasn't infringement?
13 Was it a novel issue of law that nobody really knew
14 whether there was infringement on it until the court
15 came down?

16 I think those are all cases where
17 getting hit with these really high statutory damages
18 would be inappropriate. So we should be giving more
19 guidance to courts and juries about how to do that.

20 We could also give judges discretion to
21 not use the per-work multiplier if that would lead
22 to arbitrary awards, and we could also have a law

1 that sets maximum statutory damages for the case as
2 a whole as opposed to maximum damages per work, to
3 account for these cases where we might have one
4 individual who shared a couple dozen songs, and when
5 you multiply the statutory damages by 24 songs, that
6 can really escalate quickly in a way that doesn't
7 reflect the damage that was done to the plaintiff.

8 And just on one thought: I would have
9 to argue against the notion that lower damages would
10 somehow encourage infringement. As we hear from
11 pretty -- as we hear from companies in business that
12 have pretty deep pockets, federal litigation is
13 expensive.

14 The litigation fees and the attorneys'
15 costs alone are a pretty huge deterrent to people
16 who are being potentially accused of infringement;
17 and when we add actual damages and something that
18 hopefully would be an approximation of actual
19 damages through statutory damages, I think that
20 would still be a really strong deterrent against
21 infringement.

22 MR. GOLANT: Thanks.

1 George?

2 MR. BORKOWSKI: I agree that federal
3 litigation is expensive, considering I manage so
4 much of it. I know, and I see the bills for it.

5 But that is itself a deterrent. I mean,
6 content owners don't just willy-nilly go out and
7 start suing people unless they think it is a very
8 important message to send or a very egregious
9 defendant to go after.

10 So I don't think there's this huge
11 outbreak of litigation, certainly not against
12 targeting -- not against individuals, with the
13 exception of the enforcement program that we ran and
14 that Jay alluded to. But that was more kind of an
15 educational program in a lot of ways, and it did get
16 the message across, and most people settled. It's a
17 big open secret, you can settle for a few thousand
18 bucks, and we sent our message and what have you.

19 And we would be open to something like a
20 series of guidelines, because I think guidelines are
21 important. I think juries need to be given a sense
22 as to what they should consider, and maybe if -- I'm

1 just making this up, but if there's something like a
2 strong fair use defense, that could be taken into
3 account; or if there's an extraordinary amount of
4 infringement, that could be taken into account on
5 the other side.

6 I will note, thought, that in the
7 Tenenbaum case, the one that went up to the First
8 Circuit here, one of the two file-sharing cases
9 mentioned earlier, the court did give the jury a
10 series of non-exhaustive factors to take into
11 consideration before the jury came back with its
12 verdict.

13 And some of the factors were things like
14 the nature of the infringement; the defendants'
15 purpose and intent; the profits the defendants
16 reaped, if any, or expenses they saved; the revenue
17 lost by plaintiff; the value of the copyright; the
18 duration of the infringement; the defendants'
19 continuation of infringement after notice; and the
20 need to deter.

21 So in that case, there were a series of
22 guidelines, and I think most judges will go out of

1 their way to charge the jury. Whether we should
2 have consistent guidelines in these cases, I think
3 that's a fair question and something that should be
4 pursued.

5 MR. GOLANT: Great. I'd like to follow
6 up on that, because that's in line with the next
7 question, and that is, what kind of factors should
8 the courts examine in the context of individual file
9 sharers? And in particular, perhaps, should the
10 courts consider it a factor to pay as a
11 consideration in this particular instance?

12 MR. COLEMAN: I do have a couple
13 thoughts. I think it answers your question; it also
14 addresses a point that George brought up
15 incidentally.

16 You say what factors do courts consider,
17 and the thing about statutory damages cases is, you
18 can find cases that say that they should -- because
19 there is a punitive aspect of statutory damages,
20 therefore courts should consider or instruct juries
21 to consider the ability to pay, because what's
22 punitive for me and what's punitive for some very

1 wealthy person or some very poor person are three
2 different things.

3 I think it might be worth taking a step
4 back and asking ourselves, why are juries making
5 these decisions? If anyone has ever tried a jury
6 case involving intellectual property, the damages
7 tend to be very often hard to assess. I'm talking
8 about actual damages.

9 Statutory damages is weird. When you
10 first encounter it, you think, well, it's punitive;
11 it has all these equitable aspects to it.

12 Why are juries the ones that are making
13 these sort of what we would generally in litigation
14 associate with judicial-type decisions regarding
15 equity, regarding penalties?

16 Now, of course, juries do make verdicts
17 in terms of punitive damages in other contexts; I
18 recognize that. I think that's a question that's
19 worth asking.

20 I appreciate George's point that there
21 should be -- that there probably is room, even from
22 the RIAA point of view, of, for some sort of -- I

1 don't know how granular you want to get, but
2 something in the way of guidelines.

3 Having been involved in a couple of jury
4 trials, and having read them and written about them,
5 I don't know where juries are getting these numbers.
6 And it scares the hell out of me, because I've been
7 in courtrooms where the people on the jury look a
8 lot like the people sitting at the table with me,
9 and they're imposing seven-figure judgments where
10 there's been no evidence of anything remotely
11 approaching -- I'm talking about actual damages.

12 I guess this panel is not meant to
13 discuss whether the jury system is right; but I do
14 think a very good point was brought up here, which
15 is that, because the jury is presented with this
16 range of fantastically high possibilities, somehow
17 this funny-money concept, they somehow think they're
18 in show biz, I don't know what it is, but the
19 numbers just get out of control.

20 So I think those are factors we have to
21 consider. We have to ask ourselves about what the
22 role of the jury really is and should be here.

1 And, George, you talked about sending
2 messages. I do think to the extent that judges are
3 sending messages to juries by guiding them or not
4 guiding them at this point, of course, as you point
5 out, the district judge did everything within his
6 power until finally the Circuit told him his power
7 was a lot more limited than he realized to do
8 something that he thought was the equitable thing to
9 do with statutory damages -- or she thought was the
10 equitable thing to do with statutory damages. I
11 haven't practiced in this district, ladies and
12 gentlemen. And obviously the First Circuit didn't
13 want to hear it.

14 MR. GOLANT: Thanks.

15 Jay, and then George, in response.

16 MR. ROSENTHAL: The jury issue is really
17 funny, it really is, because one would think from a
18 defendant's point of view, you would want a jury,
19 because there's probably a good shot that one of the
20 jurors is probably doing the same thing as what the
21 guy sitting next to you is doing. It's like, oh, we
22 don't want to harm that.

1 But then again, you also have the chance
2 that, oh, they infringed an artist who I really
3 like. So I'm going to really -- you don't know why
4 they're coming to those kinds of numbers.

5 I just wanted to throw out two
6 additional points.

7 I've always been troubled by the idea
8 that registration is what -- that a registration
9 process of copyrights is determinative of whether
10 you can get statutory damages. I wonder if that is
11 something that, first of all, is violative of some
12 kind of international obligation and whether we
13 should be thinking about changing that.

14 But on another proposal that has been
15 made, one which I don't agree with at all, which is
16 a small claims approach, if in fact a small claims
17 approach is accepted in one way or another, you do
18 have a limitation on damages. That's where the
19 plaintiff has decided, I'm not going to go after
20 these big numbers; for ease, for whatever it is, I'm
21 going to go after a smaller number.

22 So there are ways that maybe you could

1 get to from a decision-making process of a plaintiff
2 where they might waive these big damages in lieu of
3 having to either pay an attorney or do something or
4 just waste more time in their minds to go after an
5 infringer of some kind.

6 I'm not quite sure it fits perfectly in
7 the dynamic of how things go, but there are ways
8 that you could fit into the system the plaintiff
9 actually making a decision that I am not going to go
10 after the big damages, but I want equity, and I want
11 them to stop.

12 And that may be the role of the courts,
13 is to get them to stop as much as it is to give big
14 damages.

15 MR. GOLANT: Thanks.

16 MR. BORKOWSKI: Just a couple things,
17 briefly.

18 The answer to the question as to why
19 juries are citing this is the Seventh Amendment.
20 There's ample case law in there that juries have to
21 make a determination of damages.

22 And that always, like any other

1 determination by a jury, is subject to review -- a
2 judgment on an outstanding verdict, or whatever it's
3 called, JMOL, the judge can always cut it back, so
4 there is some protection there.

5 I don't think it's a situation of -- I'm
6 going to say it again -- the numbers getting out of
7 control. There are two cases that are always used
8 as a poster child for runaway statutory damages.

9 Two cases is not a representative
10 sample of anything. And as I mentioned before,
11 there were very valid reasons in those cases why the
12 awards were what they were, and they weren't that
13 high per work, as I said before, and that is because
14 in both instances, the jury knew that these
15 defendants had lied. They had lied about a lot of
16 things, and one of them had actually destroyed
17 evidence.

18 So the jury did not like these people
19 and that is why I would suggest the numbers are, not
20 even that high, but are higher than they would have
21 been if they were sympathetic people, if it was a
22 close call of infringement.

1 One of them had over 5,000 sound
2 recordings in his share folder that he was
3 distributing over the Internet. That's the kind of
4 facts that were before the jury.

5 So the extent of the infringement and
6 the bad actions by these defendants I think were
7 taken into account by juries of their peers.

8 MR. GOLANT: Next I think we have Jodie
9 and -- oh, David, you had your card up.

10 MR. HERLIHY: I just want to say one
11 thing. I think that the multiplier effect that
12 Jodie talked about does provide these sort of
13 stratospheric results that I think in the public
14 create a disconnect. It seems so far removed from
15 the damages suffered.

16 My fear is that it kind of creates a
17 disrespect for copyright. People feel as if, well,
18 this system is so out of whack, that it almost
19 encourages this sort of ignoring of the law.

20 If there was some way of bringing
21 statutory damages in a calibrated way that wouldn't
22 expose some of the \$22,000 per sound recording

1 file -- I just think that that is astronomical. I
2 feel there's got to be some more of a nuanced way
3 for us to divide the actors into different monetary
4 categories.

5 MR. GOLANT: Thanks.

6 Jodie, and then we're going to have Anne
7 talk about secondary liability and statutory
8 damages.

9 MS. GRIFFIN: Just one more thought on
10 the multiplier effect.

11 I'm not against juries deciding these
12 cases; I think the jury system is important. But I
13 think when you're using calculations that involve
14 kind of these multipliers, then that is what can
15 lead to these really enormous damages.

16 And if I can make an analogy to an area
17 of law that can seem kind of separate from
18 copyright, but in personal injury law, we saw these
19 arguments where someone would be injured and the
20 plaintiff's lawyer would say to the jury, now,
21 imagine how much someone would have to pay you to go
22 through this amount of pain for five minutes; and

1 then multiply that by number of weeks, number of
2 years, the entire life expectancy of the plaintiff.
3 And it would lead to crazy, crazy damages.

4 And as a result, now you see all these
5 state laws that say you can't make that argument in
6 court because it's just too manipulative to the
7 jury. And if the plaintiff's lawyer even mentions
8 it, it's a mistrial and they throw it out.

9 And I don't think that that's exactly
10 what we want in copyright, but I think it shows how
11 easily lawyers, especially when we're talking about
12 an individual versus a pretty well-heeled law firm
13 representing a major label or publisher, there's the
14 very real possibility that we can play this numbers
15 game that kind of manipulates the jury into coming
16 up with damages that basically are counterintuitive
17 to common sense.

18 MR. GOLANT: Thanks.

19 Jay?

20 MR. ROSENTHAL: Just one last point
21 about all of this.

22 When you talk about the law firms and

1 who decides who to sue, there's always the issue of
2 the deep pocket versus the non-deep pocket. And I
3 think there is built into this system -- and
4 probably George could speak to this better than I
5 can -- in the law firms that they want to make sure,
6 maybe we'll get to this secondary liability, but
7 they want to make sure that a defendant can pay if
8 there's going to be some kind of a settlement.

9 This reasonableness has to be brought
10 into this conversation, that lawyers are not
11 interested in jumping out there and suing folks that
12 they believe are empty pockets that can't pay the
13 damages. There's a balancing effect, a kind of
14 regulatory, that kind of keeps folks away from going
15 after damages that they know, as we've heard, puts
16 people's lives out of whack or ruins lives.

17 Nobody really, in these firms and these
18 associations and these companies, want that. They
19 want basically, if they think they can get a damage
20 award paid, that's what they're going to go after,
21 and that's what they're going to settle upon.

22 MR. GOLANT: Thanks.

1 MR. ROSENTHAL: That's it.

2 MR. COLEMAN: We may be making a mistake
3 focusing too much -- we have the benefit of having
4 George here, so it's so tempting -- on enforcement
5 of file-sharing cases.

6 I've been involved in a couple of cases,
7 tangentially or otherwise, and if I say the word
8 "Righthaven," then I think everyone is going to know
9 exactly what I'm talking about.

10 Short of the well-heeled law firm and a
11 deep-pocketed plaintiff, there's an entire industry,
12 a business model that has sprung up premised on
13 generating profits from the threat -- and George
14 makes a good point; there are two well-known cases
15 involving big file-sharing verdicts.

16 But outside of file sharing, there have
17 been very substantial six-figure judgments that have
18 either not been appealed or that have been upheld on
19 appeal that involve minimal or disproportionate
20 damages.

21 And again, the whole Righthaven
22 industry, the copyright trolling industry, was

1 premised on this idea that you can use essentially a
2 cookie cutter sort of plaintiff complaint, minimal
3 investment up front, you send people letters saying
4 that as you know, your potential liability is in the
5 high six or seven figures.

6 And they were called out in the District
7 of Nevada, but in other places, I'm representing
8 Sarah Palin in a case involving her use of the
9 famous 9/11 photograph, the rights of which are
10 owned by a New Jersey newspaper company.

11 One of her people used it as a thumbnail
12 on Facebook. It was probably online for all of 24
13 hours. And they're seeking windfall, what can only
14 be identified as windfall damages.

15 And that's the other side of the deep-
16 pockets argument, which is that because my client
17 happens to have relatively deep pockets, you've got
18 plaintiff's lawyers that work on a contingency and
19 for whom it's worth pursuing because even if there's
20 a one-out-of-three chance of their succeeding, their
21 upside far outstrips -- so there's a distortion
22 there that the statutory damages regime, as it

1 exists now, is clearly giving us.

2 MR. ROSENTHAL: She's not your normal
3 infringer, though. She's a little special.

4 MR. COLEMAN: Well, but the fact is,
5 she's not, but in many ways she stands in for a lot
6 of people who are less famous and who are less able
7 to work out a deal with me to get the representation
8 that would be appropriate.

9 MR. BORKOWSKI: If I could just make one
10 very quick point.

11 I would just caution everybody, though,
12 that if there are abuses in terms of, whether you
13 want to call them copyright trolls -- I know this
14 happens in some of the porn cases as well -- there
15 are ways not to throw out the baby with the bath
16 water, because there are legitimate uses of
17 statutory damages. They do provide a deterrent
18 effect. They're extremely important to many
19 industries, especially content industries.

20 If there are abuses, we should focus on
21 those abuses; and some courts already have. There's
22 a case in the D.C. Circuit that just came down on

1 personal jurisdiction that went against one of these
2 patent troll cases -- one of the guys used to be at
3 Prenda Law -- in which the court said you couldn't
4 just sue somebody -- file a Doe suit and then serve
5 a subpoena on the ISP for the identities of 2,000
6 subscribers, because you don't know where the
7 subscribers are located and you haven't shown
8 sufficient nexus to the jurisdiction of the District
9 Court of those potential defendants.

10 So courts are pushing back against this
11 kind of abuse of process, so I would just hope that
12 that is allowed to run its course also, and not just
13 to shrink the availability of statutory damages
14 because in some instances you have abusive lawsuits,
15 because then you end up hurting other people who are
16 using federal litigation for appropriate purposes.

