DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE

GREEN PAPER ROUNDTABLE ON REMIXES,
FIRST SALE DOCTRINE, AND STATUTORY DAMAGES

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MS. PERLMUTTER: Good morning, everyone.

Welcome to the fourth and final one of our series of roundtables on digital copyright policy issues. So we are delighted to be here at Berkeley law school and I particularly wanted to thank the Berkeley Center for Law and Technology for hosting us here today. And welcome to all of you who are joining us by webcast.

My name is Shira Perlmutter. I'm the chief policy officer of the US Patent and Trademark Office. And this roundtable is part of the process that was started by the Department of Commerce's internet policy task force through last year's Green Paper on copyright policy, creativity and innovation in the digital economy. And in the Green Paper we identified a number of policy issues on which the task force would identify, would undertake further work, and it is those policy issues, three issues that are the subject of today's roundtable.

The Green Paper work for the department's internet policy task force has been led by the Patent and Trademark Office together with the National Telecommunications and Information Administration, the NTIA, and we've also been consulting with the copyright office.

So we started in December with a full-day
public meeting in Washington which addressed a number
of issues including the three we will address today.
We received two sets of written comments from a wide
range of stakeholders and we had three roundtables so
far. And through the roundtables our goal is to really
deepen and broaden the discussion.

We are traveling to four locations around the
country that are particular centers of copyright
activity. So our other meetings have been in
Nashville, in Cambridge, Massachusetts and in Los
Angeles. And our goal is to hear from a wide variety
of stakeholders. And of course based on the locations,
the input we're hearing is a bit different in each
location as we engage stakeholders from different
copyright communities and industries.

So today we're here at Berkeley, which is, of
course, a center for the tech industry in particular,
to hear from all of you. And we're very pleased that
we were able to accommodate everyone to sit on panels
who wanted to participate today.

So the goal of these roundtables is to have
interactive discussions rather than listen to prepared
presentations. So it's not like a congressional
hearing. And we ask that you -- we'll throw out a
number of questions for discussion and we ask that
everyone make their comments responsive to the
questions and keep the comments relatively short so
that we can have active engagement by everyone. And
what we've found is particularly helpful in our
experience so far with three other roundtables is to
have a lot of back and forth in people responding to
each other.

So we will start with -- make sure I have this
correct. Remixes. We're doing a slightly different
orders in different places. So we'll start today with
the issue of the legal framework for the creation of
remixes or mashups as we were told yesterday we should
call them. And in the Green Paper we asked whether or
not the creation of these types of works is being
unacceptably impeded by legal uncertainty, and if so,
if there is a need for any new approaches.

We will then have a coffee break and the next
topic will be -- doublecheck -- the First Sale
Doctrine. That issue is really the relevance and scope
of the First Sale Doctrine in the digital environment.

And what we're trying to do is to dig deeper
than just having a debate over whether the answer is no
or yes, the doctrine should or shouldn't apply to
digital transmissions. We asked in the Green Paper
whether there's a way to preserve the benefits of that
doctrine in the analogue world when we move into the
digital world. So what are those benefits. Will the
market develop to provide them or has it done so. And
if so, how. And if not, what types of solutions might
be appropriate.

And then after the lunch break we will resume
with our final panel, which is the appropriate
calibration of statutory damages. And what we're
trying to do is look at how statutory damages are
calculated in two particular contexts. One is
secondary liability claims against mass online services
that have perhaps hundred of thousands of different
works being made available to the public. And second,
the situation of private individuals who are engaged in
file sharing.

So what we would ask is that you focus on
these specifics issues rather than have a discussion of
the value or application of statutory damages in
general. So those are our topics.

In terms of some logistics, we want to make
sure everyone has an opportunity to make comments
whether they're in the room or online. And so there
will be time allotted for comments from the audience
either physically or online after each panel. And so
for those of you who are here, if you have a comment,
please go to one of the microphones in the aisle and start by identifying yourself. For those of you who are watching the webcast, please call 800-369-3319 and that will get you into our phone bridge. The access code is 1981439. And that number and code are on the agenda posted on the copyright page of our website, the USPTO website if you didn't get that down.

