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

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A G E N D A

MORNING SESSION

Wednesday, June 25, 2014

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

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

(Pause)

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

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

I'm Shira Perlmutter; I'm the chief policy officer of the Patent and Trademark Office. And this roundtable is part of an ongoing process that was started by the Department of Commerce's Internet Policy Task Force, through last year's

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

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

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

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

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

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

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

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

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

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

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

So as I said, there will be three issues.

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

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

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

So we would like the panel, the

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

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

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

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

So with that, let's begin.

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

And for those who are watching the webcast, you can go to cyber.law.harvard.edu/questions/uspto. And we've provided that link also on the copyright page of the PTO website next to the link for this webcast.

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

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

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

So let me give the floor to John Morris, who's associate administrator and director of Internet policy at NTIA.

MR. MORRIS: Great. Thanks, Shira.

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

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

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

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

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

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

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

MS. CHAITOVITZ: Good morning, everyone. I'm Ann Chaitovitz; I'm an attorney advisor at the Patent and Trademark Office, and I will be asking our distinguished panelists here questions about remixing.

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

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

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

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

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

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

So my question is, is the creation of

remixes being unacceptably impeded by legal uncertainty?

And that was good, because everybody went in order.

(Laughter)

MS. CHAITOVITZ: So, Jay?

MR. ROSENTHAL: Thank you, Ann.

The issue of --

MS. CHAITOVITZ: Oh, could you introduce yourself?

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

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

MS. CHAITOVITZ: Jay?

MR. ROSENTHAL: Yes?

MS. CHAITOVITZ: Can I just put you on

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

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

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

MR. ROSENTHAL: I'm introduced.

(Laughter)

MR. COURTNEY: I'm Kyle Courtney; I'm copyright advisor for Harvard University. I guess in my prior life, I was a full-time librarian; now I'm putting on the lawyer hat.

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

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

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

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

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

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

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

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

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

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

MR. ROSENTHAL: Same thing.

(Laughter)

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

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

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

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

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

But there are also examples already in

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

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

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

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

There have been examples of smaller

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

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

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

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

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

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

Thank you.

MS. CHAITOVITZ: Thank you.

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

MR. ROSENTHAL: Yes.

MS. CHAITOVITZ: But did it include --

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

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

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

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

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

MS. CHAITOVITZ: Thank you.

And David, I think you were next.

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

MR. BROWN: He was first.

MR. HERLIHY: Thank you.

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

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

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

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

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

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

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

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

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

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

MS. CHAITOVITZ: Thank you.

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

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

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

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

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

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

Yes, you can put it up for six weeks,

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

MS. CHAITOVITZ: Allan?

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

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

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

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

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

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

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

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

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

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

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

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

And our concern is that the definition

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

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

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

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

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

MS. CHAITOVITZ: Thank you.

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

MR. BROWN: Thank you.

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

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

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

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

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

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

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

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

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

derivative thereof.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A long, long time ago I used to get to

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

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

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

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

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

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

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

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

MS. CHAITOVITZ: Thank you.

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

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

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

I'll take it further, though.

MR. ROSENTHAL: You should stop there.

(Laughter)

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

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

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

So any of the chances of legislation was

very slim, anyway, because Congress was not getting that much done, being nobody really wants compulsory licensing in this area.

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

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

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

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

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

How much is a sample, a two-second, three-second clip done to an unfair extent? Bridgeport, which I assume some people agree is not a great decision, has basically said that a three-second guitar riff with a loop that's about seven seconds that appears seven times in a song is too much, and that any sampling should be copyright infringement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter)

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

similarly situated.

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

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

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

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

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

MR. HERLIHY: I just want to say that I

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

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

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

stuff in the first place.

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

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

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

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

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

because we've been focusing on licensing collectives.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ROSENTHAL: You're the monitor.

Real quick; I will be quick on this.

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

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

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

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

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

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

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

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

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

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

the admin costs, everything.

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

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

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

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

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

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

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

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

(Laughter)

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

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

The libraries have to be there to tell

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

Those are the stakeholders I'm thinking about.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

using this.

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

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

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

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

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

MR. McDONOUGH: But I think it's

important to note that --

MS. CHAITOVITZ: Walter? Is yours --

MR. COURTNEY: He didn't know.

MS. CHAITOVITZ: We'll let you go.

MR. McDONOUGH: I'm sorry.

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

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

(Laughter)

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

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

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

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

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

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

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

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

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

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

MR. COURTNEY: We can do that over coffee.

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

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

focused on the fact that it was a parody.

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

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

MS. CHAITOVITZ: I just wanted to ask you, because we've been talking about a licensing hub, and I know that CCC is a licensing hub for techs.

But does it not ensure, does it give you -- can you license through CCC remix, rights to mash up things, of the kind of multimedia that Kyle just mentioned?

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

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

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

The marketplace I think can produce, as

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

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

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

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

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

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

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

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

MS. CHAITOVITZ: Walter, and David.

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

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

I thought that was funny, personally.

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

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

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

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

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

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

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

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

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

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

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

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

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

built upon must get compensated.

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

MS. CHAITOVITZ: I think --

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

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

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

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

does exist.

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

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

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

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

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

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

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

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

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

MS. CHAITOVITZ: Thank you.

And Jay, can you --

MR. ROSENTHAL: Real quick.

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

And the answer is certainly in this case, yes.

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

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

implications there.

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

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

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

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

mechanic reproduction that deserved a payment.

Nevertheless, I'd rather not do that. I'd rather work on the collective approach through license.

MS. CHAITOVITZ: Thank you.

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

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

(Pause)

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

MR. ROSENTHAL: No emails from Girl Talk?

(Laughter)

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

MR. ROSENTHAL: Really.

FROM THE AUDIENCE: Nothing else matters.

(Laughter)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oh, no; now we start all over again.

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

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

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

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

available commercially.

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

MS. PERLMUTTER: Other thoughts on this?

Alain, did you have someone?

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

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

and other areas."

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

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

MS. PERLMUTTER: Other thoughts on that?

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

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

I mean, there are multiple, multiple

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

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

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

And you can't underestimate the

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

Thank you.

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

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

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

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

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

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

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

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

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

MR. HERLIHY: I know there are.

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

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

(Recess)

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

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

FROM THE AUDIENCE: Won't last.

(Laughter)

(Pause)

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

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

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

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

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

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

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

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

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

(Laughter)

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

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

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

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

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

(Laughter)

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

MR. GOLANT: Thank you all; wonderful.

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

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

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

Ron, and then David, and then George,

and then Jodie. Go right ahead.

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

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

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

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

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

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

MR. GOLANT: Thank you.

Next? David?

MR. HERLIHY: Thanks.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. COLEMAN: You heard that, right?

MR. GOLANT: Thanks for that.

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

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

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

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

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

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

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

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

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

very good in court.

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

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

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

the plaintiff.

MR. GOLANT: Thanks.

Jay, you had your card up.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GOLANT: Thanks.

George?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GOLANT: Thanks.

Jay, and then George, in response.

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

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

I just wanted to throw out two additional points.

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

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

So there are ways that maybe you could

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

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

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

MR. GOLANT: Thanks.

MR. BORKOWSKI: Just a couple things, briefly.

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

And that always, like any other

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

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

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

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

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

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

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

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

My fear is that it kind of creates a disrespect for copyright. People feel as if, well, this isn't so out of whack, that it almost encourages this sort of ignoring of the law.

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

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

MR. GOLANT: Thanks.

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

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

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

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

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

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

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

MR. GOLANT: Thanks.

Jay?

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

When you talk about the law firms and

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

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

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

MR. GOLANT: Thanks.