17 MS. PERLMUTTER: So let me just say,
18 this is a very interesting and very important issue.
19 It's one that obviously one could have separate
20 panels on, and it's not just related to statutory
21 damages, but obviously raises other issues as well.

22 And in fact, some of the questions about

1 what are sometimes now be labeled copyright trolls
2 are also coming up in the multistakeholder forum on
3 the use of the notice and takedown process that we
4 are simultaneously engaging in. Some of you may be
5 involved in that as well.

6 But it's not one of the issues that
7 we're pursuing as part of the Green Paper process.

8 So very much a discussion that's
9 important to be continued, but let's move on and
10 talk about -- in a way, the two issues we're looking
11 at here with statutory damages are the shallow
12 pockets, the shallowest pockets and the deepest
13 pockets, so the cases against the individual file
14 sharers on the one hand and the cases against the
15 large entities that are distributing large
16 quantities of work.

17 So why don't we turn to that next topic.

18 MS. CHAITOVITZ: Right. So my questions
19 are going to deal with the secondary liability for
20 large-scale infringement.

21 First, just picking up on what we've
22 already discussed this morning, because a variety of

1 commenters, including the RIAA and their comments,
2 and Jodie sitting here today, have suggested
3 guidelines for courts and jury instructions when
4 awarding statutory damages.

5 Now, we discussed that in the individual
6 file-share circumstances, and I don't want to repeat
7 that discussion. I just want to know if you would
8 say anything different in the case of secondary
9 liability for large-scale infringement, and also
10 talked about factors that should be considered if
11 you have additional factors that should be
12 considered for the context of secondary liability
13 for large-scale infringement.

14 MS. GRIFFIN: I think if we're talking
15 about kind of the large-scale services, often
16 services that host user-generated content, the issue
17 that would come up more would be, is this a novel
18 question of law or is this a really close case?

19 I'm less concerned about the bad actors
20 here and more concerned about chilling people who
21 want to launch legitimate services, but they're not
22 sure if they're going to be hit with -- we were

1 talking about astronomical, when you multiply by 24;
2 but when you're multiplying by thousands, that's
3 truly astronomical, even if you're a company.

4 And I think that the concern there would
5 be, what if somebody in good faith tries to launch a
6 service, maybe is even trying to get licenses or has
7 a theory for why it's not infringement that's
8 actually a good theory, but it may not ultimately
9 prevail; and do we really want to throw the book at
10 them, or do we want to make them pay for the damages
11 that they caused, and then move on and try to
12 preserve the benefits of technology, particularly
13 general-purpose technologies, while still saying
14 that infringement is against the law and you have to
15 pay if you cause damage?

16 MS. CHAITOVITZ: Meg?

17 MS. KRIBBLE: I would feel the same way.
18 As libraries, lending libraries who have unique
19 collections of things that may be in copyright, may
20 not be in copyright, may be orphan works so we can't
21 figure out if they're in copyright, who the owners
22 are, there's definitely a chilling effect there.

1 There was a great example at one of the
2 previous roundtables where someone from the New York
3 Public Library had calculated potential damages, and
4 they turned out to be \$1.8 billion if they had been
5 sued for a World's Fair collection that they put up.
6 So that's the New York Public Library, and they felt
7 chilled by that.

8 So imagine a small town, a public
9 library that has some sort of unique local history
10 collection, something like that that they'd like to
11 share, that they would like people to be able to
12 study and maybe connect with similar collections in
13 other institutions.

14 All sorts of good motives there, and it
15 would be good to have people feel less inhibited
16 about those sorts of projects.

17 MR. BORKOWSKI: There's a whole series
18 of sayings painted on the walls just outside this
19 conference room that I was reading during the break.
20 And one of them is perfectly --

21 MR. COLEMAN: They're all in the public
22 domain, by the way.

1 MR. BORKOWSKI: They are, actually.

2 One that is particularly apt when we're
3 talking about these large intermediary infringers
4 and actors is by Jonathan Swift, and I wrote down
5 here: "Laws are like cobwebs which may catch small
6 flies but let wasps and hornets break through."

7 I kind of like that. I think it's
8 important not to let the wasps and hornets break
9 through in terms of having these intermediary
10 infringers somehow being off the hook for
11 facilitating widespread infringement.

12 And I hear a lot of speculative talk
13 about potential chilling of innovation and what have
14 you because of statutory damages awards. There
15 frankly is no evidence of this whatsoever, and it
16 doesn't even kind of make logical sense to me.

17 Innovation is not infringement. Infringement is not
18 innovation.

19 Since 1999, which is when Congress
20 amended the DCMA to increase the range of statutory
21 damages, there has been an explosion of technology
22 on the Internet. There are services out there that

1 were unimaginable in 1999.

2 These companies are very successful.

3 They have not been deterred by statutory damages.

4 There are over 2,500 digital music services right

5 now that are licensed and authorized and that allow

6 users to access music any way they want, wherever

7 they want. So I do not agree, and I'd like to see

8 some evidence, because I do not agree that this

9 chills innovation in any way.

10 And Congress certainly didn't think so

11 when it increased the range in 1999, because

12 Congress of course, one thing they want to do is

13 increase business and innovation, one of the things

14 they want to do, and not squelch it in any way.

15 For issues like libraries and orphan

16 works, I mean, orphan works, there's a big

17 discussion that has been going on for years as to

18 how best to address this, and this could certainly

19 be part of some kind of orphan works. If there's an

20 orphan works issue, then the whole notion -- there

21 could be, again, guidelines put into place.

22 And I don't think, really, that -- I

1 just don't see what libraries have to fear, because
2 I don't see people standing in line waiting to sue
3 libraries. Libraries are not bad actors. At least
4 our industry likes to go after bad actors.

5 MR. ROSENTHAL: I just want to add to
6 that point of view that I don't think libraries have
7 anything to worry about.

8 I think in terms of players we're
9 talking about, believe me, LimeWire and Megaupload
10 are special categories of focus that deserve the
11 exact amount of damages that are out there that a
12 plaintiff can ask for. I think that's right.

13 I think that the libraries -- and I like
14 the idea, and I do ascribe to this, that many of the
15 problems with libraries can be solved in other
16 areas, especially orphan works. Mass digitization
17 is obviously a big issue, but it's out there as a
18 separate point and may be a separate solution.

19 But we are all in favor of viewing
20 libraries and what they do in a much more benign way
21 in terms of how we move forward with this copyright
22 reform than we are with the LimeWires of the world

1 and Megauploads, where they get no relief
2 whatsoever, if not harder, actually, statutory
3 damages if we can get them in any way for bad actors
4 like that.

5 MR. COLEMAN: We all know the really bad
6 actors when we see them: LimeWire, Napster. It was
7 obvious; right?

8 But somehow in the case of Aereo, the
9 Second Circuit, the United States Court of Appeals
10 for the Second Circuit, thought what they were doing
11 was legal, as did obviously the lawyers they hired
12 to advise them before investments of a probably
13 pretty massive scale.

14 You've seen those gazillion little
15 stupid antennas that they had; right? Someone put a
16 lot of money into that based on not just a couple of
17 opinions that this is legal. I don't know what they
18 were thinking, frankly, but obviously the Second
19 Circuit bought it. And a number of Supreme Court
20 Justices bought it, too.

21 Well, easy come, easy go; right?

22 I wonder whether the statute -- unspoken

1 premise here: Businesses that, like Aereo -- I
2 mean, if in fact it turns out that Aereo was an
3 infringer, which apparently it does, there's going
4 to be a lot of stuff. They're out of business;
5 right? We understand; they're out of business.

6 Statutory damages, the way for us to
7 decide, is that a very rational, societally
8 speaking, policy-wise way to come to conclusions
9 about innovative technologies? Because federal
10 courts will not issue advisory decisions.

11 So you can't -- and besides, if you'd
12 gone to a district court, and even this Court of
13 Appeals, you'd think you'd have something going for
14 you; right?

15 That's a question I think that statutory
16 damages is not so great at answering for us. The idea
17 that, as George said, we're slamming -- you know,
18 innovation is not infringement. Well, innovation
19 wasn't infringement for Aereo until this morning.

20 MR. BORKOWSKI: I'm also tempted to talk
21 about the Aereo opinion; it's very exciting.

22 But Aereo was not innovation. Every

1 commentator, every court, including the Supreme
2 Court, recognized it was not innovation. It was
3 this elaborate, ridiculous, as you said, attempt to
4 work around the transmit clause of the Copyright
5 Act; and I thought it was absurd from the very
6 beginning. I was proved right this morning.

7 But Aereo has nothing to do with
8 statutory damages; it really doesn't. It is a case
9 that was brought to stop infringement, and get an
10 injunction to stop infringement. That's the primary
11 purpose of that case, even though I don't represent
12 the plaintiffs in that case.

13 But that really was the harm that was
14 being caused. I really don't see how statutory
15 damages works in this whole Aereo thing. Aereo
16 would have done what it did regardless of whether
17 there were statutory damages. Well, it did.

18 It tried to, quote-unquote, innovate,
19 and you have these statutory damage awards, and so
20 it was not hindered in any way, in terms of
21 attempting to do what it failed to do.

22 MS. CHAITOVITZ: So Jodie, and then Jay,

1 and then I'm going to move on to the next question.

2 MS. GRIFFIN: Just a couple things.

3 So first, the idea that statutory
4 damages can be effective as a deterrent but they
5 would never chill innovation in the gray areas I
6 think is inconsistent. You can't say one without
7 the other.

8 And also, when we're talking about these
9 services, if you're talking about services that
10 might need licenses, then some of these are going to
11 be services that want licenses where they need them
12 and they're trying to negotiate.

13 And so when we're talking about
14 statutory damages, that has a huge impact on the
15 negotiations that are happening. I think about the
16 music business because that's what I know best, and
17 we're looking at industries that are very highly
18 concentrated, both among the publishers and the
19 record labels; and this makes it even more difficult
20 to negotiate their prices for a new service, because
21 you've got a company that's controlling a third or
22 more of the market, and if you don't get a license,

1 you could be on the hook for up to \$150,000 per
2 work, depending on the finding of willfulness.

3 And I think it just exacerbates the
4 problem; it makes it harder for new services to
5 launch and kind of leads into this effect where it
6 gives the companies that are already in power the
7 ability to kind of entrench themselves in the new
8 technologies going forward, which doesn't help
9 consumers, and it doesn't help the artists.

10 And one more thing I'll throw out is
11 that we're talking about like what's fair in a lot
12 of this conversation, and one really important part
13 about this that I don't think we have a clear answer
14 on is, how much of these damages ever actually go to
15 the artist?

16 MR. ROSENTHAL: Okay. First of all,
17 quickly on the artist thing, because I've done many,
18 many, many artist deals.

19 Contractually, they're supposed to go to
20 the artist. Realistically, I have no comment. And
21 I don't work for the labels, so I don't know.

22 I know that for songwriters and music

1 publishers, if in the contracts, as they almost all do,
2 have provisions that if you have an award of some
3 kind, that the songwriters will get paid. And they
4 do it whether it's song-specific, work-by-work
5 infringement; or if it's much more of a blanket
6 infringement, they will apportion damages and get
7 them back in one way or another to the writers.

8 I just wanted to respond real quick to
9 that point.

10 I just want to say something about
11 Aereo. I see no difference between the chutzpa of
12 Barry Diller and the chutzpa of Megaupload. And I
13 agree with George on this particular point; I saw
14 that from the very beginning. Barry Diller just
15 looks better in a suit.

16 (Laughter)

17 MS. CHAITOVITZ: And, George, can you
18 try and --

19 MR. BORKOWSKI: Yes, very quickly.

20 As Chris Brown said on the first panel
21 today, copyright includes the right to say no --
22 it's an exclusive right.

1 And I guess I didn't quite understand
2 Jodie's point on the negotiation in terms of trying
3 to get rights, because you always have the right to
4 say no. I don't know -- is the suggestion is that
5 statutory damages, if they're smaller, then the person
6 wanting to use the work would be incentivized to go out
7 and violate the copyright if they couldn't get a license?

8 I mean, I really don't understand the
9 connection between the two; I just don't see it
10 myself. That's all I'm going to say.

11 MS. CHAITOVITZ: Okay. So now for the
12 next question. I'm going to go through a number,
13 well, four suggestions that some of the commenters
14 made about recalibrating statutory damages for
15 secondary liability.

16 One was a total damage cap. PK -- I
17 believe you guys commented on that.

18 Another is providing courts with the
19 flexibility to award less than minimum damages if
20 there's a large number of works infringed.

21 Another was changing the innocent
22 infringement criteria; a lot of the libraries

1 suggested that.

2 And also limiting statutory damages when
3 there's a good-faith belief that the use is non-
4 infringing, and that is something that I think you
5 even spoke about here today this morning.

6 So I was wondering -- oh; and also
7 allowing the court the discretion to calculate the
8 damages, not based on the number of works infringed,
9 but just a damage amount.

10 So what do you think of -- and that was
11 five. Sorry; I know I said four at the beginning.

12 So I was just wondering what you think
13 of these various things that have been suggested.

14 MR. COLEMAN: I don't think much of
15 them. To the extent that I'm on the left side of
16 the panel here, I don't think they're very good.

17 Obviously an absolute damages cap is
18 preposterous, because there's going to be a Barry
19 Diller for whom it's worth spending a billion to
20 risk -- I mean, that just makes no sense at all.

21 I'm a little bit surprised that I've
22 been hearing so much about the multiplier effect.

1 If a judge has -- I've experienced this myself on
2 the enforcement side -- if a judge has decided that,
3 or a jury, that there's a number that they want, all
4 they have to do is change the denominator.

5 You don't have to worry about a
6 multiplier; you just decide, this is a million-
7 dollar infringement. Now I'm going to just -- there
8 were 26 works; I'm going to divide it by a million.
9 That's not a problem.

10 I think judges have a tremendous amount
11 of flexibility; again, not as much as they might
12 think in light of what happened with the First
13 Circuit, which I find somewhat troubling, but none
14 of those make any sense to me.

15 MS. GRIFFIN: I think that they are good
16 ideas. In terms of the total damages cap, which was
17 brought up specifically, I think that that would be
18 important. I think that the multiplier effect is
19 really important and has been shown, at least in the
20 cases that we've seen, to make a really big
21 difference, particularly when we're talking about
22 individuals who don't have deep pockets or the

1 ability to handle these huge damages.

2 I think that you could have damage caps
3 for certain situations, kind of including all of
4 these ideas as part of a package. When we're
5 talking about giving guidelines, you can include
6 caps for certain types of actions or certain
7 situations, depending on the good-faith nature of a
8 non-infringement argument or whether it's a close
9 case, where you want to avoid the situation where
10 each side has a good argument and whoever wins is
11 going to be a billion dollars richer, because that
12 just seems --

13 We don't need those kinds of high
14 stakes, and it just leads to grandstanding or people
15 just dropping out of the business entirely.

16 MR. HERLIHY: I would just like to sort of
17 come from the middle ground. I think that the
18 damages cap could make sense, as Jodie sort of
19 intimated, about individual infringement cases, but
20 maybe not for the corporate cases.

21 I think the Aereo case was obviously
22 eyes wide open, very thoroughly contemplated, and

1 that was a risk that they took. I think that for an
2 individual file sharer at a home, I think that there
3 could well be some kind of a cap.

4 I also think, at least to my
5 understanding, that the Copyright Act already allows
6 for a certain amount of flexibility in statutory
7 damages in that if it's innocent infringement, it
8 can go down to \$200. Whatever innocent is, I guess
9 the devil is in the details there; but I think maybe
10 having more guidelines for the judges to be able to
11 use and juries to be able to use.