One thing that's important when you do call in, if you want to speak, you need to press star one for the operator. I gathered yesterday some people missed that step. And then once the operator announces you, you'll be able to state your comment.

So we had what I have to say were really terrific discussions at the Nashville and Cambridge and Los Angeles roundtables with very helpful ideas and constructive dialogues.

Someone asked me who had been involved in an earlier stage of writing the Green Paper whether we were hearing different things at each roundtable or it was just very repetitive and I said no, actually we've learned new and different things at each one. I think we've made progress in understanding the full range of perspectives on these issues. And I think we all look forward to learning more from today's conversation.

So I now would like to give the floor to John
Morris, associate administrator and director of internet policy at NTIA.

MR. MORRIS: Great. Thanks very much, Shira, and I just want to join Shira and PTO in welcoming you to the fourth in the series of our copyright roundtables.

NTIA, like PTO, is an agency housed within the U.S. Department of Commerce. And just as PTO is the lead agency within the executive branch on intellectual property issues, NTIA is the lead agency in the executive branch on internet and communications policy issues. And we have been very pleased to work with PTO on the Green Paper and then on the efforts and policy initiatives after the Green Paper.

And the Green Paper espoused a number of critical goals, and most importantly the goals of ensuring a meaningful copyright system that continues to provide necessary incentives for creative expression and the other goal of preserving technology innovation. And those goals are two goals that we think can and must be achieved in tandem.

So the conversations we've had around the country have been extremely helpful and I look forward to another good day of conversation. So I think I'm turning it over to Ann who will lead us through this
MS. CHAITOVITZ: Thank you. Thank you for participating in our panel discussion today, the first panel is on remixes. 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.

The Green Paper defines the term remixes, and I'm going to read this, as creative new works produced through changing and combining portions of existing works. We heard yesterday that some people like to call that mashups, but that's what we're talking about here today.

These types of user-generated content are a hallmark of today's internet and particularly on video sharing sites. But because remixes typically rely on copyrighted works as source material, often using portions of multiple different works, they can raise daunting legal and licensing issues. There may be legal uncertainty given the fact-specific balancing required by fair use and the fact that licenses may not always be available or easily available.

So I will start with questions, but first I would like you all to introduce yourself and as I ask questions, if you have an answer, to turn your card up
this way and I'll try to remember the order but
notoriously I'll get the first two and then I'll forget
everybody else. So I'll try my best. Oh, and your mic
is always live. So if you're whispering something,
it's being transcribed on the webcast. So you're on
notice.

So, Peter, do you want to start introducing
yourself.

MR. MENELL: Peter Menell. I'm a professor at
the University of California at Berkeley and I work on
both technology side issues and content side issues.

MS. McSHERRY: My name is Corynne McSherry.
I'm the intellectual property director for the
Electronic Frontier Foundation.

MS. RAVAS: I'm Tammy Ravas. I'm the visual
and performing arts librarian at the University of
Montana. And I'm here today as a chair of the
legislation committee of the Music Library Association.

MS. DARE: I'm Tiki Dare. I'm a managing
counsel in trademark and copyright at Oracle.

MR. ENGSTROM: I'm Evan Engstrom, policy
director at Engine Advocacy which is a nonprofit
research and advocacy organization that supports
startups through promoting policies and legislation
that foster innovation and entrepreneurship.
MR. GIVEN: My name is David Given. I'm an attorney in San Francisco and I have spent most if not all of my career representing clients in the creative arts.

MS. CHAITOVITZ: Thank you. So for our first question today, many of our commenters, because we've received comments on this issue, and both owners and users point to the large number of remixes available online and conclude that fair use combined with marketplace mechanisms function. So I was wondering if you agree and if current case law is interpreting fair use handling the issues appropriately. And if the creation of remixes is being unacceptably impeded by legal uncertainty or if fair use and licensing is working.

Okay. Again, I saw Peter and then David and then everyone will go in order of where you're sitting.