MR. ROSENTHAL: That's it.

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

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

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

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

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

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

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

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

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

exists now, is clearly giving us.

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

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

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

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

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

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

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

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

And in fact, some of the questions about

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

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

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

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

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

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

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

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

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

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

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

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

MS. CHAITOVITZ: Meg?

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

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

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

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

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

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

MR. BORKOWSKI: They are, actually.

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

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

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

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

were unimaginable in 1999.

These companies are very successful. They have not been deterred by statutory damages. There are over 2,500 digital music services right now that are licensed and authorized and that allow users to access music any way they want, wherever they want. So I do not agree, and I'd like to see some evidence, because I do not agree that this chills innovation in any way.

And Congress certainly didn't think so when it increased the range in 1999, because Congress of course, one thing they want to do is increase business and innovation, one of the things they want to do, and not squelch it in any way.

For issues like libraries and orphan works, I mean, orphan works, there's a big discussion that has been going on for years as to how best to address this, and this could certainly be part of some kind of orphan works. If there's an orphan works issue, then the whole notion -- there could be, again, guidelines put into place.

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

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

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

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

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

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

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

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

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

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

Well, easy come, easy go; right?

I wonder whether the statute -- unspoken

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

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

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

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

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

But Aereo was not innovation. Every

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

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

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

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

MS. CHAITOVITZ: So Jodie, and then Jay,

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

MS. GRIFFIN: Just a couple things.

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

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

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

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

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

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

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

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

I know that for songwriters and music

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

I just wanted to respond real quick to that point.

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

(Laughter)

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

MR. BORKOWSKI: Yes, very quickly.

As Chris Brown said on the first panel today, copyright includes the right to say no to an exclusive right.

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

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

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

One was a total damage cap. I believe you guys commented on that.

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

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

suggested that.

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

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

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

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

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

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

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

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

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

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

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

ability to handle these huge damages.

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

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

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

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

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

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

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

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

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

I do think that the current scheme does

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

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

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

So I am opposed to a cap. I think it

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

MS. CHAITOVITZ: Jay?

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

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

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

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

MS. CHAITOVITZ: Meg?

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

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

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

the rate.

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

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

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

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

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

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

MR. HERLIHY: Woolrich?

MR. BORKOWSKI: Woolworth?

MR. COLEMAN: There is no presumption --

MR. BORKOWSKI: Walgreen's?

(Laughter)

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

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

So we got this extreme case when I used

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

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

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

But I think the voice here, the argument

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

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

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

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

And if you're going to limit the

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

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

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

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

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

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

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

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

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

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

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

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

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

point of view.

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

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

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

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

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

carrots moving forward.

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

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

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

The statutory damages thing does have a lottery aspect --

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

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

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

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

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

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

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

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

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

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

But I think what happened in Righthaven,

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

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

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

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

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

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

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

(Lunch recess)

MR. GOLANT: We'll get started shortly.

(Pause)

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

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

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

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

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

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

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

So let's get started with the introduction.

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

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

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

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

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

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

FROM THE AUDIENCE: Introductions?

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

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

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

MR. GOLANT: Thank you.

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

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

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

Illusion of More.

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

And I think that's about it. Thanks.

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

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

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

and journal publishers.

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

MR. COURTNEY: Sure. I'll start.

So I have the feeling that there's a real problem for libraries with first sale problems occurring, as a current interest.

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

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

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

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

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

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

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

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

Let's look at Kindles. The Kindle

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

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

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

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

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

I'm sure Meg has something on that, too.

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

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

There's something that I think we still need to and can't figure out to preserve that balance a little better.

MR. GOLANT: Thanks.

Allan?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

you lend one book to one reader at a time.

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

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

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

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

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

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

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

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

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

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

Penguin and Random House, which were

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

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

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

So it's a little bit more complicated

than you might think it is on the surface.

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

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

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

companies.

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

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

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

MR. GOLANT: Thanks for the very comprehensive topic.

I think Kyle might have something to say about that.

MR. COURTNEY: A couple things.

I agree that there have been some

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GOLANT: How about David first.

MR. HERLIHY: Thank you.

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

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

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

MR. GOLANT: Thanks.

Allan?

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

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

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

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

And that's one of the reasons why the

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

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

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

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

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

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

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

MR. GOLANT: Excellent.

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

From a practical perspective, is there a

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

David, you put up your card first.

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

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

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

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

With that, I'll let someone else go.

MR. GOLANT: Thanks.

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

MR. HARRISON: Thank you.

Speaking as a consumer, I have to agree with the concept that consumers are less interested in actually owning things, and certainly see less of a need for a secondary market. I can't remember the last time I went to a used record shop or a used bookstore, for that matter, which is kind of sad.

So many things are digitally, and at such a geographic dispersion, you can be anywhere in the country or anywhere with decent Internet access and basically get anything you used to be able to get on Newbury Street in Boston in terms of either music or books.

So, yes, the secondary market concept is

kind of going away, especially with the current pricing regime, which seems very fair for the convenience of accessing something on any of your devices anywhere you are.

And kind of going to the idea that the library should have some special new statutory case for digital first sale, it seems like that's working out okay in terms of private contract, at least from a consumer's perspective. It almost seems as if upsetting the statutory regime right now would unsettle those settled expectations and disrupt the ongoing negotiation process.

MR. GOLANT: Ben?

MR. SHEFFNER: So I just want to expand a little bit on what David was saying a few minutes ago.

The world has obviously changed a lot in the last fifteen to twenty years as the Internet has become a ubiquitous sort of force in all the media industries. We've obviously seen a shift away from ownership of physical goods towards access-based models.

And one of the primary drivers of the move towards access-based models is consumers. Consumers don't necessarily want to have bulky physical items, and they're very happy with services, whether it's on the video side, things like Netflix or Amazon Prime or Hulu or Vudu or many of the other hundred or so legal services through which people can access videos and television now.

We see the exact same thing on the music side, services like Spotify or Pandora, where you don't own a physical object, but you either for free or through a premium service get access, even on the book side. I subscribe to Audible audiobooks, which you basically pay a monthly fee and it makes a certain number of books available to you each month.

Again, those are driven by consumers, and the terms of those services are set by licenses, which are essentially contracts between consumers and these services.

If consumers don't like the terms on which the service provides them access to the works, they'll gravitate towards other services. It may

not happen immediately, but services that continue to displease their consumers don't last very long.

One thing we don't see from consumers is a demand to shift back to an ownership model that would enable them to take advantage of the rights afforded to them under Section 109 in the first sale doctrine.

Again, we see services that are based on access rather than ownership really taking off, and the ownership-based or physical models on their way towards, if not extinction, at least becoming a much smaller part of the market.

So again, if there's consumer demand for the right to be able to resell -- and I put quotes around "sell" because most of these are again license-based models -- then they will be there, and you even see some services taking out patents that would allow for the licensed resale of digital files.

And if there's consumer demand for them, we will see those services flourish. If there's continued consumer demand for physical items,

whether they be Blu-ray disks, DVDs, or physical books that people can resell under the first sale doctrine, we'll continue to see those in the marketplace.

So again, I don't think there's this consumer demand for a continued secondary market in the way that we've seen it in the old physical world.

MR. GOLANT: Thanks.

So it's going to be Allan A., Keith, Ed and Kyle.

MR. ADLER: In backing up, I think it was David who was saying about the difference between the current desire for ownership as opposed to access to assets, I may recommend something to all of you, very simple to find online.