12 But I think that more guidelines about
13 sort of the intent of the party involved, the market
14 effect, the actual loss to the plaintiff, I think
15 all of those things could be more straightforward.

16 But I do think there should be a
17 bifurcation between corporate infringement and
18 individual liability.

19 MR. BORKOWSKI: I think I agree with
20 about three-quarters of what David said, which is
21 pretty good.

22 I do think that the current scheme does

1 give broad flexibility, including an innocent
2 infringement finding of \$200, which does force, I
3 think, a judge to charge a jury in a way that they
4 will be thinking about the intent of the parties and
5 the harm that was caused and whether there was a
6 good-faith belief that it was either a fair use or
7 whether it was non-infringing or something of that
8 nature. I think those are valid factors that should
9 be taken into account.

10 I think that if you're a bad actor, then
11 it should be at a higher rate; and if you either
12 made a mistake or were just kind of careless, then
13 perhaps a lower award is appropriate. But I think
14 the flexibility does exist there.

15 But the total damages cap I don't agree
16 with, especially because I think that would
17 encourage wide-scale infringement. I'm sure
18 Megaupload's Kim Dotcom would be thrilled to have a cap
19 on his liability, once we get him, I hope, extradited to
20 the District of Virginia, where we have sued him for
21 copyright infringement.

22 So I am opposed to a cap. I think it

1 would encourage wide-scale infringements, especially
2 by these intermediary type companies that are liable
3 at least for secondary liability, though in his
4 instance I think there's direct liability as well.

5 MS. CHAITOVITZ: Jay?

6 MR. ROSENTHAL: I also agree with the
7 system in place right now. I don't like the idea of
8 the cap.

9 My comment here is, let's not miss the
10 point that while, yes, it's punitive in a certain
11 context, the whole system of statutory damages was
12 also about the fact that a plaintiff doesn't know
13 their damages when they file a lawsuit.

14 And you have to maintain some kind of a
15 sense that -- if in fact the infringement is much
16 greater, especially with a bigger player, not
17 individual infringement but a bigger player, to cut
18 off in any way the ability of a defendant to go down
19 the road and to claim that and -- in the form of
20 statutory damages as opposed to or in addition to
21 compensatory is not an incentive that you want to
22 take away from a plaintiff in these kinds of cases.

1 So I like the system. I'm always
2 partial to this idea that, yes, libraries should be
3 viewed differently in one way or another, and I do
4 think that that's valid to go down. Otherwise, I
5 think the system's fine.

6 MS. CHAITOVITZ: Meg?

7 MS. KRIBBLE: I just want to say
8 quickly, libraries very much appreciate that view;
9 but just if you think that is a universal view, I
10 would refer you to the notes from the copyright
11 roundtables in March. So that's not universal, and
12 we do have those worries related to damages.

13 MS. GRIFFIN: Just one thought on the
14 Aereo example I think that's worth noting.

15 It's not statutory damages or nothing;
16 there's also actual damages. And if we're looking
17 at Aereo specifically, we have an established
18 retransmission consent right for the broadcasters;
19 we have the copyright for the networks. If they're
20 fitting into the MPVD cable system regulations under
21 the FCC's rules, then there are ways to show this is
22 what we would have been paid had we needed to pay

1 the rate.

2 So I think there are ways to make sure
3 that people are made whole for infringement other
4 than these high statutory damages.

5 MR. BORKOWSKI: Well, but the problem
6 with that, as I see it, is that's essentially saying
7 I'm going to go out and I'm going to infringe. If I
8 get caught, all I have to do is pay what I would
9 have had to have paid to get the license in the first
10 place.

11 And that really isn't the point of what
12 statutory damages are. You're essentially forcing
13 the license on the plaintiff; then they have to go
14 out and sue to get the license fee, and you don't
15 get any more than that.

16 That's not what the purpose of statutory
17 damages is. The Supreme Court in the Woolworth case
18 had made it crystal clear that the whole point of
19 this is to be a fine, is to be a penalty, is to make
20 it not worth the infringement. And so it has to be
21 substantially higher than what actual damages or a
22 reasonable license fee would be.

1 MR. COLEMAN: And I don't think there's
2 anything I disagree with that. I agree with you;
3 there's got to be a kicker, or else, exactly, if
4 you've were to have a compulsory license, then
5 there's no real downside for you.

6 On the other hand -- and I know, George,
7 I'm mixing and matching -- but in the eBay case, the
8 Supreme Court said -- I'm sorry; Wal-Mart.

9 MR. HERLIHY: Woolworth?

10 MR. BORKOWSKI: Woolworth?

11 MR. COLEMAN: There is no presumption --

12 MR. BORKOWSKI: Walgreen's?

13 (Laughter)

14 MR. COLEMAN: It's one of those W -- one
15 of those cases involving a letter of the alphabet.

16 There's no presumption in an injunction
17 context of irreparable harm in a patent
18 infringement. And courts are running with this in
19 the Second Circuit, where I practice, and saying, it
20 looks like under that rule, same rule for copyright,
21 same rule for trademark.

22 So we got this extreme case when I used

1 to do anti-counterfeiting work. That seemed to be
2 the perfect case for statutory damages, because
3 inevitably we could not get meaningful information.
4 In fact, we were off and operating doing inquests,
5 ex parte; the other side defaulted; there was no
6 information.

7 So that's the classic case of no
8 information, so now, Judge, come up with a number.
9 By the way, as George knows all too well, it's
10 usually a number that is not going to be collected,
11 anyways. The number is for purposes of a press
12 release.

13 On the other hand, if you're now
14 acknowledging finally that sometimes works can be
15 infringed and there isn't really harm, okay. You
16 know, again, the starving artist from my original
17 comments, he never sold a painting, but now you've
18 decided to steal this painting and make it a meme on
19 the Internet, and he should be entitled to some kind
20 of compensation for that separate and apart from the
21 market value. Fine; that's the other extreme.

22 But I think the voice here, the argument

1 here is for a little bit more common sense, a little
2 bit less arbitrariness in the application of these
3 principles.

4 MS. CHAITOVITZ: Okay. One final
5 question before we break for lunch -- oh; before,
6 that's right, we will open it to the floor and to
7 online viewers as well, and then we'll go on.

8 So a number of commenters have noted
9 that the safe harbor regime already provides
10 limitations to intermediaries who are behaving
11 responsibly. So would a change in the statutory
12 damage regime upset that compromise?

13 MR. BORKOWSKI: I think in some ways --
14 you can't cherry-pick. If there's going to be any
15 kind of modification of the scheme under which we
16 currently operate, you can't just cherry-pick and
17 change -- I'm not advocating to do this, but to
18 change the statutory damages approach, whether the
19 range or add other changes to it, because they're
20 used for a very useful purpose, a good deterrent
21 effect.

22 And if you're going to limit the

1 effectiveness of them, for whatever reasons, if
2 somebody in Congress thinks there are valid reasons
3 to do so, then I think there needs to be an
4 assessment as to whether there should be changes
5 made elsewhere, particularly with intermediaries
6 under the DMCA, whether there should be an
7 imposition of greater obligations on the part of the
8 intermediaries to fight infringement that could be
9 going on on their services to offset taking away
10 some of the deterrent value of the statutory
11 damages, for example.

12 So I think it's not something that, I
13 don't think you can just change one little part of
14 the Copyright Act without seeing implications to
15 other parts of the Copyright Act, and assessing
16 whether those other parts need to be changed to
17 address that first change.

18 MS. GRIFFIN: I think that it would
19 confuse the issues if we were to try to tie 512 to
20 statutory damage provisions. I think that there's
21 the question of who's responsible for the
22 infringement, is it direct, is it secondary; and

1 then there's a question of, assuming there was
2 infringement, how do we pay for it? How do we make
3 a person who's harmed whole?

4 And I think if we start to conflate
5 those two theories, then it's going to make the
6 copyright law a lot more complex, and it's also
7 going to lead to people who are good actors and
8 people who are not infringing copyright having to go
9 through extra burdens just because we maybe, I
10 guess, want to try to catch more people who are the
11 bad actors.

12 But I think the way to solve it is just
13 to go after the bad actors and make them pay for the
14 harm that they caused, and people who are not
15 infringing should be able to use the safe harbors
16 that we have now.

17 MS. CHAITOVITZ: So anybody in the
18 audience or in our virtual audience have comments?

19 MR. LAPTER: It's more of a question.
20 Sorry; I should use this.

21 So one question-slash-comment that comes
22 from Ryan Lucht says, "I agree with Professor

1 Herlihy" -- maybe a student? -- "that the all-around
2 stratospheric damages creates public disrespect or
3 disregard for copyright law.

4 "Is it the belief of the panelists that
5 replicating past statutory damage cases will slow
6 the rate of music piracy or file sharing?"

7 MR. COLEMAN: I do think there's a sense
8 up there -- again, this gets back a little bit to my
9 comments earlier about the jury aspect of this, and
10 George's Seventh Amendment point is well taken
11 nonetheless -- that there is a lottery aspect to
12 this. Windfalls are in play for the person who
13 aligns things the right way. It's true for a lot of
14 the legal system, of course; but statutory damages
15 really lend themselves to that sort of perception.

16 On the other hand, I do have a hard
17 time -- it might be less respected, but it's hard to
18 imagine that that emotional feeling is not being
19 overridden by terror; and disincentives, to the
20 extent that disincentives -- people act rationally
21 when faced with disincentives, it's hard to argue
22 against statutory damages in that respect, from my

1 point of view.

2 MR. ROSENTHAL: I just have one thing to
3 say about this idea that statutory damages somehow
4 kind of brings down the respect for copyright.

5 I just want people to not infringe. I
6 don't care if they respect me; I don't care -- you
7 know, they feel, oh, copyright's been -- I just want
8 them to not infringe.

9 Artists a long time ago, and I've
10 represented artists my whole career, have come to
11 the conclusion that, you know, the relationship
12 we've had with our fans isn't like we thought it
13 was. These fans, they love us, but they still have
14 no problem with taking our works without paying us,
15 even though we actually say that we don't want to
16 pay them.

17 So my sense is, the damage awards and
18 the system is fine; if they don't love us, fine; I
19 want them to respect copyright and not to infringe.

20 MR. HERLIHY: I'd just like to respond,
21 I think that we have a situation, an opportunity now
22 to sort of look at how we create the sticks and the

1 carrots moving forward.

2 And I think that whether it's focusing
3 on remuneration and technology so that people can
4 get paid no matter how works are shared, or maybe
5 having a more calibrated statutory damages regime
6 for non-commercial actors versus commercial actors,
7 I think we have a chance now -- and we're embarking
8 on this road, obviously -- to make the law be more
9 nuanced and simpler so that we can sort of not treat
10 all bad actors with the same sledgehammer, and sort
11 of look at it in a way that really perpetuates the
12 progress that this technology affords.

13 So I think that it's a good discussion.
14 I think statutory damages have their place, but I
15 think they need to be more calibrated across the
16 different kinds of infringements that occur.

17 MR. HARRISON: I'm just weighing in from
18 the audience, for what that's worth.

19 The statutory damages thing does have a
20 lottery aspect --

21 MS. PERLMUTTER: I'm sorry; can you
22 identify yourself?

1 MR. HARRISON: Oh, yes. Alan Harrison,
2 your missing panelist. Sorry; traffic was terrible
3 on the Pike.

4 There's a lottery aspect to the
5 statutory damages, and the people who are
6 sophisticated enough to be aware of the damages in
7 the first place, and possibly be deterred, are also
8 aware both of the lottery aspect and of the
9 enforcement costs associated with actually getting
10 the damages.

11 So unless they're a very big infringer,
12 such as a pirate party in Sweden, where arguably our
13 law doesn't even reach, they may look at the lottery
14 aspect and they look at the cost of enforcement and
15 decide that most rational copyright owners typically
16 won't even pursue the case because it will cost too
17 much to achieve the damages.

18 So I would question how much of a
19 disincentive these statutory damages really are for
20 most actors.

21 MR. COLEMAN: To some extent, in
22 response to that, I want to add a little bit of

1 nuance to something I said. Terror trumps love. I
2 get that.

3 And on the other hand, I think David
4 makes a very important point about the importance
5 for stakeholders and content producers and owners of
6 buy-in, political and cultural buy-in.

7 And if there is a perception in the
8 broader populace that it's a racket, whether it's an
9 accurate perception or not, that people are being
10 disproportionately punished for what appear to most
11 people to be, rightly or wrongly, to be fairly minor
12 offenses, the distance between the political support
13 for the existing regime and the actual regime is
14 going to grow greater. I don't doubt right now that
15 content providers are able to maintain their hold on
16 legislatures to the extent that they have
17 demonstrated over the last fifteen or twenty years.

18 I'm sure when we reach the end of the
19 next copyright expiration period, it will just be
20 added -- they'll just put zero at the end of 75
21 years, and that will be fine.

22 But I think what happened in Righthaven,

1 to some extent, was a recognition of the judiciary
2 perhaps beginning to feel that there's a game going
3 on here; and that's something that I think that
4 plaintiffs or right holders, stakeholders in this
5 system have to keep in mind.

6 MR. BORKOWSKI: I just want to make one
7 little point here.

8 The climate in Washington has shifted
9 dramatically over the last several years, and the
10 influence that content industries have -- and I
11 think Ben Sheffner sitting there from NMPA will
12 back me up on this -- is far, far less than it was
13 fifteen years ago.

14 The power is shifting towards the
15 Googles of the world. Google just opened up an
16 enormous office in Washington, D.C. with lobbyists.
17 A lot of other technology companies and ISPs have
18 very strong lobbying, and they are being heard in
19 Congress all the time.

20 So it's not the case that any content
21 industry, to the extent it ever was, is going to be
22 able to walk the halls of Congress and get

1 legislation passed that it wants that's not going to
2 take into account myriad other views of stakeholders
3 all across the spectrum.

4 MS. CHAITOVITZ: It's time for lunch
5 now, and we will be coming back at 1:15 to start
6 talking about first sale.

7 (Lunch recess)

8 MR. GOLANT: We'll get started shortly.

9 (Pause)

10 MR. GOLANT: So I'm going to get started
11 now. This is the last panel of the day, but it's a
12 great one, and I'm looking forward to it.

13 As you can see from the agenda, we have
14 discussion from 1:15 to 2:30; then 2:30 to 2:45
15 we'll have contributions from our online and offline
16 audiences; and then at 3:00, it will be the end of
17 the day and everyone will be on their way.

18 So we have a number of new panelists
19 here, so let me just explain some of the ground
20 rules.

21 First, I'm going to give you a little
22 introduction to the topic. Then we'll have each of

1 you tell us who you are, where you're from and whom
2 you represent.

3 I'll ask a question or two. When you
4 want to respond to a particular question, put up
5 your card, as Ann just did, and if I remember who
6 did it first, I'll write it down, and we'll go in
7 order of that and we'll move on as the situation so
8 warrants.

9 And I want to say thank you for all the
10 librarians in the audience and on the panel; it's
11 always good to have these people represented in this
12 particular context.

13 So let's get started with the
14 introduction.

15 The first sale doctrine as codified in
16 the Copyright Act allows the owner of a physical
17 copy of a work to resell or otherwise dispose of
18 that copy without the copyright owner's consent by
19 limiting the scope of the distribution right.

20 But the copyright owner's remaining
21 exclusive rights, notably the right of reproduction,
22 are not affected.

1 As a result, the first sale doctrine in
2 its current form does not apply to the distribution
3 of a work through digital transmission where copies
4 are created, implicating the reproduction right, and
5 the Copyright Office concluded in 2001 that the
6 doctrine should not be extended to do so.