MR. MENELL: There's no question that there's a tremendous amount of energy and passion and new creativity in this space. I would not say, however, that it is at sort of a social optimum in the sense that we have clarity about the rules or we have very effective channeling of the money that comes in to the people who are responsible for creating different aspects of these new works.
And so the way I would capture it, and I've listened in on some of the prior hearings and have been reading the materials, I think there's a very sharp divide between what I'll call the traditional music copyright interest and the digerati, the sort of tech user-generated content crowd. On.

The traditional crowd, I think there's a view that most mashups require license, that artists, publishers and record labels should have and do have control over how their works are used. That copyright is more in the nature of a property right. And they would look to the Bridgeport case, the 6th Circuit case, as their starting point.

On the other side I think there's a view that just about all remix is fair use and that we ought not to be very concerned about what's going on. This helps to promote the works that are being remixed. That the first amendment is the main place to look for trying to resolve these issues. And I would say that the Cariou case out of the 2nd Circuit is a case they would cite.

And so it's hard to imagine a more polarized view of this issue. And I would say coming, and hopefully we'll have more time during the panel to look at alternatives or other ideas. I would say that this is a collision course. It's highly dependent on which
sort of test cases will get presented and where they are presented. And I don't think that's a good foundation for a copyright system that's trying to promote all aspects of the creativity that we're talking about. We want to have a very, I think, well functioning system across both the people who are creating the underlying works and the people who are remixing.

Just to give one example, if a DJ remix artist were coming up today, they would face a stark choice. They could try to license all of the things they are using. And as Peter DiCola and Kembrew McLeod's 2011 book, Creative License, talks about, it would be near impossible to do that, to do the kind of very intensive mashing up that's going on.

The alternative would be to just do it, release it, earn money in live performance. And that is where I see most of that marketplace going. And one would have to, I think, say that that's not feeding all of the different contributors to that musical genre.

MS. CHAITOVITZ: Thank you.

MR. GIVEN: I'm reminded of the old saw that what is old is new again. In my experience, and I've been doing legal work in the creative arts for coming up on 25 years now, mashups, remixes, sampling have
been around for years. Sampling has been around since at least the early '90s with the advent of and emergence of hip hop music. Mashups go all the way back to a movement in the early '50s, early '60s, if I'm not mistaken.

And in answer to your question, I think the system works. I don't perceive in my own practice and in my own experience any disconnect between new and emerging artists who have a wish or a desire to use pre-existing recordings or pre-existing songs to go out and get permission to do so.

Furthermore, I'm not aware of any empirical evidence, any academically vetted study or survey that suggests in direct answer to this task force question, is creativity being impinged. That, in fact, creativity is being impinged.

Moreover, I would suggest, respectfully, that the notion that we could measure creativity, that is, an increase or decrease in creativity, in any meaningful, empirical manner is highly problematic. It's problematic primarily because there are two significant data points in relation to that. One is quantity, which certainly can be measured. But the other is quality. Okay. And I'd like to believe that people here on this panel and people in the audience
and on the web today can tell the difference between an
Epic Fail video on YouTube and a movie about Epic Fail,
for instance, Blade Runner, which is about dystopia, or
more to the point, Chinatown, which is about actual
dystopia in the real world.

It's very, very difficult, it seems to me, to
try to answer this task force question in a meaningful
empirically valid way. And I would point out, I
actually pulled the Green Paper last night and read it.
The section on remixes is rather short, but the answer
I think is embodied in the Green Paper because it says,
I think it notes that there is today a healthy level of
production.

So the baseline inquiry begins with the
proposition, it seems to me, that we're okay on the
issue of creativity, creativity writ large. And that
if we're going to make a change to the current business
and legal regime, it seems to me the burden is very
squarely on those who are advocating that position to
come with evidence to suggest that that level of
production is at risk, is being impeded, is being
lessened in some meaningful way.

Now, that portion of the Green Paper goes on
to say clear legal options might, might result in even
more valuable creativity. Again, there's not a clear
suggestion that clear legal options would result in
more valuable creativity. Again, it seems to me that
the burden is on those who are proposing a change to
the current legal and business regime to come forward
with a showing that that would, in fact, occur.