Search out the name Mary Meeker and look for her Internet Trends report from December 2012. She has a whole chapter in there on what she calls the "Asset-Light Generation" where she shows example after example of physical goods and tangible goods and services where the current generation has

decided that the costs, burdens of maintenance, storage and other things associated with ownership of these types of things has yielded for them to just-in-time access according to their desire to use these types of materials.

And the breadth of the types of services and products that she can demonstrate this is taking place with is just extraordinary.

But I also wanted to comment to you something very interesting that was said at the start of the fair sale hearing that was held at the beginning of this month in New York by the Chairman of the House Judiciary Committee, Bob Goodlatte. He said, "Although some legal doctrines may be invisible to Americans, the first sale doctrine is not one of them. Entire businesses have been built upon it, such as Blockbuster video stores and Netflix by mail."

Well, I sidled up next to him afterwards and pointed out that, just in case he mentioned this again in another speech, he should know that Blockbuster stores are largely out of business, and

Netflix has become a wild success by streaming its videos, not by selling actual copies of them through the mail.

But he also made another very important point. He said, "Consumer expectations have also been built upon this doctrine. Laws and consumer expectations are developed independently, but they can help shape each other."

So when the question is asked, do we need a secondary market in digital content, whose need are we talking about? What need is at issue here? And are we talking about a condition, if we're talking about consumer expectations, that has been shaped by the law rather than by the expectations that consumers may have developed independently?

I would suggest to you that it's really a question of the former, because there are so many ways in which consumers now are able to have this kind of just-in-time, when they want it, reasonably affordable access to the digital content of their choice for the uses they want to make of it.

In the e-book area, for example, there are now subscription services. Some people might say, well, that sounds like you tried to replace the traditional Book of the Month Club. Well, maybe we did, but again, with adjustments taking into account that digital versions are different, and they're used differently by readers, and the readers appreciate those differences.

So you have now Scribd, you have Oyster, you have Entitle, in addition to Amazon and its Kindle library, that offer monthly subscriptions at a low, affordable price where people can get a certain number of e-books every month that they want, and they get to use them for as long as they're using them to consume them.

This type of option can't exist in a world where the first sale doctrine, as it applied to physical goods, physical chattel, would simply be extended to apply to digital content. It simply couldn't exist. There would be no reason for it to exist.

And the economics, which even now are

experimental -- nobody really knows how ultimately these subscription services will turn out for e-books, whether they'll be as successful as they have been for music and as successful as they have been for motion pictures -- but that's experimentation in the marketplace, and that's what copyright has always fueled, that's what copyright has always thrived upon, and we'd like to see that continue in this space as well.

MR. GOLANT: Thank you.

Keith?

MR. KUPFERSCHMID: I'll try not to reiterate what has already been said, so I'll just say what he said, what he said and what he said; and endorse those comments.

(Laughter)

MR. KUPFERSCHMID: There is one little aspect I'll sort of take and run with here, which is, we've already mentioned that consumers in the future will only own essential things and things that they use very often; right? And in the future, that the things that they use only occasionally,

those are things that they'll rent, or they'll license. They won't necessarily own those things, like a fancy pair of shoes or special jewelry or this pizza-making set, things like that.

But what I want to point out here is, that is not just limited by any stretch to copyright. That is something that consumer expectations and consumer -- what consumers want, that's not limited to just focused on copyright.

You have to look beyond that, and things like, look at the Zipcar, for instance. Look at Rent a Runway, where you rent these fancy dresses. Things like ToolSpinner and SnapGoods, where you can rent electronics or license electronics, and tools and lawnmowers and things like that.

And now there's also these peer-to-peer models, where you can even go to one centralized location. It could be just you sort of borrowing -- it could end up being your neighbor -- in sort of this peer-to-peer model.

The important takeaway here is that you've got to be real careful here not to create

sort of special rules for copyright that could really hinder or get in the way of these consumer expectations. I think that's a real concern here.

Allan did a fantastic job of talking about the e-book market and contents. Well, I won't go into that unless there's further questions upon it, so I'll take on software here a little bit.

On Monday I was arguing a case before a judge in Austin, Texas, because it was an individual who was trying to sell his Adobe software on eBay, secondary market.

If you look at the Adobe license, actually, for this particular software, it allowed the transfer. But there are several steps that the individual who owns that license to use the software needs to do to make sure that they're not retaining a copy -- right? -- that there's no piracy going on, things like that. So it's not necessarily saying that we want to hinder the secondary market, but that certain precautions need to take place.

This particular individual could care less about those precautions and was burning a copy

onto a CD and trying to sell it and violating a whole bunch of other conditions in the license, so we'll put that aside.

But not all Adobe licenses allow for the transfer, the selling of the license in the secondary market; for instance, academic software.

Academic software is the same exact software you would buy in non-academic software; but what they do is, to be able to sell it at a lower price point for students and teachers and others who qualify, what they do is, the license is a little bit different.

And one way the license is different is that it prevents the further transfer to people who don't qualify for this academic license. So you couldn't sell it to your average consumer, but you could resell that license to a student or teacher or anybody else who sort of qualifies.

That's not terribly onerous requirements, but people have a real struggle and they complain about that.

Now, if that license somehow by the law

was overlooked or bypassed, or those terms invalidated in some way by the law, be it a new digital first sale doctrine or something else, well, then I can pretty much guarantee that not only Adobe but many other software companies that provide this academic software, as well as things like OEM software and things like site licenses and what have you, that those would disappear.

Because what would happen is, you'd get a lot of students who would take that, buy that academic software at a cheaper price, engage in arbitrage, and then sell it and try to make more money off of it. And so that model would disappear.

That model is very, very beneficial, I'm sure, to the academic community; and that is something that would disappear if in fact those licenses were endorsed.

MR. GOLANT: I just have a follow-up.

Does eBay have terms of use or any language on their website that warns people that they can't sell licensed goods, or anything to that effect?

MR. KUPFERSCHMID: It's not quite like that, but they do. The license prohibits it. If it's a license violation, then that's a violation of eBay's terms. I mean, I would obviously defer to them to respond to your question, but that certainly is my understanding.

There are various reasons you can get, under their terms and conditions, an auction taken down, and that is one of them. In this case, that was both a license violation and a copyright violation.

MR. GOLANT: Got it.

Ed?

MR. SHEMS: Thanks.

I liked what Allan was saying about, who needs the secondary market? What's it there for? Why do people want it? I kind of feel like it's -- you know, everybody likes having a yard sale. They have their stuff and they want to move it off when they're no longer using it.

But what I think a lot of people don't realize when it comes to digital, because of all the

licensing that has been created, the different options for licensing, what people don't realize is the price that they're paying now is the lower end of the cost.

So with the secondary market, the first sale of it would have to be -- like, for example, let's take my artwork. When I sell artwork to a client, they tell me what they need it for, and I price accordingly. I'm going to move this closer to me. And they tell me what they need it for.

I then price it based on what their needs are. I don't price it -- if they want it for a brochure, if they want an illustration of mine for a brochure, I give them price X.

If they then say later on that they want it for a website and then they want it for a billboard, well, it has to be X plus whatever it might be, X plus 1, because their use has gotten larger.

This is a little bit different from how the music industry provides music, in that I also have the ability to -- for example, I have a

customer right now that I'm licensing for five years the use of my characters.

So there are some differences, and people need to also recognize that the price that they're paying, $1.25 for a song -- I'm just using iTunes as an example -- $1.25 is a great price to pay. And I feel like sometimes they forget that for $1.25, they don't need to have that secondary market, being able to take it off their computer and resell it.

MR. COURTNEY: You know, we're giving a lot of credit here to consumers.