7 So the first question for our librarians
8 is this: How are the lending practices for e-books
9 at libraries different than those of physical books
10 that are purchased and lent out under the auspices
11 of the first sale doctrine?

12 The second part is: What type of
13 restrictions are commonly imposed by contract in
14 these relationships?

15 So who would like to go first with that
16 particular set of questions?

17 FROM THE AUDIENCE: Introductions?

18 MR. GOLANT: Oh, sure; I'm sorry. Go
19 ahead. We'll start at the tail end of the left-hand
20 side.

21 MR. HARRISON: Good afternoon; my name
22 is Alan Harrison. I'm primarily a patent attorney,

1 but also a copyright attorney, out of Hartford,
2 Connecticut. I'm here as an individual member of
3 the public, consumer as well as attorney, and I
4 don't really have any interests to represent.

5 MR. GOLANT: Thank you.

6 MR. KUPFERSCHMID: I am Keith
7 Kupferschmid, general counsel and senior vice-
8 president for intellectual property for the Software
9 and Information Industry Association. We represent
10 technology companies that make and distribute
11 software, content, data and data products, companies
12 like Oracle, IBM, Adobe, Reed Elsevier, John Wiley,
13 et cetera.

14 MS. KRIBBLE: Meg Kribble, research
15 librarian at Harvard Law School, and here as the
16 chair of the Copyright Committee for the American
17 Association of Law Libraries.

18 MR. NEWHOFF: I am David Newhoff; I'm a
19 writer and a filmmaker, and I've been writing about
20 digital-age issues, including copyright, and
21 representing artists' interests for about two years,
22 predominantly on a blog that I write called The

1 Illusion of More.

2 MR. SHEMS: Hi; I'm Ed Shems. Thanks
3 for having me. I represent the Graphic Artists
4 Guild. It's a group of -- it represents graphic
5 designers, Web designers, illustrators. And I
6 myself am a graphic designer and a children's book
7 illustrator. My company is called edfredned.

8 And I think that's about it. Thanks.

9 MR. COURTNEY: Hi; I'm Kyle Courtney
10 from Harvard University. I'm a copyright advisor
11 here, especially working with the 73 libraries here
12 at Harvard.

13 MR. SHEFFNER: I'm Ben Sheffner, vice-
14 president of legal affairs at the Motion Picture
15 Association of America. We represent the six major
16 U.S. movie studios, which are Sony Pictures, 21st
17 Century Fox, Paramount Pictures, Warner Brothers,
18 Disney, and NBC Universal.

19 MR. ADLER: I'm Allan Adler; I'm general
20 counsel and vice-president for government affairs
21 for the Association of American Publishers, which is
22 the national trade association for our nation's book

1 and journal publishers.

2 MR. GOLANT: Thanks, all. I apologize
3 for skipping that, but now we're back to our
4 question.

5 MR. COURTNEY: Sure. I'll start.

6 So I have the feeling that there's a
7 real problem for libraries with digital first sale problems
8 currently, as they are currently addressed.

9 We all looked at ReDigi, and that was
10 dealing with music; but the fundamental notion that
11 libraries exist because of the first sale doctrine
12 is an important one; it's an important one to
13 society.

14 I like to think of libraries as the
15 holders of record. So we're collecting scholarship
16 works. Our model is, we buy a book and we can lend
17 it thousands of times in its lifetime to various
18 scholars, students, faculty, staff and the public
19 that come visit our library.

20 When we move into the realm of e-books,
21 or digital first sale, we're not actually buying
22 those e-books in the sense of purchasing with

1 rights. We are renting these e-books online, and
2 I've seen a lot of these contracts for libraries.

3 The idea that there is no first sale
4 associated with these digital e-books is a problem
5 because it interferes with our ability to collect,
6 preserve and keep the scholarship and public record
7 for the world.

8 I have a feeling that these types of
9 license deals are destroying secondary markets, and
10 specifically libraries are a secondary market. We
11 actually have a model that is based on the Bobbs-
12 Merrill idea, and going back to as far as 1908.

13 So interlibrary loan is just one aspect
14 that's being affected by this. So interlibrary loan
15 is a means by which we are within our rights, under
16 Section 108, as libraries because we're special,
17 Congress says we're special, and so we are able to
18 loan these works.

19 However, when journals and books go into
20 an e-book format, sometimes the license makes us
21 incapable of loaning.

22 Let's look at Kindles. The Kindle

1 license initially said you may not rent, lease,
2 loan, or sell this to anyone else. The intent there
3 is to control their particular market.

4 But my concern is that if you have
5 access to Amazon, you can donate to their lending
6 library; well, what if you don't have access to
7 Amazon? What if you don't have access to an e-book,
8 or even the Internet? There are plenty people here
9 in Boston at the Boston Public Library that line up
10 every morning to access the Internet. They're
11 accessing the library.

12 If we can't have these books on our
13 shelves, or the contract leaves us in danger of
14 having our collections pulled back -- let's say we
15 buy an e-book, a collection, 500 or 600 e-books that
16 are not subject to the first sale doctrine because
17 there's no digital first sale.

18 What if we decide to leave that vendor?
19 Then we suddenly have 500 to 1,000 books, depending
20 on the deal, that are suddenly removed from our
21 libraries that are inaccessible to the public, the
22 faculty, the students and the scholars.

1 So I think there's a great concern for
2 libraries here with the ability for us to exercise
3 what we perceive as our cultural mission to collect
4 and keep and retain these works.

5 I'm sure Meg has some words on that, too.

6 MS. KRIBBLE: I don't have too much to
7 add, but I would say it goes beyond e-books and
8 other materials as well. We've been dealing with
9 these problems for a number of years, whether it's
10 licensed or owned and losing access to massive
11 amounts of journal volumes and issues as well.

12 And I think there are solutions -- I
13 don't think we've figured them out yet -- that could
14 be more creative than saying, after 26 checkouts,
15 you have to rebuy an e-book even though it's the
16 exact -- you know, it's digital; it hasn't been
17 degraded at all.

18 There's something that I think we still
19 need to and can figure out to preserve that
20 balance a little better.

21 MR. GOLANT: Thanks.

22 Allan?

1 MR. ADLER: Yes; by all means, let's
2 talk about libraries and e-books.

3 First of all, in terms of libraries, we
4 need to understand that libraries are institutions
5 that change with the times and the circumstances of
6 the times, like many others.

7 So, for example, I have the good
8 fortune, I live just across the road in Fairfax,
9 Virginia from one of the regional libraries of
10 Fairfax County. And three times a year they have
11 book sales where they sell books from their
12 collection.

13 Typically those books are chosen either
14 based on the fact that there has been little or no
15 circulation, which indicates that they don't think
16 there's a readership interest in those books.

17 There may be multiple copies of those
18 books, but the interest in borrowing them doesn't
19 merit that many copies.

20 And in some instances, it's just because
21 the wear and tear on the physical copies has meant
22 that they think that they're no longer suitable for

1 regular circulation, so they sell them, and they
2 sell them as used books at a great discount.

3 But also, interestingly, the county
4 library has as a policy matter examined its
5 collection, and does this on a review basis, to
6 determine which works are most in demand, which are
7 actually being circulated and borrowed by readers,
8 and that's a very different image of libraries than
9 many people have.

10 I've always thought of libraries as
11 places that hopefully would introduce me to literary
12 works that I was not familiar with and maybe would
13 help expand my horizons by doing that.

14 But libraries, like other businesses,
15 need to operate according to their budgets; and
16 because of the constraints on budgets these days,
17 and Fairfax County is by no means an economically
18 depressed jurisdiction, nevertheless, they are
19 reviewing their collections on a regular basis to
20 determine what is it that their patrons want to
21 read, and if they're not borrowing certain books,
22 those books are not going to be kept to free up

1 shelf space, nor are they going to be purchased in
2 the future.

3 Which has often led me to wonder if one
4 day, if this becomes kind of an ultimate popularity
5 sort of review of which works are in demand, we're
6 going to end up with libraries that are going to be
7 sort of full of Harlequin romances, and not a great
8 deal else.

9 But on the issue of e-books and the
10 question of library lending of e-books, this ties
11 into that in a way, because traditional practices in
12 the conversations we've had with the library
13 community indicate that when you have physical books
14 in the lending collection, typically a book will be
15 loaned, if there is such demand for it, no more than
16 say 25, 26 times before they feel that the condition
17 of the book, usually from the experience of having
18 been loaned that many times, makes it unsuitable for
19 a continued loaning out, and they will purchase
20 another copy of the physical book.

21 And also, of course, the model
22 traditionally for library lending has always been,

1 you lend one book to one reader at a time.

2 All of that was called into question, of
3 course, by digital capabilities with e-books.

4 First of all, the fact that they may be
5 able to lend e-books indefinitely without the kind
6 of wear and tear limiting it to the 25 loans that
7 they typically would do with physical books. More
8 than that, there's also the capability for lending
9 the e-books remotely so that patrons never have to
10 set foot in the library in order to access the work
11 in e-book form in the library's collection.

12 And more than that, the networks give
13 them the capability of allowing simultaneous reading
14 of a single e-book by multiple readers, which means
15 that the whole model of library lending is different
16 today because of technological changes, because of
17 economic changes, for a variety of reasons.

18 So the question of whether or not it's
19 essential that libraries be able to replicate what
20 they viewed as the traditional lending model based
21 on first sale with respect to e-books is called into
22 question by that.

1 As a result, the major producers of
2 e-books that are of consequence in this
3 consideration, which are the trade publishers, the
4 people who publish fiction and non-fiction works
5 that you typically see on the bestseller lists of
6 the New York Times or the L.A. Times, of that
7 nature, they are the ones whose e-books are in
8 demand by library patrons for the ability to borrow
9 them.

10 And not surprisingly, in the current
11 antitrust environment, neither AAP could sit down
12 and discuss with our member trade publishers what
13 those policies would or should be, nor could the
14 trade publishers discuss with each other, because
15 after all, they're in competition, not only in the
16 readership market generally but for the library
17 acquisition market as well.

18 So what you have, just to give you some
19 examples -- and I had to write this down in our
20 statement submitted to the House Judiciary
21 Committee, because I can't remember these details
22 anymore -- but, for example, Hachette offers all of

1 its e-book titles to libraries simultaneously with
2 print editions and with unlimited single-user-at-a-
3 time circulations; and they reduce the price of the
4 e-book one year after its publication.

5 Harper Collins, on the other hand,
6 offers e-book titles to libraries, but allows
7 libraries to lend their new titles 26 times before
8 the license for that particular e-book copy expires.
9 That 26 times is an effort to try to replicate more
10 or less the economic model that, due to physical
11 wear and tear applied to a physical copy, which
12 would mean at that point the library, if they
13 thought the book was that popular, would purchase a
14 new copy of the work.

15 Macmillan started offering library
16 lending of e-book titles in March of 2013 under
17 licenses allowing libraries to lend the titles for
18 two years, or 52 loans. So they actually doubled
19 the amount of Harper Collins. It was their
20 judgment, different from the people at Harper
21 Collins, but made sense.

22 Penguin and Random House, which were

1 separate trade publishers but recently merged, are
2 kind of combining their separate e-book library
3 lending policies. Penguin licenses e-books to
4 libraries for one-year lending terms; Random House
5 offers e-book titles to libraries under perpetual
6 licenses to be loaned from their main collections.

7 And then you have Simon & Schuster, one
8 of the larger trade publishers, that currently
9 offers all of its titles, new books as well as its
10 backlist for books that are already published, for
11 one year to New York area libraries under a pilot
12 program that they're working in collaboration with
13 the New York Public Library to test out a number of
14 different options and a number of different e-book
15 distributors.

16 Since you have to remember, this is not
17 just a question of the libraries dealing with the
18 publishers; there's an intermediary here. Typically
19 it's a company like OverDrive or 3M, which is
20 actually the source of the e-book copy that the
21 library patron is going to borrow.

22 So it's a little bit more complicated

1 than you might think it is on the surface.

2 But we also point out that, in addition
3 to the way in which they're handling the policies
4 with libraries, there is of course the Kindle
5 Owners' Lending Library, which I think Kyle
6 commented on before.

7 Now, that's an interesting sort of a
8 comment and an interesting sort of an observation,
9 because, yes, Amazon does restrict, even more
10 tightly in some instances, its lending library
11 policy with respect to the works that it lends. It
12 has a lending library that features over 500,000
13 titles, but of course you have to be a member of
14 Amazon Prime in order to be able to benefit from
15 that lending policy.

16 Now, to the extent that Kindle's
17 restrictions apply, so very much the way that Apple
18 has certain restrictions on what kinds of its works
19 or what kinds of works could be played on its
20 devices, none of that, none of that is a matter
21 of copyright restrictions imposed by the rights
22 holders. Those are decisions made by the tech

1 companies.

2 The restrictions that apply to Kindle
3 use or to Amazon works that are sold to the public,
4 those are Amazon's policies, not the policies of the
5 publisher.

6 And the walled garden approach that
7 Apple takes in a similar vein, that's Apple's
8 policy, not the policies of the publisher.

9 So not all of these issues about
10 restrictions and whether or not you like these
11 policies come back to the rights holder. The tech
12 companies are important parts of how this works in
13 practical terms. And you have to consider where
14 restrictions, when there are restrictions that you
15 think shouldn't be there, where are those
16 restrictions coming from? Who is imposing them?

17 MR. GOLANT: Thanks for the very
18 comprehensive topic.

19 I think Kyle might have something to say
20 about that.

21 MR. COURTNEY: A couple things.

22 I agree that there have been some

1 strides in the ability for people to access e-books
2 from these various publishers. They make libraries
3 pay three to ten times as much for access to an
4 e-book as they would their current book. So we're
5 talking about libraries that are making choices that
6 are based on finances.

7 These book sales aren't necessarily all
8 about, this is low circulation; it's about space,
9 it's about budget. They need money. If you're
10 going to pay ten times the amount that an average
11 citizen would pay for an e-book, you have to really
12 adjust your budgets here.

13 Random House has books offered for \$9.99
14 on the Amazon website; it's \$39.99 for libraries to
15 buy. This is kind of the reality that we're living
16 in. So it is a budget factor.

17 The other thing is, we're not just
18 talking about public libraries where there's romance
19 novels -- absolutely, there's tons of those
20 available -- but we're also talking about academic
21 libraries. We're trying to preserve all the
22 editions and all the stuff so that scholars and

1 folks can come and visit. And to limit the checkout
2 to 26 times -- American Constitutional Law by Tribe
3 here has been checked out, per semester, 200 times;
4 and the book is solid.

5 So if we had to pay that every single
6 time that was checked out 26 times -- this is not
7 just interlibrary loans checkouts; it's checkouts to
8 the users that have library cards in your field, in
9 your market here at Harvard or at other academic
10 institutions.

11 So each checkout counts, so you're not
12 only counting the interlibrary loan to another
13 library, you're also counting the user that comes
14 and borrows it out of circulation for an hour,
15 because it's on reserve. That counts as a checkout.

16 So we have to consider all of that, too,
17 because the libraries are getting squeezed out; and
18 as I said, we're a secondary market.

19 We are a market; I'd like to point out
20 we are a market, and we buy as much as the public
21 buys, or maybe even more, because we're trying to
22 preserve the cultural knowledge and history of this.

1 Try and find a first-edition textbook of
2 some medical text that was online ten years ago
3 because you want to do research on that; it's nearly
4 impossible because it was in some e-book format or
5 is behind some paywall that doesn't exist anymore.

6 So we want to be able to at least have
7 libraries have the ability to have a first sale
8 exception.

9 I'm not sure what Meg and I have talked
10 about in the past, but the idea that, could we
11 preserve that e-book somewhere in an archive, a
12 special collection somewhere, so that it doesn't
13 disappear from the populace should these companies
14 go under?