MS. CHAITOVITZ: Thank you. Corynne, do you
want to go and we'll just go down to you.

MS. McSHERRY: Our problem just came back to
the original question. I think Fair Use is actually
doing a pretty decent job in and of itself. I think
the Fair Use Doctrine is flexible, robust. Yes, there
can be uncertainty, but that's what happens when you
have a flexible and robust fair use doctrine and I
think on -- on balance, that flexibility is far more
valuable than the downside. The benefits far outweigh
the costs of that.

So I would suggest that the problem for remix,
to the extent that there is one, actually lies
elsewhere. It is not fair use. Fair use is fine.

It's elsewhere in the sort of the legal environment for
remix. So I'll just flag two things. One is that the
reason that we don't have more case law development I
think in fair use with respect to remix is because
many, many remix artists, and I know this from my own
experience counseling folks, if you talk to them and
you say hey, you're suffering a legal threat right now,
I will help you fight back, I will, in fact, represent
you for free. Not everybody will do that. I'll
represent you for free if you're willing to fight back.

But I have to tell them of the downside risk.
And this gets into what we're going to talk about later
today so I will be brief, but the issue for the folks
that I've talked to is they are afraid to step out and
defend themselves and go to court to defend their
remixes if they get a legal threat because they're
worried about statutory damages because I have to tell
them that I think you will win. I will promise I will
represent you, but I have to tell you there is this
possibility that you could lose. If you lose, here's
your downside risk. Anywhere between $750 up to
$150,000 per work. That's very scary for regular
people.

So I think that that's one problem is that
we're actually not getting as much case law development
with respect to fair use in remix as we might if a
noncommercial -- folks without vast resources were able
and willing to go to court and develop the case law.

The other aspect of the legal environment that
I think we have to acknowledge at least as we talk
about the legal environment for remix is the issue of
platforms. Remixes go out into the world via platforms, via Vimeo, YouTube, et cetera. All the different web hosts that host that content. So part of the legal environment for remix is what is the legal environment for those hosts.

And fortunately I think on balance the case law has gone well with respect to protecting those hosting services. But I think talking about the legal environment for remix and not acknowledging the legal environment for platforms is kind of missing a big part of the point.

MS. CHAITOVITZ: Thank you.

MS. RAVAS: I'm looking at this particular problem from the standpoint of being a music librarian as well as being -- getting into the head of professors or schoolteachers who teach music. So for me, these mashups, they demonstrate -- they can demonstrate controversies, they can demonstrate social commentary. They have a lot of different purposes. And I can bring up several examples here and I feel that fair use is working in their favor.

So, for instance, a few artists here, Lady Gaga, when she -- when her song Born This Way came out, many people were creating mashups comparing that particular work to Madonna's Express Yourself. They're
both in the same key, they use very similar chord
progressions, and the controversy was that Lady Gaga
was perhaps stealing Madonna's music.

   Another example would be Robin Thicke's
Blurred Lines. Many people compared that particular
song to Marvin Gaye's Got To Give It Up and Prince's
Kiss. And I know that legal action was being thought
of by Marvin Gaye's family against Robin Thicke, but
I'm not exactly sure how that was resolved.

   Another one would be Wrecking Ball by Miley
Cyrus. There are several mashups comparing Miley
Cyrus' Wrecking Ball to Sinead O'Connor's Nothing
Compares To You. Again, they're both in the same key,
have very, very similar chord progressions, and very
skilled DJs have been able to show just how similar
they truly are.

   Also, getting into I believe the two
particular artists who have been discussed in previous
roundtables, Girl Talk. It's interesting, I've
listened to some of Gregg Gillis, that's the name of
the artist who goes by the stage name Girl Talk. He
cites a Acuff Rose versus Campbell as the justification
for his works and he feels that his own mashups are
creations of social commentary on pop culture. And
there's also the gray album by Danger Mouse where he
remixed the Beatles' White Album and Jay-Z's Black Album.