Do they know what they're buying when they have a four-page license agreement from iTunes to buy a 99-cent song? Amazon, iTunes, OverDrive, wherever they say "Buy now," you're clicking "Buy"; you're clicking the word "Buy." There's a presumption of purchase there that's going on.

I'd like to think, oh, they know they're getting into a contract in which, if something happens, they can remote-delete their stuff; they can take their stuff away. They can't transfer it.

I know that iTunes and iPods have ended up in Probate Court, because, can it be transferred to their heirs? I mean, this has actually happened.

The presumption by consumers is that they're buying it because it says they're buying it, meaning they own it.

Now, we know they don't own it. They may not take the time to read a four-page agreement for a 99-cent song.

And as to there's no demand for this, well, obviously, if you can get something instantly, you're going to get that first, especially if it says "Buy it now" with one click. That means that they're buying. They're like, oh, I don't have to go to the bookstore; I can buy it now with one click.

We have never had a used MP3, used e-book market; it hasn't existed yet. So we don't know if there's a demand for it.

I would say people would love that: Oh, I can buy this MP3 for 50 cents instead of paying 99 cents, and it's "used," quote-unquote? That sounds

better to me. I'm a consumer; I want the lowest price possible.

And I agree, low prices are great and that's what drives demand; but consumers don't realize they're risking themselves to be subject to a contract put out by the technologists that say, hey, we can remote-delete your stuff anytime we want.

That actually happened with Amazon. Some students lost their homework on a George Orwell "1984" e-book. Amazon realized, wait, we don't have the rights to this. They remote-deleted it, and their annotations were in there.

Now, they said it was a bad move in the long run, but it was a great blog entry.

The lawyers said, well, they're well within their rights in doing this. They learned the lessons from the software industry in that they're leasing these books, they're leasing these MP3s.

So I think maybe there's an awareness campaign that could possibly be -- where we could probably come together on something on this panel,

is the idea that we inform these folks that you're not buying it.

Maybe we should stop using the word "purchase" and "buy" in our contracts where we're dealing with this, and actually explicitly explain, you're leasing these. You're leasing these songs, you're leasing these e-books, at best, and you can't sell them in a yard sale, and there is no e-book or MP3 used market yet.

Would you be interested in one? I would be interested to hear what consumers say about that.

MR. GOLANT: That's very prescient, that whole category, because the next set of questions is exactly about that. So let me ask you and everyone else here these questions.

So what are consumers' expectations when they buy a movie or a television show online through iTunes or Amazon?

MR. COURTNEY: Sorry I jumped ahead.

MR. GOLANT: Second, how clear are the contractual terms? Third, do most think that they can resell what they purchased? And fourth, is

there any empirical data on the issue to show what people think?

So with those sets of questions in mind, why don't we start with David, and then Ben, and Ed.

MR. NEWHOFF: Thank you.

I think you're right that there is a degree of confusion out there among consumers. I question whose fault the confusion is.

When those of us who write criticisms about Internet companies, what we'll encounter with those criticisms about things like privacy invasion and whatnot, the Internet companies come back and say, well, you should read the terms of service. In this case, the reverse is true.

I think you're right that people don't understand it. Whether or not it's the consumer's responsibility, iTunes' or the reseller's responsibility or the producer's responsibility is a good question.

It would be a good idea if consumers were conscious of it, because it is reality. Like I said, this is what people are moving toward. They

are demanding these kinds of relationships with the media anyway. They're not really, I don't think, thinking much about it; I know I wouldn't if I weren't paying attention to these things. I'd click yes, I want to watch this movie now.

And as far as sort of trying to gauge consumer demand, I think it's a problematic question, because if you ask anybody, would you rather pay 30 cents for this than 90 cents, well, I think we all know the answer to that, that we don't need a study.

But picking up on what Ed was saying is that we're already at a point when prices are not only low, but in some cases unsustainably low. We're fighting that problem right now. I mean iTunes came around and kind of sort of saved the music market, but now here comes Spotify to destroy that.

And pretty much everybody has said, everybody on the music side has said, the rates being paid by Spotify just don't sustain us. And so we may not care about the current rock star, but we

might care about the next generation actually being able to enter the market.

So.... sorry, I apologize; I lost my thought.

So consumers are already getting a very low rate, and if you compare the $1.29 price that you're getting for a song right now, in 1990 dollars that should be $2.35.

So all that I think would happen if you created this sort of ability to resell is that you'd foster a situation where some middleman got to once again skim some dollars off the transaction, and you would end up creating a new primary market that replaces the secondary market, because of course there's no loss of quality -- a digital file is a digital file; it's just as good the thousandth time you play it -- that then you'd only temporarily continue to drive prices down to some other unsustainable level for a brief period of time, I think.

And then, whether it's a ReDigi or Amazon getting into this or iTunes, they'd make some

money off the transactions for a period of time and then either resell or get out of that business, and we'd see what happens.

But I think in the meantime, a lot of damage would probably be done to the producing side.

MR. GOLANT: Ben, what are your perspectives?

MR. SHEFFNER: Just like we were talking a few minutes ago about the transition from physical to intangible, or from ownership to access, so too are consumer expectations shifting and they're continuing to shift, and we are in a time of transition and probably will be for quite a while longer.

I'm reminded of one of my favorite quotes. It comes from a story which might even be true, which is back in the seventies, Zhou Enlai, the premier of China, was asked, "What do you think, Mr. Chairman, of the impact of the French revolution?"

And he said, "Too early to tell."

(Laughter)

MR. SHEFFNER: It's too early to tell what the impact of the digital revolution, of the shift from ownership to access is going to be.

I would say a couple things.

The notion that when a consumer sees the word "Buy" or "Purchase," that he or she automatically thinks that he or she is obtaining ownership of a physical item is not quite right. And I forget who I'm stealing this example from, because I've heard it at one of these other fora before.

But, for example, when you go on an airline website and you go through all the rigamarole and tell them where you want to go and what time, and you're finally ready to put in your credit card information and you're finally ready to hit the final button, which often says things like "Buy now," you know you're not actually buying a seat on a plane. What you're buying is the right to have that airline fly you from one place to another. You're not obtaining anything physically. But I think most people in common parlance would still

think you're buying something.

If you ask people when you go to a site to buy a movie or a book or a song, I think they pretty much understand that you're not actually buying the copyright. What you are doing is you're purchasing or buying a license which permits you to do certain things.

Now, I don't think there's going to be anyone on Earth who is going to sit here and defend, whether it's four or ten or forty pages of an end user license agreement. Very, very few of us actually read them, and I think there's always room for improvement and clarification and simplification.

It's hard. The world's a complicated place. Sometimes it requires complicated licenses to tell you exactly what people should be allowed to do or not do, and to explain exactly what they are buying. Again, there's room for clarification and simplification.

But I don't think that we should assume, again, that when people see the word "Buy," they

necessarily think they're buying, meaning obtaining a permanent physical object.

I'll leave it at that for now.

MR. GOLANT: Thanks.

Ed?

MR. SHEMS: Thank you.

When I see that "Buy" button, I actually read it as -- now that I know better, I read it as buy a license now.

What really needs to happen is the public needs to be educated in this new digital paradigm that when you're paying for a chicken, you don't get the whole farm.

So I think people just need to be educated to recognize that at this price, there's no way you could possibly be buying the rights to this song.

Thank you.

MR. GOLANT: Could I just add, who do you think should be the one educating: the content owner, the distributor, the public libraries?

MR. SHEMS: Who should be educated? The

consumers need to be educated.

MR. GOLANT: Educating the public about.

MR. SHEMS: Oh; boy. Kyle, could you...?