15 So I think that's where we stand with
16 some of that stuff.

17 MR. GOLANT: How about David first.

18 MR. NEWHOFF: Thank you.

19 I don't quite have that expertise in
20 libraries, certainly, but picking up on what Allan
21 and Kyle said, I hear a lot of -- there's a fair bit
22 of complexity in those answers in terms of, there's

1 a lot of nuance. Each situation has its own kind of
2 challenge, which is true throughout the digital
3 transformation.

4 My concern is that I feel very strongly
5 that expanding first sale in the commercial market
6 would have a very negative effect, for a variety of
7 reasons; and therefore my concern is almost a
8 question to the group, which is whether or not
9 there's a way to solve libraries' specific problems
10 without expanding first sale doctrine, which across
11 the board, like I say, once we go into the
12 commercial market of consumer and producer, it has a
13 number of other problems that I think are very
14 detrimental.

15 MR. GOLANT: Thanks.

16 Allan?

17 MR. ADLER: So, in part to respond to
18 Kyle's comments as well as David's comments, so
19 we're talking about how the marketplace works, and
20 one of the ways in which the marketplace works,
21 which shouldn't surprise anyone here, is that from
22 the perspective of the publisher as well as from the

1 perspective of, say, Amazon or Apple, looking at a
2 public library, a local public library, as compared
3 to looking at Harvard University and Harvard
4 University's ability to stock its library and serve
5 its patrons, who are mostly students who pay a
6 tremendous amount of money for the privilege of
7 having access to Harvard generally, let alone its
8 various learning facilities, obviously those are
9 going to have different metrics in the marketplace.

10 The idea that Harvard University Law
11 School, in terms of its library's needs, should be
12 equated with those of small-town public libraries
13 and that they should all have basically this kind of
14 lowest-common-denominator policy imposed by
15 government for access to these works makes no sense
16 whatsoever.

17 So there are differences, to be sure.
18 The fact that Larry Tribe's book or any other legal
19 hornbook is taken out a hundred times, a thousand
20 times, shouldn't surprise anyone at Harvard
21 University.

22 And that's one of the reasons why the

1 publishers of legal books, for example, set
2 different price points, particularly in their
3 electronic products, depending upon whether they're
4 selling to a student, whether they're selling to a
5 school, whether they're selling to a law firm,
6 because each of those has different economic
7 circumstances and different use circumstances that
8 should figure into the calculations that the
9 publisher should be allowed to engage in in
10 determining what is an appropriate basis for
11 offering a product in the marketplace to that
12 particular user.

13 MR. GOLANT: Could I ask one follow-up
14 question?

15 Do small libraries have a consortium, a
16 buying group, that can get a better rate or bulk
17 discounts for kind of e-books?

18 MR. ADLER: Yes. Not only do libraries
19 -- well, not even just small libraries; libraries
20 have consortia all throughout the country.

21 I guess the best-known one, of course,
22 is now the HathiTrust Digital Library partnership;

1 but for example, there's an Ohio library consortium,
2 there are a number of other different consortia, and
3 the State of Connecticut, with whom we've been in
4 dialogue now for several years since they proposed
5 legislation that would have required publishers to
6 sell e-books to libraries under certain terms, they
7 backed away from that, and they just passed new
8 legislation that is going to fund the setting up of
9 a statewide platform.

10 So the idea there is to serve, within
11 the state on behalf of Connecticut's public
12 libraries, as a kind of consortium; but in more
13 practical terms, the ability to have a single
14 platform through which patrons of all of the
15 different Connecticut libraries, regardless of which
16 city or county you're located in, can all have
17 access to e-books under the same terms.

18 MR. GOLANT: Excellent.

19 Well, let me extrapolate with that,
20 expand the question base to the other panelists with
21 this one right here.

22 From a practical perspective, is there a

1 need for a secondary market for e-books, online
2 music, video and software analogous to the secondary
3 market for physical media? Why or why not?

4 David, you put up your card first.

5 MR. NEWHOFF: It is my observation that
6 the digital age has all but obviated the need for a
7 secondary market, if you're talking about consumers;
8 that consumers get incredible access and incredible
9 pricing right now that begs the question as to what
10 a secondary market actually would look like.

11 In addition to that, the whole idea of
12 ownership at all is actually, even as we're
13 speaking, becoming something of an anachronism.
14 People are moving toward -- when I say "people," I
15 mean consumers -- are moving toward a desire for a
16 subscription-based relationship.

17 They're not as interested in owning
18 media as they used to be. They're willing to give
19 up that notion, in fact are eager to in some cases
20 give up that idea of having something on a shelf for
21 the sake of the convenience of the pricing that they
22 get.

1 So just this idea that a thing is owned
2 in the first place begs the question what a
3 secondary market actually is, what is it you're
4 reselling?

5 With that, I'll let someone else go.

6 MR. GOLANT: Thanks.

7 So in order, we'll have Alan H., Ben,
8 and then Allan A.

9 MR. HARRISON: Thank you.

10 Speaking as a consumer, I have to agree
11 with the concept that consumers are less interested
12 in actually owning things, and certainly see less of
13 a need for a secondary market. I can't remember the
14 last time I went to a used record shop or a used
15 bookstore, for that matter, which is kind of sad.

16 So many things are digitally, and at
17 such a geographic dispersion, you can be anywhere in
18 the country or anywhere with decent Internet access
19 and basically get anything you used to be able to
20 get on Newbury Street in Boston in terms of either
21 music or books.

22 So, yes, the secondary market concept is

1 kind of going away, especially with the current
2 pricing regime, which seems very fair for the
3 convenience of accessing something on any of your
4 devices anywhere you are.

5 And kind of going to the idea that the
6 library should have some special new statutory case
7 for digital first sale, it seems like that's working
8 out okay in terms of private contract, at least from
9 a consumer's perspective. It almost seems as if
10 upsetting the statutory regime right now would
11 unsettle those settled expectations and disrupt the
12 ongoing negotiation process.

13 MR. GOLANT: Ben?

14 MR. SHEFFNER: So I just want to expand
15 a little bit on what David was saying a few minutes
16 ago.

17 The world has obviously changed a lot in
18 the last fifteen to twenty years as the Internet has
19 become a ubiquitous sort of force in all the media
20 industries. We've obviously seen a shift away from
21 ownership of physical goods towards access-based
22 models.

1 And one of the primary drivers of the
2 move towards access-based models is consumers.
3 Consumers don't necessarily want to have bulky
4 physical items, and they're very happy with
5 services, whether it's on the video side, things
6 like Netflix or Amazon Prime or Hulu or Vudu or many
7 of the other hundred or so legal services through
8 which people can access videos and television now.

9 We see the exact same thing on the music
10 side, services like Spotify or Pandora, where you
11 don't own a physical object, but you either for free
12 or through a premium service get access, even on the
13 book side. I subscribe to Audible audiobooks, which
14 you basically pay a monthly fee and it makes a
15 certain number of books available to you each month.

16 Again, those are driven by consumers,
17 and the terms of those services are set by licenses,
18 which are essentially contracts between consumers
19 and these services.

20 If consumers don't like the terms on
21 which the service provides them access to the works,
22 they'll gravitate towards other services. It may

1 not happen immediately, but services that continue
2 to displease their consumers don't last very long.

3 One thing we don't see from consumers is
4 a demand to shift back to an ownership model that
5 would enable them to take advantage of the rights
6 afforded to them under Section 109 in the first sale
7 doctrine.

8 Again, we see services that are based on
9 access rather than ownership really taking off, and
10 the ownership-based or physical models on their way
11 towards, if not extinction, at least becoming a much
12 smaller part of the market.

13 So again, if there's consumer demand for
14 the right to be able to resell -- and I put quotes
15 around "sell" because most of these are again
16 license-based models -- then they will be there, and
17 you even see some services taking out patents that
18 would allow for the licensed resale of digital
19 files.

20 And if there's consumer demand for them,
21 we will see those services flourish. If there's
22 continued consumer demand for physical items,

1 whether they be Blu-ray disks, DVDs, or physical
2 books that people can resell under the first sale
3 doctrine, we'll continue to see those in the
4 marketplace.

5 So again, I don't think there's this
6 consumer demand for a continued secondary market in
7 the way that we've seen it in the old physical
8 world.

9 MR. GOLANT: Thanks.

10 So it's going to be Allan A., Keith, Ed
11 and Kyle.

12 MR. ADLER: In backing up, I think it
13 was David who was saying about the difference
14 between the current desire for ownership as opposed
15 to access to assets, I may recommend something to
16 all of you, very simple to find online.

17 Search out the name Mary Meeker and look
18 for her Internet Trends report from December 2012.
19 She has a whole chapter in there on what she calls
20 the "Asset-Light Generation" where she shows example
21 after example of physical goods and tangible goods
22 and services where the current generation has

1 decided that the costs, burdens of maintenance,
2 storage and other things associated with ownership
3 of these types of things has yielded for them to
4 just-in-time access according to their desire to use
5 these types of materials.

6 And the breadth of the types of services
7 and products that she can demonstrate this is taking
8 place with is just extraordinary.

9 But I also wanted to comment to you
10 something very interesting that was said at the
11 start of the fair sale hearing that was held at the
12 beginning of this month in New York by the Chairman
13 of the House Judiciary Committee, Bob Goodlatte. He
14 said, "Although some legal doctrines may be
15 invisible to Americans, the first sale doctrine is
16 not one of them. Entire businesses have been built
17 upon it, such as Blockbuster video stores and
18 Netflix by mail."

19 Well, I sidled up next to him afterwards
20 and pointed out that, just in case he mentioned this
21 again in another speech, he should know that
22 Blockbuster stores are largely out of business, and

1 Netflix has become a wild success by streaming its
2 videos, not by selling actual copies of them through
3 the mail.

4 But he also made another very important
5 point. He said, "Consumer expectations have also
6 been built upon this doctrine. Laws and consumer
7 expectations are developed independently, but they
8 can help shape each other."

9 So when the question is asked, do we
10 need a secondary market in digital content, whose
11 need are we talking about? What need is at issue
12 here? And are we talking about a condition, if
13 we're talking about consumer expectations, that has
14 been shaped by the law rather than by the
15 expectations that consumers may have developed
16 independently?

17 I would suggest to you that it's really
18 a question of the former, because there are so many
19 ways in which consumers now are able to have this
20 kind of just-in-time, when they want it, reasonably
21 affordable access to the digital content of their
22 choice for the uses they want to make of it.

1 In the e-book area, for example, there
2 are now subscription services. Some people might
3 say, well, that sounds like you tried to replace the
4 traditional Book of the Month Club. Well, maybe we
5 did, but again, with adjustments taking into account
6 that digital versions are different, and they're
7 used differently by readers, and the readers
8 appreciate those differences.

9 So you have now Scribd, you have Oyster,
10 you have Entitle, in addition to Amazon and its
11 Kindle library, that offer monthly subscriptions at
12 a low, affordable price where people can get a
13 certain number of e-books every month that they
14 want, and they get to use them for as long as
15 they're using them to consume them.

16 This type of option can't exist in a
17 world where the first sale doctrine, as it applied
18 to physical goods, physical chattel, would simply be
19 extended to apply to digital content. It simply
20 couldn't exist. There would be no reason for it to
21 exist.

22 And the economics, which even now are

1 experimental -- nobody really knows how ultimately
2 these subscription services will turn out for
3 e-books, whether they'll be as successful as they
4 have been for music and as successful as they have
5 been for motion pictures -- but that's
6 experimentation in the marketplace, and that's what
7 copyright has always fueled, that's what copyright
8 has always thrived upon, and we'd like to see that
9 continue in this space as well.

10 MR. GOLANT: Thank you.

11 Keith?

12 MR. KUPFERSCHMID: I'll try not to
13 reiterate what has already been said, so I'll just
14 say what he said, what he said and what he said; and
15 endorse those comments.

16 (Laughter)

17 MR. KUPFERSCHMID: There is one little
18 aspect I'll sort of take and run with here, which
19 is, we've already mentioned that consumers in the
20 future will only own essential things and things
21 that they use very often; right? And in the future,
22 that the things that they use only occasionally,

1 those are things that they'll rent, or they'll
2 license. They won't necessarily own those things,
3 like a fancy pair of shoes or special jewelry or
4 this pizza-making set, things like that.

5 But what I want to point out here is,
6 that is not just limited by any stretch to
7 copyright. That is something that consumer
8 expectations and consumer -- what consumers want,
9 that's not limited to just focused on copyright.

10 You have to look beyond that, and things
11 like, look at the Zipcar, for instance. Look at
12 Rent a Runway, where you rent these fancy dresses.
13 Things like ToolSpinner and SnapGoods, where you can
14 rent electronics or license electronics, and tools
15 and lawnmowers and things like that.

16 And now there's also these peer-to-peer
17 models, where you can even go to one centralized
18 location. It could be just you sort of borrowing --
19 it could end up being your neighbor -- in sort of
20 this peer-to-peer model.

21 The important takeaway here is that
22 you've got to be real careful here not to create

1 sort of special rules for copyright that could
2 really hinder or get in the way of these consumer
3 expectations. I think that's a real concern here.

4 Allan did a fantastic job of talking
5 about the e-book market and contents. Well, I won't
6 go into that unless there's further questions upon
7 it, so I'll take on software here a little bit.

8 On Monday I was arguing a case before a
9 judge in Austin, Texas, because it was an individual
10 who was trying to sell his Adobe software on eBay,
11 secondary market.

12 If you look at the Adobe license,
13 actually, for this particular software, it allowed
14 the transfer. But there are several steps that the
15 individual who owns that license to use the software
16 needs to do to make sure that they're not retaining
17 a copy -- right? -- that there's no piracy going on,
18 things like that. So it's not necessarily saying
19 that we want to hinder the secondary market, but
20 that certain precautions need to take place.

21 This particular individual could care
22 less about those precautions and was burning a copy

1 onto a CD and trying to sell it and violating a
2 whole bunch of other conditions in the license, so
3 we'll put that aside.

4 But not all Adobe licenses allow for the
5 transfer, the selling of the license in the
6 secondary market; for instance, academic software.

7 Academic software is the same exact
8 software you would buy in non-academic software; but
9 what they do is, to be able to sell it at a lower
10 price point for students and teachers and others who
11 qualify, what they do is, the license is a little
12 bit different.

13 And one way the license is different is
14 that it prevents the further transfer to people who
15 don't qualify for this academic license. So you
16 couldn't sell it to your average consumer, but you
17 could resell that license to a student or teacher or
18 anybody else who sort of qualifies.

19 That's not terribly onerous
20 requirements, but people have a real struggle and
21 they complain about that.

22 Now, if that license somehow by the law

1 was overlooked or bypassed, or those terms
2 invalidated in some way by the law, be it a new
3 digital first sale doctrine or something else, well,
4 then I can pretty much guarantee that not only Adobe
5 but many other software companies that provide this
6 academic software, as well as things like OEM
7 software and things like site licenses and what have
8 you, that those would disappear.

9 Because what would happen is, you'd get
10 a lot of students who would take that, buy that
11 academic software at a cheaper price, engage in
12 arbitrage, and then sell it and try to make more
13 money off of it. And so that model would disappear.

14 That model is very, very beneficial, I'm
15 sure, to the academic community; and that is
16 something that would disappear if in fact those
17 licenses were endorsed.

18 MR. GOLANT: I just have a follow-up.

19 Does eBay have terms of use or any
20 language on their website that warns people that
21 they can't sell licensed goods, or anything to that
22 effect?

1 MR. KUPFERSCHMID: It's not quite like
2 that, but they do. The license prohibits it. If
3 it's a license violation, then that's a violation of
4 eBay's terms. I mean, I would obviously defer to
5 them to respond to your question, but that certainly
6 is my understanding.

7 There are various reasons you can get,
8 under their terms and conditions, an auction taken
9 down, and that is one of them. In this case, that
10 was both a license violation and a copyright
11 violation.

12 MR. GOLANT: Got it.

13 Ed?

14 MR. SHEMS: Thanks.

15 I liked what Allan was saying about, who
16 needs the secondary market? What's it there for?
17 Why do people want it? I kind of feel like it's --
18 you know, everybody likes having a yard sale. They
19 have their stuff and they want to move it off when
20 they're no longer using it.

21 But what I think a lot of people don't
22 realize when it comes to digital, because of all the

1 licensing that has been created, the different
2 options for licensing, what people don't realize is
3 the price that they're paying now is the lower end
4 of the cost.

5 So with the secondary market, the first
6 sale of it would have to be -- like, for example,
7 let's take my artwork. When I sell artwork to a
8 client, they tell me what they need it for, and I
9 price accordingly. I'm going to move this closer to
10 me. And they tell me what they need it for.

11 I then price it based on what their
12 needs are. I don't price it -- if they want it for
13 a brochure, if they want an illustration of mine for
14 a brochure, I give them price X.

15 If they then say later on that they want
16 it for a website and then they want it for a
17 billboard, well, it has to be X plus whatever it
18 might be, X plus 1, because their use has gotten
19 larger.

20 This is a little bit different from how
21 the music industry provides music, in that I also
22 have the ability to -- for example, I have a

1 customer right now that I'm licensing for five years
2 the use of my characters.

3 So there are some differences, and
4 people need to also recognize that the price that
5 they're paying, \$1.25 for a song -- I'm just using
6 iTunes as an example -- \$1.25 is a great price to
7 pay. And I feel like sometimes they forget that for
8 \$1.25, they don't need to have that secondary
9 market, being able to take it off their computer and
10 resell it.

11 MR. COURTNEY: You know, we're giving a
12 lot of credit here to consumers.

13 Do they know what they're buying when
14 they have a four-page license agreement from iTunes
15 to buy a 99-cent song? Amazon, iTunes, OverDrive,
16 wherever they say "Buy now," you're clicking "Buy";
17 you're clicking the word "Buy." There's a
18 presumption of purchase there that's going on.

19 I'd like to think, oh, they know they're
20 getting into a contract in which, if something
21 happens, they can remote-delete their stuff; they
22 can take their stuff away. They can't transfer it.

1 I know that iTunes and iPods have ended up in
2 Probate Court, because, can it be transferred to
3 their heirs? I mean, this has actually happened.

4 The presumption by consumers is that
5 they're buying it because it says they're buying it,
6 meaning they own it.

7 Now, we know they don't own it. They
8 may not take the time to read a four-page agreement
9 for a 99-cent song.

10 And as to there's no demand for this,
11 well, obviously, if you can get something instantly,
12 you're going to get that first, especially if it
13 says "Buy it now" with one click. That means that
14 they're buying. They're like, oh, I don't have to
15 go to the bookstore; I can buy it now with one
16 click.

17 We have never had a used MP3, used
18 e-book market; it hasn't existed yet. So we don't
19 know if there's a demand for it.

20 I would say people would love that: Oh,
21 I can buy this MP3 for 50 cents instead of paying 99
22 cents, and it's "used," quote-unquote? That sounds

1 better to me. I'm a consumer; I want the lowest
2 price possible.

3 And I agree, low prices are great and
4 that's what drives demand; but consumers don't
5 realize they're risking themselves to be subject to
6 a contract put out by the technologists that say,
7 hey, we can remote-delete your stuff anytime we
8 want.

9 That actually happened with Amazon.
10 Some students lost their homework on a George Orwell
11 "1984" e-book. Amazon realized, wait, we don't have
12 the rights to this. They remote-deleted it, and
13 their annotations were in there.

14 Now, they said it was a bad move in the
15 long run, but it was a great blog entry.

16 The lawyers said, well, they're well
17 within their rights in doing this. They learned the
18 lessons from the software industry in that they're
19 leasing these books, they're leasing these MP3s.

20 So I think maybe there's an awareness
21 campaign that could possibly be -- where we could
22 probably come together on something on this panel,

1 is the idea that we inform these folks that you're
2 not buying it.

3 Maybe we should stop using the word
4 "purchase" and "buy" in our contracts where we're
5 dealing with this, and actually explicitly explain,
6 you're leasing these. You're leasing these songs,
7 you're leasing these e-books, at best, and you can't
8 sell them in a yard sale, and there is no e-book or
9 MP3 used market yet.

10 Would you be interested in one? I would
11 be interested to hear what consumers say about that.

12 MR. GOLANT: That's very prescient, that
13 whole category, because the next set of questions is
14 exactly about that. So let me ask you and everyone
15 else here these questions.

16 So what are consumers' expectations when
17 they buy a movie or a television show online through
18 iTunes or Amazon?

19 MR. COURTNEY: Sorry I jumped ahead.

20 MR. GOLANT: Second, how clear are the
21 contractual terms? Third, do most think that they
22 can resell what they purchased? And fourth, is

1 there any empirical data on the issue to show what
2 people think?

3 So with those sets of questions in mind,
4 why don't we start with David, and then Ben, and Ed.

5 MR. NEWHOFF: Thank you.

6 I think you're right that there is a
7 degree of confusion out there among consumers. I
8 question whose fault the confusion is.

9 When those of us who write criticisms
10 about Internet companies, what we'll encounter with
11 those criticisms about things like privacy invasion
12 and whatnot, the Internet companies come back and
13 say, well, you should read the terms of service. In
14 this case, the reverse is true.

15 I think you're right that people don't
16 understand it. Whether or not it's the consumer's
17 responsibility, iTunes' or the reseller's
18 responsibility or the producer's responsibility is a
19 good question.

20 It would be a good idea if consumers
21 were conscious of it, because it is reality. Like I
22 said, this is what people are moving toward. They

1 are demanding these kinds of relationships with the
2 media anyway. They're not really, I don't think,
3 thinking much about it; I know I wouldn't if I
4 weren't paying attention to these things. I'd click
5 yes, I want to watch this movie now.

6 And as far as sort of trying to gauge
7 consumer demand, I think it's a problematic
8 question, because if you ask anybody, would you
9 rather pay 30 cents for this than 90 cents, well, I
10 think we all know the answer to that, that we don't
11 need a study.

12 But picking up on what Ed was saying is
13 that we're already at a point when prices are not
14 only low, but in some cases unsustainably low.
15 We're fighting that problem right now. I mean
16 iTunes came around and kind of sort of saved the
17 music market, but now here comes Spotify to destroy
18 that.

19 And pretty much everybody has said,
20 everybody on the music side has said, the rates
21 being paid by Spotify just don't sustain us. And so
22 we may not care about the current rock star, but we

1 might care about the next generation actually being
2 able to enter the market.

3 So.... sorry, I apologize; I lost my
4 thought.

5 So consumers are already getting a very
6 low rate, and if you compare the \$1.29 price that
7 you're getting for a song right now, in 1990 dollars
8 that should be \$2.35.

9 So all that I think would happen if you
10 created this sort of ability to resell is that you'd
11 foster a situation where some middleman got to once
12 again skim some dollars off the transaction, and you
13 would end up creating a new primary market that
14 replaces the secondary market, because of course
15 there's no loss of quality -- a digital file is a
16 digital file; it's just as good the thousandth time
17 you play it -- that then you'd only temporarily
18 continue to drive prices down to some other
19 unsustainable level for a brief period of time, I
20 think.

21 And then, whether it's a ReDigi or
22 Amazon getting into this or iTunes, they'd make some

1 money off the transactions for a period of time and
2 then either resell or get out of that business, and
3 we'd see what happens.

4 But I think in the meantime, a lot of
5 damage would probably be done to the producing side.

6 MR. GOLANT: Ben, what are your
7 perspectives?

8 MR. SHEFFNER: Just like we were talking
9 a few minutes ago about the transition from physical
10 to intangible, or from ownership to access, so too
11 are consumer expectations shifting and they're
12 continuing to shift, and we are in a time of
13 transition and probably will be for quite a while
14 longer.

15 I'm reminded of one of my favorite
16 quotes. It comes from a story which might even be
17 true, which is back in the seventies, Zhou Enlai,
18 the premier of China, was asked, "What do you think,
19 Mr. Chairman, of the impact of the French
20 revolution?"

21 And he said, "Too early to tell."

22 (Laughter)

1 MR. SHEFFNER: It's too early to tell
2 what the impact of the digital revolution, of the
3 shift from ownership to access is going to be.

4 I would say a couple things.

5 The notion that when a consumer sees the
6 word "Buy" or "Purchase," that he or she
7 automatically thinks that he or she is obtaining
8 ownership of a physical item is not quite right.
9 And I forget who I'm stealing this example from,
10 because I've heard it at one of these other fora
11 before.

12 But, for example, when you go on an
13 airline website and you go through all the
14 rigamarole and tell them where you want to go and
15 what time, and you're finally ready to put in your
16 credit card information and you're finally ready to
17 hit the final button, which often says things like
18 "Buy now," you know you're not actually buying a
19 seat on a plane. What you're buying is the right to
20 have that airline fly you from one place to another.
21 You're not obtaining anything physically. But I
22 think most people in common parlance would still

1 think you're buying something.

2 If you ask people when you go to a site
3 to buy a movie or a book or a song, I think they
4 pretty much understand that you're not actually
5 buying the copyright. What you are doing is you're
6 purchasing or buying a license which permits you to
7 do certain things.

8 Now, I don't think there's going to be
9 anyone on Earth who is going to sit here and defend,
10 whether it's four or ten or forty pages of an end
11 user license agreement. Very, very few of us
12 actually read them, and I think there's always room
13 for improvement and clarification and
14 simplification.

15 It's hard. The world's a complicated
16 place. Sometimes it requires complicated licenses
17 to tell you exactly what people should be allowed to
18 do or not do, and to explain exactly what they are
19 buying. Again, there's room for clarification and
20 simplification.

21 But I don't think that we should assume,
22 again, that when people see the word "Buy," they

1 necessarily think they're buying, meaning obtaining
2 a permanent physical object.

3 I'll leave it at that for now.

4 MR. GOLANT: Thanks.

5 Ed?

6 MR. SHEMS: Thank you.

7 When I see that "Buy" button, I actually
8 read it as -- now that I know better, I read it as
9 buy a license now.

10 What really needs to happen is the
11 public needs to be educated in this new digital
12 paradigm that when you're paying for a chicken, you
13 don't get the whole farm.

14 So I think people just need to be
15 educated to recognize that at this price, there's no
16 way you could possibly be buying the rights to this
17 song.

18 Thank you.

19 MR. GOLANT: Could I just add, who do
20 you think should be the one educating: the content
21 owner, the distributor, the public libraries?

22 MR. SHEMS: Who should be educated? The

1 consumers need to be educated.

2 MR. GOLANT: Educating the public about.

3 MR. SHEMS: Oh; boy. Kyle, could
4 you...?

5 Yes, I think iTunes is a good start.
6 Companies like them, the big companies, need to
7 start 'fessing up that they're not actually selling
8 you the song.

9 I don't know; I think people maybe
10 weren't ready for this licensing paradigm until
11 they -- what was it, Ford -- oh, God, I'm going to
12 mess this up -- but didn't Ford say, "If I'd asked
13 my customers what they wanted, they would have asked
14 for a faster horse"?

15 Perhaps we didn't know what we wanted
16 until Apple kind of came up with this great idea or
17 whoever came up with this great licensing idea.

18 And so they and Amazon need to start to
19 be the educators.

20 MR. GOLANT: Great; thanks.

21 Allan A.?

22 MR. ADLER: I think this issue about

1 licenses, I know that we often hear people's
2 complaints about the density of the licenses, the
3 obscurity of the terminology involved, the length of
4 the license, the fact that licenses aren't
5 individually negotiated, that they're mass-market
6 licenses that apply across the board of regardless
7 of who you are. But these are all things that over
8 time have proven themselves as very important
9 aspects of keeping transaction costs individually
10 low.

11 Think about when you go to rent a car
12 from Enterprise or Hertz. If every person at the
13 counter was going to individually negotiate a
14 license for them to be able to rent that car for
15 that night, you'd have maybe two people a night who
16 would be able to rent a car, because the transaction
17 cost, the time involved in completing the
18 transaction, would just become impossible to deal
19 with.

20 So the fact of the matter is, we do have
21 mass-market licenses. We eschew the notion of
22 individual negotiation. It's true that that makes

1 people worry about what those licenses may contain,
2 but we also have other mechanisms of commerce that
3 deal with that.

4 We have the self-interest of the
5 companies whose licenses these are. They know that
6 they're being watched. They know that it's not
7 going to take very much for someone, not untypically
8 a competitor, to point out to the purchasing public
9 that these people have very unreasonable licensing
10 terms and they're snookering you; the terms are
11 dishonest; the terms are deliberately vague.

12 There are reasons why, when we say that
13 people, consumers, click through these agreements
14 without reading them, and many of them surprisingly
15 do so with a great deal of confidence that there's
16 nothing in that agreement that is going to upset
17 them in terms of whether they're acquiring what they
18 wanted and whether or not it's going to have any
19 kind of adverse impact on their experience with what
20 they're acquiring.

21 The reason for that is simply
22 experience. The reason for that is that they look

1 around and they see their neighbors doing it. The
2 reason for that is that they see that these
3 companies that are using these as mechanisms in
4 order to be able to distribute their products and
5 services in the marketplace are thriving.

6 All of which say to them, is, I don't
7 really have to read every one of these licenses in
8 order to have sufficient confidence in this
9 particular consumer transaction for me to engage in
10 it.

11 That is a very helpful cultural aspect
12 of a free enterprise marketplace, because that keeps
13 transaction costs down, it keeps the barriers to
14 entry for competition down, it enables the
15 marketplace to function far more smoothly than it
16 ever could, if we wanted to ensure that every
17 consumer's expectations, as different and
18 diversified as they may be, could be satisfied in
19 the marketplace because the government wants to make
20 sure that consumer expectations are always met.

21 MR. GOLANT: Okay; good.

22 Let's move on to Keith.

1 MR. KUPFERSCHMID: Thank you.

2 Ben, I'll disagree with him on one
3 point, which is he said that there was a customer
4 expectation that if you buy a ticket to an airline,
5 that it's going to take you from Point A to Point B.
6 I think it's more of a hope or a prayer; I'm not so
7 sure that's exactly an expectation.

8 (Laughter)

9 MR. KUPFERSCHMID: A lot of what people
10 said here is, I think, spot on. We're in a
11 difficult time now. There's a lot of new business
12 models. The technology is changing very, very
13 quickly. We're in flux.

14 So, yes, I think there is a confusion,
15 consumers have confusion; and I don't know that
16 that's necessarily with regard to consumer
17 expectation, but I think there's a level of
18 confusion.

19 But one of, I think, their expectations
20 is, the reason they click "I agree" is they don't
21 want to read through these long agreements. As
22 Allan said, there's a certain expectation that

1 they're not signing off on anything that is going to
2 dramatically or adversely affect them.

3 I know from our perspective, our
4 publishers are constantly working to make their
5 agreements shorter, if at all possible, and
6 certainly more understandable. That doesn't mean
7 that they are, but they're certainly trying to do
8 that, also meeting whatever legal obligations that
9 they have.

10 But once again, not to beat a dead horse
11 but to reiterate what I said earlier, once again,
12 this is not just a copyright problem at all. As a
13 matter of fact, it's not even primarily a copyright
14 problem. This is a commerce issue. This is a more
15 generic consumer issue.