Yes, I think iTunes is a good start. Companies like them, the big companies, need to start 'fessing up that they're not actually selling you the song.

I don't know; I think people maybe weren't ready for this licensing paradigm until they -- what was it, Ford -- oh, God, I'm going to mess this up -- but didn't Ford say, "If I'd asked my customers what they wanted, they would have asked for a faster horse"?

Perhaps we didn't know what we wanted until Apple kind of came up with this great idea or whoever came up with this great licensing idea.

And so they and Amazon need to start to be the educators.

MR. GOLANT: Great; thanks.

Allan A.?

MR. ADLER: I think this issue about

licenses, I know that we often hear people's complaints about the density of the licenses, the obscurity of the terminology involved, the length of the license, the fact that licenses aren't individually negotiated, that they're mass-market licenses that apply across the board of regardless of who you are. But these are all things that over time have proven themselves as very important aspects of keeping transaction costs individually low.

Think about when you go to rent a car from Enterprise or Hertz. If every person at the counter was going to individually negotiate a license for them to be able to rent that car for that night, you'd have maybe two people a night who would be able to rent a car, because the transaction cost, the time involved in completing the transaction, would just become impossible to deal with.

So the fact of the matter is, we do have mass-market licenses. We eschew the notion of individual negotiation. It's true that that makes

people worry about what those licenses may contain, but we also have other mechanisms of commerce that deal with that.

We have the self-interest of the companies whose licenses these are. They know that they're being watched. They know that it's not going to take very much for someone, not untypically a competitor, to point out to the purchasing public that these people have very unreasonable licensing terms and they're snookering you; the terms are dishonest; the terms are deliberately vague.

There are reasons why, when we say that people, consumers, click through these agreements without reading them, and many of them surprisingly do so with a great deal of confidence that there's nothing in that agreement that is going to upset them in terms of whether they're acquiring what they wanted and whether or not it's going to have any kind of adverse impact on their experience with what they're acquiring.

The reason for that is simply experience. The reason for that is that they look

around and they see their neighbors doing it. The reason for that is that they see that these companies that are using these as mechanisms in order to be able to distribute their products and services in the marketplace are thriving.

All of which say to them, is, I don't really have to read every one of these licenses in order to have sufficient confidence in this particular consumer transaction for me to engage in it.

That is a very helpful cultural aspect of a free enterprise marketplace, because that keeps transaction costs down, it keeps the barriers to entry for competition down, it enables the marketplace to function far more smoothly than it ever could, if we wanted to ensure that every consumer's expectations, as different and diversified as they may be, could be satisfied in the marketplace because the government wants to make sure that consumer expectations are always met.

MR. GOLANT: Okay; good.

Let's move on to Keith.

MR. KUPFERSCHMID: Thank you.

Ben, I'll disagree with him on one point, which is he said that there was a customer expectation that if you buy a ticket to an airline, that it's going to take you from Point A to Point B. I think it's more of a hope or a prayer; I'm not so sure that's exactly an expectation.

(Laughter)

MR. KUPFERSCHMID: A lot of what people said here is, I think, spot on. We're in a difficult time now. There's a lot of new business models. The technology is changing very, very quickly. We're in flux.

So, yes, I think there is a confusion, consumers have confusion; and I don't know that that's necessarily with regard to consumer expectation, but I think there's a level of confusion.

But one of, I think, their expectations is, the reason they click "I agree" is they don't want to read through these long agreements. As Allan said, there's a certain expectation that

they're not signing off on anything that is going to dramatically or adversely affect them.

I know from our perspective, our publishers are constantly working to make their agreements shorter, if at all possible, and certainly more understandable. That doesn't mean that they are, but they're certainly trying to do that, also meeting whatever legal obligations that they have.

But once again, not to beat a dead horse but to reiterate what I said earlier, once again, this is not just a copyright problem at all. As a matter of fact, it's not even primarily a copyright problem. This is a commerce issue. This is a more generic consumer issue.

I know we all -- I'd be shocked if everyone here didn't have a credit card, and so you'll probably understand what I'm saying here.

I can't tell you how many times, maybe once a quarter or once a month I get this little notice from the credit card company saying, oh, we have new license terms, and here's the license, and

it's on this crinkled-up piece of paper that's folded like a million times, in font that I don't even think I could read five years ago; I certainly can't read now.

And do I read it? Does anybody else read it? I really doubt that.

And that's not copyright; that's not copyright at all. It's not just credit cards; it's rental cars are, as Allan mentioned. Your phone, gosh, I mean the license agreement for your phone --

And then just surfing the Internet. You have terms and conditions on different websites.

I haven't looked at Google's terms and conditions recently, but if you look at the terms and conditions of use of Google, at least some point in the past, I don't know how many people knew, but there's an age limitation. You have to be a certain age to use Google's service.

And I can tell you, my daughter came home once and said, "Oh, I have to do this search on Google and find this," and I knew at the time she was not of the age anyway. I don't know how many

people even realize that, either.

So none of these examples are copyright-related. This is just about the public, not even necessarily consumers, the public and how things have changed. How you just go about your everyday life has gotten a lot more complex and complicated.

So I'll just stop there. I just think ultimately, yes, this is an issue, but this is not a copyright issue.

MR. GOLANT: Thanks.

Alan, and then Kyle.

MR. HARRISON: I'll just add that with reference to the consumer expectation of whether it's a purchase or a license or a stream or a download, a lot of that falls on the content provider and how they choose to handle it for marketing purposes.

I know that when I use, whether it's Xfinity TV or Amazon Prime to watch a video, it's pretty clear to me that I'm streaming something; I'm not actually buying a copy of it, because if I wanted to access a copy of that to transfer it to

somebody else, I'd have to do a lot of stuff with my computer, which I'm not even sure I know how to do anymore, in order to get to that file in a form that somebody else could use.

So I don't think it's that innocent parties are making copies of product or content and distributing it to their friends, unaware that maybe the provider didn't want them to do that. I think it's pretty clear that somebody who tries to do that, there's a lot of hoops there you have to jump through technologically.

And I think it's not so much an issue that we need a new statute regarding that. I think there's enough there to create a knowledge in the user of what they're doing.

MR. GOLANT: Okay; thanks.

Kyle?

MR. COURTNEY: I'm usually not pro-Comcast, so this is a weird statement, because I have them at home as cable providers.

(Laughter)

MR. COURTNEY: But they have their

Xfinity streaming service, and it says -- for example, it said it for The Lego Movie when my niece was visiting the other day -- it said "Buy" and "Rent."

And that was the first time I had seen they actually were saying, when you're streaming this rental, you get it for 24 hours, and they actually used the word "Rent." "Buy" was a higher price. So I understood that I could buy that and have access to that and actually download it and all this other stuff. But that was the first time I've seen that.

So I think maybe there is some catching on that there is a difference between those two, and the price point reflects that. That's one thing.

The other thing is, yes, contract is a completely separate role from copyright; but the world is that you can contract your way right out of your copyrights.

And I think -- because I'm from a library, I'm going to pitch libraries again -- the idea is that, yes, sometimes we're forced to take

these e-book agreements because that's the only way we're going to get the books. We would like to have them on the shelves; we would like to keep them longer than the rental agreement which we agreed to in the license.

And that's where copyright ekes over a little bit. We had this fair sale doctrine; wouldn't it be nice if we could hold onto this type of stuff?

So I think there's an awareness that we're trying to build our mission based -- whether it's university or public, that we want access for everyone. Not everyone has Comcast, not everyone has Kindle, not everyone has access to these types of things.