16 I know we all -- I'd be shocked if
17 everyone here didn't have a credit card, and so
18 you'll probably understand what I'm saying here.

19 I can't tell you how many times, maybe
20 once a quarter or once a month I get this little
21 notice from the credit card company saying, oh, we
22 have new license terms, and here's the license, and

1 it's on this crinkled-up piece of paper that's
2 folded like a million times, in font that I don't
3 even think I could read five years ago; I certainly
4 can't read now.

5 And do I read it? Does anybody else
6 read it? I really doubt that.

7 And that's not copyright; that's not
8 copyright at all. It's not just credit cards; it's
9 rental cars are, as Allan mentioned. Your phone,
10 gosh, I mean the license agreement for your phone --

11 And then just surfing the Internet. You
12 have terms and conditions on different websites.

13 I haven't looked at Google's terms and
14 conditions recently, but if you look at the terms
15 and conditions of use of Google, at least some point
16 in the past, I don't know how many people knew, but
17 there's an age limitation. You have to be a certain
18 age to use Google's service.

19 And I can tell you, my daughter came
20 home once and said, "Oh, I have to do this search on
21 Google and find this," and I knew at the time she
22 was not of the age anyway. I don't know how many

1 people even realize that, either.

2 So none of these examples are copyright-
3 related. This is just about the public, not even
4 necessarily consumers, the public and how things
5 have changed. How you just go about your everyday
6 life has gotten a lot more complex and complicated.

7 So I'll just stop there. I just think
8 ultimately, yes, this is an issue, but this is not a
9 copyright issue.

10 MR. GOLANT: Thanks.

11 Alan, and then Kyle.

12 MR. HARRISON: I'll just add that with
13 reference to the consumer expectation of whether
14 it's a purchase or a license or a stream or a
15 download, a lot of that falls on the content
16 provider and how they choose to handle it for
17 marketing purposes.

18 I know that when I use, whether it's
19 Xfinity TV or Amazon Prime to watch a video, it's
20 pretty clear to me that I'm streaming something; I'm
21 not actually buying a copy of it, because if I
22 wanted to access a copy of that to transfer it to

1 somebody else, I'd have to do a lot of stuff with my
2 computer, which I'm not even sure I know how to do
3 anymore, in order to get to that file in a form that
4 somebody else could use.

5 So I don't think it's that innocent
6 parties are making copies of product or content and
7 distributing it to their friends, unaware that maybe
8 the provider didn't want them to do that. I think
9 it's pretty clear that somebody who tries to do
10 that, there's a lot of hoops there you have to jump
11 through technologically.

12 And I think it's not so much an issue
13 that we need a new statute regarding that. I think
14 there's enough there to create a knowledge in the
15 user of what they're doing.

16 MR. GOLANT: Okay; thanks.

17 Kyle?

18 MR. COURTNEY: I'm usually not pro-
19 Comcast, so this is a weird statement, because I
20 have them at home as cable providers.

21 (Laughter)

22 MR. COURTNEY: But they have their

1 Xfinity streaming service, and it says -- for
2 example, it said it for The Lego Movie when my niece
3 was visiting the other day -- it said "Buy" and
4 "Rent."

5 And that was the first time I had seen
6 they actually were saying, when you're streaming
7 this rental, you get it for 24 hours, and they
8 actually used the word "Rent." "Buy" was a higher
9 price. So I understood that I could buy that and
10 have access to that and actually download it and all
11 this other stuff. But that was the first time I've
12 seen that.

13 So I think maybe there is some catching
14 on that there is a difference between those two, and
15 the price point reflects that. That's one thing.

16 The other thing is, yes, contract is a
17 completely separate role from copyright; but the
18 world is that you can contract your way right out of
19 your copyrights.

20 And I think -- because I'm from a
21 library, I'm going to pitch libraries again -- the
22 idea is that, yes, sometimes we're forced to take

1 these e-book agreements because that's the only way
2 we're going to get the books. We would like to have
3 them on the shelves; we would like to keep them
4 longer than the rental agreement which we agreed to
5 in the license.

6 And that's where copyright ekes over a
7 little bit. We had this fair sale doctrine;
8 wouldn't it be nice if we could hold onto this type
9 of stuff?

10 So I think there's an awareness that
11 we're trying to build our mission based -- whether
12 it's university or public, that we want access for
13 everyone. Not everyone has Comcast, not everyone
14 has Kindle, not everyone has access to these types
15 of things.

16 I think there's always going to be --
17 vinyl sales are up, everyone. Vinyl sales of
18 records are up right now. And I know that's kind of
19 a weird thing, but there's going to be always some
20 sort of demand for, A, the preservation of materials
21 from our past, no matter what format they're in; and
22 B, some sort of need to give accessibility to those

1 in socioeconomic positions that can't afford to have
2 a Kindle and iPhone and everything else that we're
3 talking now about now, and cable. So libraries
4 serve that public interest.

5 That's all I wanted to say on that.

6 MR. GOLANT: Thanks, Kyle.

7 MR. SHEFFNER: Just quickly, having
8 heard this so much today, but often when there's
9 discussion about licensing, there's almost this
10 assumption that licensing is a worse world than the
11 physical-ownership world. In the olden days, when
12 it was just all about ownership, you could do
13 whatever you want with your object; but now there's
14 all these rules that restrict you.

15 I want to push back on that and sort of
16 stand up affirmatively for licensing and talk about
17 some of the consumer benefits that you get from
18 being in an ongoing license relationship versus the
19 old ownership model. And I'll just give one kind of
20 obvious example.

21 It used to be that when I would, say,
22 buy a DVD or a Blu-ray disk, if I scratched it or I

1 lost it or I broke it, I was out of luck. The only
2 other option I had was to go and buy a new one at
3 Best Buy or Target or whatever, or maybe even go and
4 buy a used one.

5 Well, today, if I have my movies that
6 I've paid for access to stored in one of these
7 cloud-based services, you know what? If my computer
8 crashes or somehow the files get corrupted or
9 something, a lot of these services, they let you
10 redownload all this stuff for free. That's better
11 than the olden days when my Blu-ray broke.

12 In the software world, I'm constantly
13 being provided with updates, which wouldn't
14 necessarily have happened in a world where there was
15 simply a one-off purchase and then the parties just
16 walked away and had no further relationship.

17 So I just don't want the impression to
18 be left that the licensing world is sort of a worse
19 world for consumers, which is about rights being
20 taken away, and in a lot of circumstances they're
21 provided with more benefits from this licensing
22 relationship.

1 MR. MORRIS: Let me just follow up on
2 that and kind of go back to something that I think
3 Ed said earlier.

4 There's been a question if there is a
5 need to have better consumer understanding of what's
6 actually going on, who should do it, and I think Ed
7 kind of pointed to the sites that have the "Buy"
8 button on it.

9 I want to turn the question around and
10 ask, do the content owners, do the copyright owners
11 have a role enforcing that understanding? Because I
12 would think that if you have twenty different places
13 where I can go, quote, "buy" a song, but I'm really
14 just getting a license --

15 MR. SHEFFNER: I'm sorry; you're buying
16 a license.

17 MR. MORRIS: Right; but the word says
18 "Buy"; it doesn't say "Buy a license."

19 But my question is, if I have twenty
20 places like that, and I'm a business owner of one of
21 those places, am I going to want to make it clear to
22 consumers what's going on and thus perhaps lose

1 business to the other nineteen, while possibly the
2 content owners could say, for all twenty at once, if
3 you would like to convey a license, you need to make
4 it clear to the buyer that they're only getting a
5 license?

6 So I'm kind of asking the question as
7 to, have you guys thought about trying to do that?

8 MR. ADLER: That's a very interesting
9 question, John. I think it's a very important
10 question.

11 When we talk about this issue, I'm
12 always reminding my members that if they don't take
13 on the responsibility of answering questions and
14 providing information to consumers in the
15 marketplace on their own, then they're going to risk
16 the possibility that the Federal Trade Commission is
17 going to do it for them, which none of them really
18 want.

19 I think it's inappropriate for a market
20 as dynamic as this is to have an agency come in and
21 try to do the usual kind of static regulatory
22 process with respect to what are the notices to be

1 given, what must be disclosed. I think it is
2 incumbent upon the copyright owners and the
3 distributors in the marketplace to do that.

4 But I do want to make an interesting
5 point in response to your specific question.

6 Take the situation with e-books, for
7 example. E-books is in a different world than, say,
8 music and motion pictures with respect to digital
9 distribution, because when you had a book in the
10 print world -- the word "book" has no real status in
11 terms of copyright law. A book is simply a form of
12 a container for a literary work, which is what does
13 have status in the world of copyright. It was just
14 one kind of container. It actually for several
15 hundred years was the most successful container, as
16 compared to a scroll, for example, or others; okay?

17 The e-book is a different kind of
18 container; okay? And it's one that you would think
19 consumers would have gladly welcomed immediately
20 with open arms because it adds so much functionality
21 that couldn't possibly accompany the work in print
22 form.

1 However, here's the difference. When
2 the work was available in that print-form container,
3 the consumer didn't need anything else or anyone
4 else to be able to enjoy that work, to consume that
5 work, to use that work as it was intended to be
6 used.

7 But in the world of e-books, in the
8 digital world, other players now play an important
9 role in satisfying the consumer not only in terms of
10 expectations but whether or not the consumer
11 actually is going to get out of the experience what
12 they hope to get out of it.

13 So, for example, in terms of e-books,
14 e-books have had a slow penetration rate in terms of
15 consumer adoption compared to many other forms of
16 digital content, because the shift from the print
17 work to the e-book has meant that now you have the
18 involvement of the people who make the devices
19 without which an e-book is not consumable.

20 You can't use an e-book, you can't read
21 an e-book without a device. So you need some form
22 of digital electronic device that allows you to

1 actually consume the e-book.

2 And in order to do that, not only do you
3 have to have the device manufacturer set whatever
4 standards and procedures they're going to have, but
5 you also in this world have to have the software
6 people decide what kind of software is going to be
7 used with that digital device in order to render
8 your e-book perceptible to you as a reader.

9 So that means, for example, that people
10 may want to yell at Random House or Simon & Schuster
11 or any other publisher with respect to the fact that
12 they have waited for e-books to become essentially
13 transparent, seamless, interoperable, in other
14 words, completely consumer-friendly.

15 But that frankly is not within the remit
16 of the publisher. That's a matter of the device
17 manufacturer; that's a matter of the software
18 producer. So if Adobe and Microsoft continue to
19 engage in their proprietary war over who is going to
20 dominate the world of e-book software, that's not a
21 help to the consumer.

22 If Amazon and Apple produce devices that

1 have restrictions on whose books, whose e-books you
2 can read using their devices, that's not within the
3 remit of the publisher to change, either.

4 So people have to understand that there
5 are complexities in this ecosystem that involve
6 multiple parties. There's not just one person you
7 go to, bring your complaint and expect them to
8 respond to the consumer expectation.

9 And very often the ability of these
10 folks to all get together and coordinate doesn't
11 happen because they don't see it in their self-
12 interest or because there are antitrust restrictions
13 that prevent them from sitting down together quietly
14 and trying to figure out how to resolve these
15 problems on behalf of the consumer.

16 So in that instance, I would say, John,
17 you're right, it probably would make more sense for
18 the copyright owner to inform all the distributors
19 that these are the types of things you need to make
20 sure that our customers -- our customers, your
21 customer and my customer -- know.

22 But whether or not they're going to feel

1 bound to follow that advice? It's uncertain.

2 MR. GOLANT: Thanks; thanks for that.

3 I just want you to know we have less
4 than five minutes, so we're going to wrap up the
5 answer to this question, and then we'll open it up
6 to the audience out there as well as online.

7 So I think, David, you were --

8 MR. NEWHOFF: Yes. It was actually
9 partly in answer to this question of educating the
10 public, but also picking up on what Ben was saying.

11 I think, I suspect that by the time we
12 educated the public on this issue of buying v.
13 license that it may be a moot point, because, again,
14 if you look at Spotify v. iTunes, Spotify has
15 effectively -- I use that as a model -- has
16 effectively decimated digital downloads already.

17 And I think that right now what we're
18 faced with is trying to get that model right
19 economically, which is not a doctrine issue, and
20 it's quite possible that my kids and future
21 generations aren't even going to download anything
22 anymore. So it may or may not matter.

1 And one way in which these kind of
2 models, as I think Ben was saying, actually protect
3 consumers -- and it dovetails with what I've heard
4 people say about, can you inherit these things? --
5 in theory, sure, in theory I can take all the
6 digital files I have ever purchased, and I can put
7 them on a hard drive and I can write "For the kids"
8 and hand it to my kids in thirty years. And they'll
9 say, "What do I do with this?"

10 Because it's first of all not going to
11 plug into anything they're using; and even if it
12 did, the codecs and algorithms used for those files
13 may not matter anymore. They simply may not
14 interact with the operating systems, whatever those
15 things are at that point.

16 Which is one of the reasons why
17 something like an Oyster for books or a Netflix for
18 movies makes a great deal of sense for the consumer,
19 because we no longer have to worry about it.
20 Whatever the model is for streaming the stuff,
21 through either a subscription or an ad-based
22 service, that obviates the need for us to kind of

1 worry about, will I still be able to watch Avatar in
2 thirty years?

3 Obviously, if there are things that
4 matter to us, like I want to go out and buy a vinyl
5 record of T. Rex, that's a different matter, then I
6 will and I'll put it on my shelf and give it to my
7 kids; and we have no problem. First sale already
8 solves that.

9 But that's one way in which these
10 models, I think, sort of address something that I
11 don't think a lot of consumers think about when
12 they're buying things. The probability of them
13 working? Very, very low.

14 MR. GOLANT: Excellent.

15 Keith, you're the last one up.

16 MR. KUPFERSCHMID: I'll be brief.

17 In the interest of time, I agree with a
18 lot of what David just said.

19 It sounded like your question, though,
20 was also about, do these twenty companies or so get
21 into a room and decide this is the best way we
22 should put our contracts together or educate

1 consumers? And from an antitrust perspective, that
2 obviously would be a concern and wouldn't happen.

3 But I do know that individual companies,
4 whether you're talking about Intuit or Microsoft,
5 and I gave you the example of Adobe earlier, you go
6 to their website and they do attempt to explain
7 various provisions of their license agreements.
8 Whether consumers ever access that or read that or
9 review that, I don't know.

10 I'll sort of just end: I'm not sure
11 that consumers want to go through that. They want
12 it now, they want it immediately, and probably don't
13 want to review those or take the time to look at
14 them. I'm being obviously all-inclusive here,
15 but --

16 MR. MORRIS: Just to respond to that, it
17 could be as simple as saying, instead of B-u-y,
18 "Buy," have the button say "Buy a license."

19 And that might be enough to kind of
20 really shift consumers to recognize, oh, my
21 goodness, what am I buying? Oh, it's a license.
22 Those that care will figure that out, and those that

1 do not, they'll just click and get the song they
2 want. Or buy access; right.

3 MR. KUPFERSCHMID: Well, just speaking
4 for the software industry, which has been licensed
5 forever, because digital -- I'd be shocked if that
6 wasn't the consumer expectation at this point.

7 MS. PERLMUTTER: It could be different
8 for different sectors.

9 MR. SHEMS: But who would volunteer to
10 be the first ones to start saying "Buy a license"?

11 MR. MORRIS: Right; which is why I was
12 asking whether the content owners would try to start
13 that. It's just a question I was trying to think
14 through.

15 MR. SHEFFNER: I would just emphasize
16 the point that Allan made earlier, which is that, at
17 least on the motion picture side, the services that
18 we've been talking about, they're the ones, the
19 technology companies, whether it's Amazon or iTunes
20 or any of the others, they're the ones that have the
21 direct relationship with the public; they're the
22 ones who are sort of writing the copy on the pages

1 where you pay for the thing that you're getting.

2 It's not my place to talk about the
3 individual negotiations between the content owners
4 and those distributors; but as Allan also pointed
5 out, these are things that are not done in a group
6 setting for very good antitrust reasons.

7 MR. GOLANT: Thanks.

8 Are there any questions from the
9 audience? Step up to the plate. We have some time.

10 MS. PERLMUTTER: And identify yourself.

11 (Adjusting microphone.)

12 MR. MORRIS: See, in Nashville they knew
13 how to turn the mikes on.

14 MR. HERLIHY: Thank you.

15 Hi; my name is David Herlihy, and I'm
16 really interested in this idea of licensing and how
17 it continues to evolve as people's expectations sort
18 of evolve as well.

19 And so what John said, and even sort of
20 what Kyle had mentioned, when you buy a movie from
21 Comcast, if you leave Comcast, does that movie stay
22 with you? And I know lawyers all the time, when

1 they're drafting copyright grants, they'll say, "in
2 any medium hereafter devised" or whatever.

3 So could there be a consumer standard
4 where, when you license this, you have the
5 expectation that you'll be able to sort of have this
6 certificate and move forward through anything in the
7 future? Because a friend of mine bought a DVD in
8 England and brought it back to play in the U.S., and
9 it didn't play, and he was very upset "because I
10 paid for this thing."

11 So I think if there could be some
12 standard within the industry where you buy this, and
13 any technology you're provided hereafter, now or
14 that I move to, that I think would dovetail well
15 into consumer expectations, that I bought this thing
16 and I can bring it with me no matter where I go.

17 I'm just wondering if that's feasible,
18 or is that just pie in the sky?

19 MR. GOLANT: Anyone want to comment?

20 MR. COURTNEY: We would like that in
21 libraries, obviously, because we want to collect and
22 preserve that movie from England that's probably not

1 here in the States and that people might want to
2 access some day.

3 That would be fantastic for us, the idea
4 of a library-focused, not-interfering-with-the-
5 market exception to that type of thing. That would
6 be great to preserve that kind of stuff. But I'm
7 sure there's other opinions on that.

8 MR. GOLANT: Thanks.

9 Question over there?

10 MR. GOEBEL: Hi. My name is Alexander
11 Goebel; I'm a researcher at the Berkman Center.
12 I've got three quick questions-slash-comments.

13 Number one, David, perhaps you're not
14 completely aware of it; in your last statement you
15 made a very good pitch for the first sale doctrine.
16 You mentioned that we cannot open files in a short
17 amount of time, because like file formats has
18 changed, software has changed.

19 So does that not remove some of the problems
20 we had with first sale, where we have sort of wear and
21 tear of digital files or a staleness of digital
22 files? Number one.

1 Number two, it seems that this is a
2 caution about the general acceptance that there
3 isn't going to be a huge secondary market for
4 digital goods because of subscription models. I
5 feel it's completely correct for books and music,
6 but it doesn't apply, in my experience or my
7 knowledge, that much to software.

8 Yes, Adobe, Microsoft, they both have
9 switched to subscription models; but if you consider
10 iPhone apps, they are regular transactions,
11 disregarding licensing or sale.

12 Also, if you consider business software,
13 if you take a look on eBay right now, there is still
14 a huge demand for Microsoft Windows 95.

15 Of course, these products, we don't have
16 a problem there, because they were still sold on a
17 disk; but if you buy business software nowadays
18 online, what are you going to do in a few years when
19 a software developer does not sell the product
20 anymore?

21 And comment number three is in regard to
22 empirical work. We have seen here some very strong

1 opinions regarding what people think or believe that
2 they can do, and I've read and heard many experts in
3 the field give opinions on one side or the other
4 side, and they were always very strong opinions.
5 But to my knowledge, there is no current major
6 empirical work really asking this question.

7 So I started a few months ago working on
8 this question in an empirical study that's going to
9 start rather soon, but an initial pre-study has
10 shown that the answer is by far not as clearcut.

11 People don't know what they do, and they
12 don't care. When they buy a 99-cent song, they just
13 want to listen to that song right away, and they
14 don't care if it's a license or a sale or whatever.

15 But they care once they've got 10,000
16 songs, and they either die and somebody wants to use
17 it, or they now use Spotify and they don't need the
18 10,000 songs they bought, licensed, whatever, and
19 want to make use of these libraries.

20 MR. GOLANT: Any comments on that?

21 MR. NEWHOFF: Well, I guess I have to
22 respond, since you singled me out.

1 (Laughter)

2 MR. GOEBEL: Sorry.

3 MR. NEWHOFF: If I understand your
4 question correctly -- I hope I do -- what I was
5 talking about is the fact that, let's say I've got a
6 copy of the Marx Brothers' Duck Soup that I licensed
7 from iTunes, and yes, I can put it on a hard drive
8 and I can back it up, and it will play for as long
9 as the H.264 codec will work.

10 And all I'm saying is that there's no
11 guarantee, I have no reason to expect that twenty
12 years from now that that codec will necessarily
13 interface with anything.

14 I'm not sure how first sale doctrine
15 helps. That's a technological challenge, and it's
16 one we've been dealing with forever, but --

17 MR. GOEBEL: It's a technological
18 challenge, but it shows that we also have, so to
19 say, a wear and tear in digital goods.

20 Digital goods is not a perfect copy
21 forever. We cannot open the file indefinitely.

22 MR. NEWHOFF: Fine. I would argue that

1 it's not wear and tear so much as just, it's binary,
2 it either exists or doesn't, and whose
3 responsibility is it to replace it?

4 MR. GOEBEL: It's digital staleness.
5 It's a different way to describe it, but it's very
6 comparable.

7 MR. NEWHOFF: It won't exist anymore,
8 from my perspective as a consumer. So who replaces
9 it at that point?

10 In other words, I bought it from iTunes
11 for ten bucks or whatever last week. Twenty years
12 from now, it's about to become an obsolete file, not
13 to anybody's fault per se; it's just changes in the
14 dynamics.

15 By what means do I replace that file?
16 Is it iTunes' responsibility to then give me a new
17 version, assuming Apple is still in business?

18 MR. GOEBEL: It's nobody's
19 responsibility. You have the same risk as if you
20 buy a CD or a book.

21 MR. NEWHOFF: Right. So how does first
22 sale help? And maybe I'm --

1 MR. COURTNEY: So what happens is, ten
2 years from now there's an exception, and it's stored
3 in Berkman Center at the Harvard Law School library.
4 You can come there and research it and access that
5 file again and see what it was.

6 (Laughter)

7 MR. GOEBEL: No, not necessarily --

8 MR. COURTNEY: It's got to be stored
9 somewhere.

10 MR. ADLER: I would suggest to you that
11 it's actually the opposite. I mean, yes, you've
12 demonstrated, for example, on those comments that we
13 can't be certain that five years from now that
14 digital file is going to operate the way it's
15 supposed to.

16 So does that mean that four years from
17 now, before ReDigi launches its business, before the
18 patents of Amazon and Apple are activated to launch
19 their resale businesses, are we going to be looking
20 for the equivalent of a digital lemon law, for
21 example, as they have with respect to used-car
22 purchases?

1 I mean, when you go to a yard sale and
2 somebody is selling their gently used CDs for a
3 dollar, yes, you look at it, maybe you'll see
4 there's a scratch on it, maybe you won't, but you're
5 pretty confident that that's not going to play like
6 a brand-new CD; okay?

7 But if you're going to want there to be
8 an actual digital first sale doctrine that
9 authorizes the creation of these marketplaces, then
10 what consumer protections are you going to offer
11 along with that?

12 Because people aren't going to be able
13 to look at a digital file and determine whether it
14 will operate on the equipment that they have,
15 whether it's incomplete as a digital file, if it's
16 software of some sort. Where will the consumer
17 protections be for such a market?

18 MR. GOEBEL: We don't have these
19 protections for books, and we don't need to have
20 these protections for --

21 MR. ADLER: Because books are physical
22 objects, and the purchaser's risk is limited by the

1 fact that they can actually examine the physical
2 book and they can make a judgment about its
3 condition.

4 If it has the key final chapter ripped
5 out of it, I'm probably not going to buy the book.

6 MR. GOLANT: I don't mean to cut you
7 short, but we have one more question before we
8 conclude our session.

9 MS. HEROUX: Thank you.

10 I'm Marlene Heroux, consumer and also
11 Massachusetts Board of Library Commissioners.

12 In putting another plug in for
13 libraries, I've heard a lot of the concepts today,
14 education, but there's also literacy, poverty,
15 bandwidth.

16 Many people go to libraries, and I think
17 this applies to especially public libraries, because
18 they may not have the money to buy things that for
19 us might not be a big deal, but for the people who
20 are having trouble.

21 Also, they may live in a community that
22 doesn't have the bandwidth to be able to download,

1 look at the material, especially as things have
2 gotten more complicated the way information is
3 presented in PDF files, full of illustrations. I
4 remember for a while Kindle wasn't in color.

5 The concept that everything on the
6 Internet is free, I think we're finally moving away
7 from that because we are talking about "Buy"
8 buttons, so that may be good.

9 But before you throw in libraries as a
10 secondary market, I think these are all really
11 important things to consider.

12 Thank you.

13 MR. GOLANT: Thanks for your comment.

14 One last one.

15 MR. LAPTER: And one online as well.

16 MR. GOLANT: And one online? Okay. One
17 here, one there, and we're done.

18 MR. SUKHIA: Hi. My name is Rohi
19 Sukhia; I run a business called Tradeloop, which is
20 a secondary marketplace for used IT hardware.

21 This discussion has been mostly about
22 pure digital goods, but I don't see the difference

1 between digital goods and real goods, because as
2 soon as you put a transistor in it and you put a
3 zero or a one, it's now a digital good.

4 And the manufacturers of computer
5 hardware are thwarting the used market by placing
6 restrictions on the resale in the software,
7 rendering new hardware worthless when it's sold if
8 you don't have the right licensing.

9 So how does that affect this? And if
10 you think about computers, the economic impact on
11 dealers as well as the consumers who can't buy used
12 computing goods, but it's also the impact on the
13 EWay stream, which needs to be an efficient
14 marketplace with tens of millions of tons of used IT
15 gear that needs to be processed in a logistically
16 efficient manner. The restrictions on the sale of
17 software embedded in the hardware makes it less
18 efficient.

19 And if you think about where it goes
20 from computers, like a toaster, if you buy on the
21 Internet a toaster; now, can you not resell your
22 toaster?

1 And what about cars? Cars, like if you
2 could buy a used Prius, it's basically a computer on
3 wheels. Ford or Toyota, are they going to be
4 allowed to disable the resale of that vehicle
5 because you don't have the right to resell that
6 software? Will they not issue bug patches for the
7 Prius? So this seems to be a bigger issue than just
8 MP3s.

9 MR. GOLANT: Thanks.

10 Keith, I think you have a comment.

11 MR. KUPFERSCHMID: Yes, that is a bigger
12 issue than first sale, too; right? Because let's
13 not forget, there are other provisions in the
14 copyright law, things like copyright misuse, which
15 have come into play in somewhat similar
16 circumstances of which you're talking about.

17 There's also a provision in Section
18 109 -- I can't remember exactly what the number of
19 the provision is right now -- that talks about
20 software that is embedded in hardware that cannot be
21 copied, and that you can rent that hardware without
22 restriction.

1 Now, maybe that needs to be looked at a
2 little bit, to decide whether that needs to apply,
3 not just to rental, but also to sale.

4 But putting that aside, there is that
5 sort of notion there that software embedded in the
6 key, that software cannot be copied, that doesn't
7 necessarily mean that the software company is now
8 obligated to provide support for that software, nor
9 should they be, because now they engaged in an
10 agreement with a particular consumer, and now they
11 have a totally different consumer. They might have
12 very different demands. They might be using the
13 hardware or software in a way that was not foreseen
14 by the software company.

15 MR. GOLANT: Alain, is there an online
16 comment?

17 Thanks for that; sorry.

18 MR. LAPTER: One short comment in just
19 two parts.

20 Part one, consumers have barriers in
21 making choices, and the current market is not free
22 for consumers to make those choices.

1 Second part, not meant to be a downer, I
2 assume, persons representing industries in their day
3 jobs really can't credibly speak as a consumer on a
4 panel.

5 (Laughter)

6 MR. ADLER: First of all, did that
7 person identify what those barriers were?

8 MR. LAPTER: They didn't. They did not.

9 MR. GOEBEL: Panel participation
10 actually was the barrier.

11 (Laughter)

12 MR. ADLER: Did that person -- I don't
13 know why they would suppose that people sitting on
14 this panel or people passing through this building,
15 whatever their occupations are, aren't consumers in
16 the same way as other consumers.

17 There is a situation that we have always
18 dealt with, and always will deal with, which is the
19 uneven level of sophistication and knowledge and
20 information that consumers in their individual
21 capacities have when they're making a particular
22 decision.

1 That's why the marketplace is so
2 diverse, and that is also one of the reasons why the
3 value of licensing and providing as many options and
4 choices in a given transaction is valuable.

5 MS. PERLMUTTER: And I would just add
6 that obviously any comments that are made by people
7 on the panel about their experience as consumers
8 only relate to their own personal experiences as
9 consumers, and we don't take that as being
10 representative of any larger group of consumers. So
11 if that helps.

12 Well, I wanted to bring us to a close by
13 thanking everyone for coming today, for joining
14 virtually, and for taking part in the roundtable.

15 I do have to say I personally found this
16 to be an extremely substantive and thoughtful and
17 serious set of conversations. I very much
18 appreciated that.

19 And also, I think this was a very
20 valuable opportunity for us all to hear from the
21 library and publishing sectors in addition to
22 hearing more from the music and motion picture

1 sectors, which we started to hear from in Nashville
2 as well.

3 And I wanted to give a special thanks to
4 the stellar USPTO staff who's here helping us:
5 Hollis Robinson, Linda Taylor and Angel Jenkins.

6 (Applause)

7 MS. PERLMUTTER: And also to thank Amar
8 Ashar and Carey Andersen from the Berkman Center for
9 coordinating the event and letting us use this
10 really beautiful space.

11 A transcript of this hearing for those
12 who didn't take really careful notes will be posted
13 on both the USPTO and the NTIA websites sometime in
14 the next few weeks, and there will also be a
15 recording of the webcast on both websites.

16 So just future events and announcements:
17 Our final two roundtables on these issues will be
18 held in California at the end of July, so they will
19 be July 29 in Los Angeles at the Loyola Law School,
20 and July 30 in Berkeley at the Berkeley Law School,
21 Boalt Hall.

22 And there's still time for requests to

1 participate in or observe the roundtables, so please
2 tell your friends and colleagues that they should
3 sign up; we want to hear from as many people as
4 possible.

5 And then just to say as part of this
6 whole Green Paper process, we have various other
7 ongoing activities as well. We're well in the
8 middle of the Multistakeholder Forum on Improving
9 the Operation of the DMCA Notice and Takedown
10 System.

11 So for those of you who want to catch up
12 on what's been happening with those activities or
13 hear more about future ones as they come up, you can
14 sign up for our copyright alerts. We send out
15 regular alerts to those who signed up. And you can
16 find if you go to the USPTO website, there's a page
17 on copyright issues, and there's a big red button
18 that is very hard to miss. So we encourage you to
19 do that as well.

20 MR. ADLER: Did you say "buy" or
21 "purchase"?

22 (Laughter)

1 MS. PERLMUTTER: I think it might say
2 "learn" or "speak" or something like that.

3 So we very much appreciate your all
4 participating, and we look forward to seeing you at
5 future events. Thank you.

6 (Applause)

7 (2:51 p.m.)

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