I think there's always going to be -- vinyl sales are up, everyone. Vinyl sales of records are up right now. And I know that's kind of a weird thing, but there's going to be always some sort of demand for, A, the preservation of materials from our past, no matter what format they're in; and B, some sort of need to give accessibility to those

in socioeconomic positions that can't afford to have a Kindle and iPhone and everything else that we're talking now about now, and cable. So libraries serve that public interest.

That's all I wanted to say on that.

MR. GOLANT: Thanks, Kyle.

MR. SHEFFNER: Just quickly, having heard this so much today, but often when there's discussion about licensing, there's almost this assumption that licensing is a worse world than the physical-ownership world. In the olden days, when it was just all about ownership, you could do whatever you want with your object; but now there's all these rules that restrict you.

I want to push back on that and sort of stand up affirmatively for licensing and talk about some of the consumer benefits that you get from being in an ongoing license relationship versus the old ownership model. And I'll just give one kind of obvious example.

It used to be that when I would, say, buy a DVD or a Blu-ray disk, if I scratched it or I

lost it or I broke it, I was out of luck. The only other option I had was to go and buy a new one at Best Buy or Target or whatever, or maybe even go and buy a used one.

Well, today, if I have my movies that I've paid for access to stored in one of these cloud-based services, you know what? If my computer crashes or somehow the files get corrupted or something, a lot of these services, they let you redownload all this stuff for free. That's better than the olden days when my Blu-ray broke.

In the software world, I'm constantly being provided with updates, which wouldn't necessarily have happened in a world where there was simply a one-off purchase and then the parties just walked away and had no further relationship.

So I just don't want the impression to be left that the licensing world is sort of a worse world for consumers, which is about rights being taken away, and in a lot of circumstances they're provided with more benefits from this licensing relationship.

MR. MORRIS: Let me just follow up on that and kind of go back to something that I think Ed said earlier.

There's been a question if there is a need to have better consumer understanding of what's actually going on, who should do it, and I think Ed kind of pointed to the sites that have the "Buy" button on it.

I want to turn the question around and ask, do the content owners, do the copyright owners have a role enforcing that understanding? Because I would think that if you have twenty different places where I can go, quote, "buy" a song, but I'm really just getting a license --

MR. SHEFFNER: I'm sorry; you're buying a license.

MR. MORRIS: Right; but the word says "Buy"; it doesn't say "Buy a license."

But my question is, if I have twenty places like that, and I'm a business owner of one of those places, am I going to want to make it clear to consumers what's going on and thus perhaps lose

business to the other nineteen, while possibly the content owners could say, for all twenty at once, if you would like to convey a license, you need to make it clear to the buyer that they're only getting a license?

So I'm kind of asking the question as to, have you guys thought about trying to do that?

MR. ADLER: That's a very interesting question, John. I think it's a very important question.

When we talk about this issue, I'm always reminding my members that if they don't take on the responsibility of answering questions and providing information to consumers in the marketplace on their own, then they're going to risk the possibility that the Federal Trade Commission is going to do it for them, which none of them really want.

I think it's inappropriate for a market as dynamic as this is to have an agency come in and try to do the usual kind of static regulatory process with respect to what are the notices to be

given, what must be disclosed. I think it is incumbent upon the copyright owners and the distributors in the marketplace to do that.

But I do want to make an interesting point in response to your specific question.

Take the situation with e-books, for example. E-books is in a different world than, say, music and motion pictures with respect to digital distribution, because when you had a book in the print world -- the word "book" has no real status in terms of copyright law. A book is simply a form of a container for a literary work, which is what does have status in the world of copyright. It was just one kind of container. It actually for several hundred years was the most successful container, as compared to a scroll, for example, or others; okay?

The e-book is a different kind of container; okay? And it's one that you would think consumers would have gladly welcomed immediately with open arms because it adds so much functionality that couldn't possibly accompany the work in print form.

However, here's the difference. When the work was available in that print-form container, the consumer didn't need anything else or anyone else to be able to enjoy that work, to consume that work, to use that work as it was intended to be used.

But in the world of e-books, in the digital world, other players now play an important role in satisfying the consumer not only in terms of expectations but whether or not the consumer actually is going to get out of the experience what they hope to get out of it.

So, for example, in terms of e-books, e-books have had a slow penetration rate in terms of consumer adoption compared to many other forms of digital content, because the shift from the print work to the e-book has meant that now you have the involvement of the people who make the devices without which an e-book is not consumable.

You can't use an e-book, you can't read an e-book without a device. So you need some form of digital electronic device that allows you to

actually consume the e-book.

And in order to do that, not only do you have to have the device manufacturer set whatever standards and procedures they're going to have, but you also in this world have to have the software people decides what kind of software is going to be used with that digital device in order to render your e-book perceptible to you as a reader.

So that means, for example, that people may want to yell at Random House or Simon & Schuster or any other publisher with respect to the fact that they have waited for e-books to become essentially transparent, seamless, interoperable, in other words, completely consumer-friendly.

But that frankly is not within the remit of the publisher. That's a matter of the device manufacturer; that's a matter of the software producer. So if Adobe and Microsoft continue to engage in their proprietary war over who is going to dominate the world of e-book software, that's not a help to the consumer.

If Amazon and Apple produce devices that

have restrictions on whose books, whose e-books you can read using their devices, that's not within the remit of the publisher to change, either.

So people have to understand that there are complexities in this ecosystem that involve multiple parties. There's not just one person you go to, bring your complaint and expect them to respond to the consumer expectation.

And very often the ability of these folks to all get together and coordinate doesn't happen because they don't see it in their self-interest or because there are antitrust restrictions that prevent them from sitting down together quietly and trying to figure out how to resolve these problems on behalf of the consumer.

So in that instance, I would say, John, you're right, it probably would make more sense for the copyright owner to inform all the distributors that these are the types of things you need to make sure that our customers -- our customers, your customer and my customer -- know.

But whether or not they're going to feel

bound to follow that advice? It's uncertain.

MR. GOLANT: Thanks; thanks for that.

I just want you to know we have less than five minutes, so we're going to wrap up the answer to this question, and then we'll open it up to the audience out there as well as online.

So I think, David, you were --

MR. NEWHOFF: Yes. It was actually partly in answer to this question of educating the public, but also picking up on what Ben was saying.

I think, I suspect that by the time we educated the public on this issue of buying v. license that it may be a moot point, because, again, if you look at Spotify v. iTunes, Spotify has effectively -- I use that as a model -- has effectively decimated digital downloads already.

And I think that right now what we're faced with is trying to get that model right economically, which is not a doctrine issue, and it's quite possible that my kids and future generations aren't even going to download anything anymore. So it may or may not matter.

And one way in which these kind of models, as I think Ben was saying, actually protect consumers -- and it dovetails with what I've heard people say about, can you inherit these things? -- in theory, sure, in theory I can take all the digital files I have ever purchased, and I can put them on a hard drive and I can write "For the kids" and hand it to my kids in thirty years. And they'll say, "What do I do with this?"

Because it's first of all not going to plug into anything they're using; and even if it did, the codecs and algorithms used for those files may not matter anymore. They simply may not interact with the operating systems, whatever those things are at that point.

Which is one of the reasons why something like an Oyster for books or a Netflix for movies makes a great deal of sense for the consumer, because we no longer have to worry about it. Whatever the model is for streaming the stuff, through either a subscription or an ad-based service, that obviates the need for us to kind of

worry about, will I still be able to watch Avatar in thirty years?

Obviously, if there are things that matter to us, like I want to go out and buy a vinyl record of T. Rex, that's a different matter, then I will and I'll put it on my shelf and give it to my kids; and we have no problem. First sale already solves that.

But that's one way in which these models, I think, sort of address something that I don't think a lot of consumers think about when they're buying things. The probability of them working? Very, very low.

MR. GOLANT: Excellent.

Keith, you're the last one up.

MR. KUPFERSCHMID: I'll be brief.

In the interest of time, I agree with a lot of what David just said.

It sounded like your question, though, was also about, do these twenty companies or so get into a room and decide this is the best way we should put our contracts together or educate

consumers? And from an antitrust perspective, that obviously would be a concern and wouldn't happen.

But I do know that individual companies, whether you're talking about Intuit or Microsoft, and I gave you the example of Adobe earlier, you go to their website and they do attempt to explain various provisions of their license agreements. Whether consumers ever access that or read that or review that, I don't know.

I'll sort of just end: I'm not sure that consumers want to go through that. They want it now, they want it immediately, and probably don't want to review those or take the time to look at them. I'm being obviously all-inclusive here, but --

MR. MORRIS: Just to respond to that, it could be as simple as saying, instead of B-u-y, "Buy," have the button say "Buy a license."

And that might be enough to kind of really shift consumers to recognize, oh, my goodness, what am I buying? Oh, it's a license. Those that care will figure that out, and those that

do not, they'll just click and get the song they want. Or buy access; right.

MR. KUPFERSCHMID: Well, just speaking for the software industry, which has been licensed forever, because digital -- I'd be shocked if that wasn't the consumer expectation at this point.

MS. PERLMUTTER: It could be different for different sectors.

MR. SHEMS: But who would volunteer to be the first one to starting saying "Buy a license"?

MR. MORRIS: Right; which is why I was asking whether the content owners would try to start that. It's just a question I was trying to think through.

MR. SHEFFNER: I would just emphasize the point that Allan made earlier, which is that, at least on the motion picture side, the services that we've been talking about, they're the ones, the technology companies, whether it's Amazon or iTunes or any of the others, they're the ones that have the direct relationship with the public; they're the ones who are sort of writing the copy on the pages

where you pay for the thing that you're getting.

It's not my place to talk about the individual negotiations between the content owners and those distributors; but as Allan also pointed out, these are things that are not done in a group setting for very good antitrust reasons.

MR. GOLANT: Thanks.

Are there any questions from the audience? Step up to the plate. We have some time.

MS. PERLMUTTER: And identify yourself.

(Adjusting microphone.)

MR. MORRIS: See, in Nashville they knew how to turn the mikes on.

MR. HERLIHY: Thank you.

Hi; my name is David Herlihy, and I'm really interested in this idea of licensing and how it continues to evolve as people's expectations sort of evolve as well.

And so what John said, and even sort of what Kyle had mentioned, when you buy a movie from Comcast, if you leave Comcast, does that movie stay with you? And I know lawyers all the time, when

they're drafting copyright grants, they'll say, "in any medium hereafter devised" or whatever.

So could there be a consumer standard where, when you license this, you have the expectation that you'll be able to sort of have this certificate and move forward through anything in the future? Because a friend of mine bought a DVD in England and brought it back to play in the U.S., and it didn't play, and he was very upset "because I paid for this thing."

So I think if there could be some standard within the industry where you buy this, and any technology you're provided hereafter, now or that I move to, that I think would dovetail well into consumer expectations, that I bought this thing and I can bring it with me no matter where I go.

I'm just wondering if that's feasible, or is that just pie in the sky?

MR. GOLANT: Anyone want to comment?

MR. COURTNEY: We would like that in libraries, obviously, because we want to collect and preserve that movie from England that's probably not

here in the States and that people might want to access some day.

That would be fantastic for us, the idea of a library-focused, not-interfering-with-the-market exception to that type of thing. That would be great to preserve that kind of stuff. But I'm sure there's other opinions on that.

MR. GOLANT: Thanks.

Question over there?

MR. GOEBEL: Hi. My name is Alexander Goebel; I'm a researcher at the Berkman Center. I've got three quick questions-slash-comments.

Number one, David, perhaps you're not completely aware of it; in your last statement you made a very good pitch for the first sale doctrine. You mentioned that we cannot open files in a short amount of time, because like file formats has changed, software has changed.

So does that not remove the problems we had with first sale, where we have sort of wear and tear of digital files or a staleness of digital files? Number one.

Number two, it seems that this is a caution about the general acceptance that there isn't going to be a huge secondary market for digital goods because of subscription models. I feel it's completely correct for books and music, but it doesn't apply, in my experience or my knowledge, that much to software.

Yes, Adobe, Microsoft, they both have switched to subscription models; but if you consider iPhone apps, they are regular transactions, disregarding licensing or sale.

Also, if you consider business software, if you take a look on eBay right now, there is still a huge demand for Microsoft Windows 95.

Of course, these products, we don't have a problem there, because they were still sold on a disk; but if you buy business software nowadays online, what are you going to do in a few years when a software developer does not sell the product anymore?

And comment number three is in regard to empirical work. We have seen here some very strong

opinions regarding what people think or believe that they can do, and I've read and heard many experts in the field give opinions on one side or the other side, and they were always very strong opinions. But to my knowledge, there is no current major empirical work really asking this question.

So I started a few months ago working on this question in an empirical study that's going to start rather soon, but an initial pre-study has shown that the answer is by far not as clearcut.

People don't know what they do, and they don't care. When they buy a 99-cent song, they just want to listen to that song right away, and they don't care if it's a license or a sale or whatever.

But they care once they've got 10,000 songs, and they either die and somebody wants to use it, or they now use Spotify and they don't need the 10,000 songs they bought, licensed, whatever, and want to make use of these libraries.

MR. GOLANT: Any comments on that?

MR. NEWHOFF: Well, I guess I have to respond, since you singled me out.

(Laughter)

MR. GOEBEL: Sorry.

MR. NEWHOFF: If I understand your question correctly -- I hope I do -- what I was talking about is the fact that, let's say I've got a copy of the Marx Brothers' Duck Soup that I licensed from iTunes, and yes, I can put it on a hard drive and I can back it up, and it will play for as long as the H.264 codec will work.

And all I'm saying is that there's no guarantee, I have no reason to expect that twenty years from now that that codec will necessarily interface with anything.

I'm not sure how first sale doctrine helps. That's a technological challenge, and it's one we've been dealing with forever, but --

MR. GOEBEL: It's a technological challenge, but it shows that we also have, so to say, a wear and tear in digital goods.

Digital goods is not a perfect copy forever. We cannot open the file indefinitely.

MR. NEWHOFF: Fine. I would argue that

it's not wear and tear so much as just, it's binary, it either exists or doesn't, and whose responsibility is it to replace it?

MR. GOEBEL: It's digital staleness. It's a different way to describe it, but it's very comparable.

MR. NEWHOFF: It won't exist anymore, from my perspective as a consumer. So who replaces it at that point?

In other words, I bought it from iTunes for ten bucks or whatever last week. Twenty years from now, it's about to become an obsolete file, not to anybody's fault per se; it's just changes in the dynamics.

By what means do I replace that file? Is it iTunes' responsibility to then give me a new version, assuming Apple is still in business?

MR. GOEBEL: It's nobody's responsibility. You have the same risk as if you buy a CD or a book.

MR. NEWHOFF: Right. So how does first sale help? And maybe I'm --

MR. COURTNEY: So what happens is, ten years from now there's an exception, and it's stored in Berkman Center at the Harvard Law School library. You can come there and research it and access that file again and see what it was.

(Laughter)

MR. GOEBEL: No, not necessarily --

MR. COURTNEY: It's got to be stored somewhere.

MR. ADLER: I would suggest to you that it's actually the opposite. I mean, yes, you've demonstrated, for example, on those comments that we can't be certain that five years from now that digital file is going to operate the way it's supposed to.

So does that mean that four years from now, before ReDigi launches its business, before the patents of Amazon and Apple are activated to launch their resale businesses, are we going to be looking for the equivalent of a digital lemon law, for example, as they have with respect to used-car purchases?

I mean, when you go to a yard sale and somebody is selling their gently used CDs for a dollar, yes, you look at it, maybe you'll see there's a scratch on it, maybe you won't, but you're pretty confident that that's not going to play like a brand-new CD; okay?

But if you're going to want there to be an actual digital first sale doctrine that authorizes the creation of these marketplaces, then what consumer protections are you going to offer along with that?

Because people aren't going to be able to look at a digital file and determine whether it will operate on the equipment that they have, whether it's incomplete as a digital file, if it's software of some sort. Where will the consumer protections be for such a market?

MR. GOEBEL: We don't have these protections for books, and we don't need to have these protections for --

MR. ADLER: Because books are physical objects, and the purchaser's risk is limited by the

fact that they can actually examine the physical book and they can make a judgment about its condition.

If it has the key final chapter ripped out of it, I'm probably not going to buy the book.

MR. GOLANT: I don't mean to cut you short, but we have one more question before we conclude our session.

MS. HEROUX: Thank you.

I'm Marlene Heroux, consumer and also Massachusetts Board of Library Commissioners.

In putting another plug in for libraries, I've heard a lot of the concepts today, education, but there's also literacy, poverty, bandwidth.

Many people go to libraries, and I think this applies to especially public libraries, because they may not have the money to buy things that for us might not be a big deal, but for the people who are having trouble.

Also, they may live in a community that doesn't have the bandwidth to be able to download,

look at the material, especially as things have gotten more complicated the way information is presented in PDF files, full of illustrations. I remember for a while Kindle wasn't in color.

The concept that everything on the Internet is free, I think we're finally moving away from that because we are talking about "Buy" buttons, so that may be good.

But before you throw in libraries as a secondary market, I think these are all really important things to consider.

Thank you.

MR. GOLANT: Thanks for your comment.

One last one.

MR. LAPTER: And one online as well.

MR. GOLANT: And one online? Okay. One here, one there, and we're done.

MR. SUKHIA: Hi. My name is Rohi Sukhia; I run a business called Tradeloop, which is a secondary marketplace for used IT hardware.

This discussion has been mostly about pure digital goods, but I don't see the difference

between digital goods and real goods, because as soon as you put a transistor in it and you put a zero or a one, it's now a digital good.

And the manufacturers of computer hardware are thwarting the used market by placing restrictions on the resale in the software, rendering new hardware worthless when it's sold if you don't have the right licensing.

So how does that affect this? And if you think about computers, the economic impact on dealers as well as the consumers who can't buy used computing goods, but it's also the impact on the EWay stream, which needs to be an efficient marketplace with tens of millions of tons of used IT gear that needs to be processed in a logistically efficient manner. The restrictions on the sale of software embedded in the hardware makes it less efficient.

And if you think about where it goes from computers, like a toaster, if you buy on the Internet a toaster; now, can you not resell your toaster?

And what about cars? Cars, like if you could buy a used Prius, it's basically a computer on wheels. Ford or Toyota, are they going to be allowed to disable the resale of that vehicle because you don't have the right to resell that software? Will they not issue bug patches for the Prius? So this seems to be a bigger issue than just MP3s.

MR. GOLANT: Thanks.

Keith, I think you have a comment.

MR. KUPFERSCHMID: Yes, that is a bigger issue than first sale, too; right? Because let's not forget, there are other provisions in the copyright law, things like copyright misuse, which have come into play in somewhat similar circumstances of which you're talking about.

There's also a provision in Section 109 -- I can't remember exactly what the number of the provision is right now -- that talks about software that is embedded in hardware that cannot be copied, and that you can rent that hardware without restriction.

Now, maybe that needs to be looked at a little bit, to decide whether that needs to apply, not just to rental, but also to sale.

But putting that aside, there is that sort of notion there that software embedded in the key, that software cannot be copied, that doesn't necessarily mean that the software company is now obligated to provide support for that software, nor should they be, because now they engaged in an agreement with a particular consumer, and now they have a totally different consumer. They might have very different demands. They might be using the hardware or software in a way that was not foreseen by the software company.

MR. GOLANT: Alain, is there an online comment?

Thanks for that; sorry.

MR. LAPTER: One short comment in just two parts.

Part one, consumers have barriers in making choices, and the current market is not free for consumers to make those choices.

Second part, not meant to be a downer, I assume, persons representing industries in their day jobs really can't credibly speak as a consumer on a panel.

(Laughter)

MR. ADLER: First of all, did that person identify what those barriers were?

MR. LAPTER: They didn't. They did not.

MR. GOEBEL: Panel participation actually was the barrier.

(Laughter)

MR. ADLER: Did that person -- I don't know why they would suppose that people sitting on this panel or people passing through this building, whatever their occupations are, aren't consumers in the same way as other consumers.

There is a situation that we have always dealt with, and always will deal with, which is the uneven level of sophistication and knowledge and information that consumers in their individual capacities have when they're making a particular decision.

That's why the marketplace is so diverse, and that is also one of the reasons why the value of licensing and providing as many options and choices in a given transaction is valuable.

MS. PERLMUTTER: And I would just add that obviously any comments that are made by people on the panel about their experience as consumers only relate to their own personal experiences as consumers, and we don't take that as being representative of any larger group of consumers. So if that helps.

Well, I wanted to bring us to a close by thanking everyone for coming today, for joining virtually, and for taking part in the roundtable.

I do have to say I personally found this to be an extremely substantive and thoughtful and serious set of conversations. I very much appreciated that.

And also, I think this was a very valuable opportunity for us all to hear from the library and publishing sectors in addition to hearing more from the music and motion picture

sectors, which we started to hear from in Nashville as well.

And I wanted to give a special thanks to the stellar USPTO staff who's here helping us: Hollis Robinson, Linda Taylor and Angel Jenkins.

(Applause)

MS. PERLMUTTER: And also to thank Amar Ashar and Carey Andersen from the Berkman Center for coordinating the event and letting us use this really beautiful space.

A transcript of this hearing for those who didn't take really careful notes will be posted on both the USPTO and the NTIA websites sometime in the next few weeks, and there will also be a recording of the webcast on both websites.

So just future events and announcements: Our final two roundtables on these issues will be held in California at the end of July, so they will be July 29 in Los Angeles at the Loyola Law School, and July 30 in Berkeley at the Berkeley Law School, Boalt Hall.

And there's still time for requests to

participate in or observe the roundtables, so please tell your friends and colleagues that they should sign up; we want to hear from as many people as possible.

And then just to say as part of this whole Green Paper process, we have various other ongoing activities as well. We're well in the middle of the Multistakeholder Forum on Improving the Operation of the DMCA Notice and Takedown System.

So for those of you who want to catch up on what's been happening with those activities or hear more about future ones as they come up, you can sign up for our copyright alerts. We send out regular alerts to those who signed up. And you can find if you go to the USPTO website, there's a page on copyright issues, and there's a big red button that is very hard to miss. So we encourage you to do that as well.

MR. ADLER: Did you say "buy" or "purchase"?

(Laughter)

MS. PERLMUTTER: I think it might say "learn" or "speak" or something like that.

So we very much appreciate your all participating, and we look forward to seeing you at future events. Thank you.

(Applause)

(2:51 p.m.)