So, in essence, how do music libraries handle this particular situation when it comes to their missions of preserving the cultural record. It's a very gray area, I believe, for us. And for one thing, you know, we can try to write to the artist to see if they'd be willing to work with us somehow. And even that gets kind of be a bit of a gray area.

I think another, a better way to put this would be into an educational perspective. Let's say that I was teaching a popular music class. These Mashups would be a topic for me to cover, these artists' works. These would be my curricular material and the students' primary resources for their research. And as I'm sure many people on this panel and audience know, YouTube videos and music mashups in downloadable or streaming formats, they can be very ephemeral. And I feel that music libraries are in the best position to be preserving these kinds of materials for the purpose of research and scholarship. But there can be some legal uncertainties.

I still feel that fair use is working in our favor. But, you know, how is it that we as librarians and as well as educators keep these kinds of works
available for future generations to come.

MS. CHAITOVITZ: Thank you.

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

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

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

So, for example, it would be delightful to me if every song ever recorded were available through either iTunes or the Amazon library and you could get a sync license for just a dollar more because that would -- you know, that would actually make all of this use that we're making -- no one understands a sync license unless they're probably in this room or a copyright attorney or very dedicated to music.

But it seems like there are some market mechanisms that need to evolve, but I think they will evolve on their own. And again, I don't think a legislative solution is what we need. But those are some areas where there are gaps and that's where uncertainty is created.

I do see a tremendous amount of creativity going on and I certainly acknowledge that it would be very difficult to measure. But I am occasionally tempted to want more licensing in this area because of the zero value problem that fair use generates instead of looking for a license.

And one of the problems that I think, you know, the market mechanisms and where we evolutionarily need to get to is if you did a compulsory license, for example, and you charge 9 cents or 18 cents for things,
what if you're the creator of this amazing mashup or remix and you have works of 50 different artists in your three-minute YouTube video, and you would like in some way to compensate or credit the artist who contributed to your work, and you suddenly get five million hits. If you charged per hit, you would be dead in the water. There's no way.

It seems like we can only create a licensing fee or something like that. A compulsory license scenario would only work if you can track the license to the value that was being generated. I mean, certainly when someone makes commercial, you know, when someone has commercial success or makes money, it seems that's the only time you would start paying licensing fees probably.

But that's one of those problems that, again, the platforms that we use to distribute these creative works would need to be considered. That's why I think the market should do it. And I don't think we're ripe at this point for a legislative solution to come in. Obviously when we created compulsory license in the music industry, all of those structures and the social and contractual relationships around them had been developed for a while and, you know, I don't feel that this is -- this scenario is ripe yet for a very obvious
solution.

I think we're innovating so fast and our market responses and our platforms, we haven't had YouTube all that long. We've only really had the internet since 1995. And we have had YouTube for a much shorter time than that. But these -- you know, and, again, as David pointed out, these are old instincts to put things together, to put your own stamp on it, to, you know, to be inspired by others and then turn that inspiration around.

But I do see -- the zero value problem is the one that tugs at me a little bit when you have a fair use scenario. But where obviously value is contributed and where a commercial success is occurring on the other end.

MS. CHAITOVITZ: Thank you.
Evan.

MR. ENGSTROM: I think it's important to note from the outset that the definition provided of a remix, which I'm not going to be able to quote from memory, but the creative combination of existing materials is really a broad definition of innovation and creativity writ large, it's not just remixes. This is what creativity is. So it's hugely important culturally and as I'll get into economically to
preserve this attitude towards creation.

While there is a great fair use framework in this country that provides a lot of flexibility, which is necessary, particularly in the technology space where I'm speaking from because, of course, technology is going to always evolve faster than any bright line rule you're going to ever put down. But the uncertainty does cause other problems. It's a double-edged sword. Anytime you have uncertainty, you're disincentivizing risk taking.

And I think Corynne's point about platforms being just as important in this world is well taken. While the proliferation of remixes shows that it is popular, it does represent in a lot of people's minds a creative expression that we need to encourage.

There had been relatively few platforms for distributing this material when you think about kind of the history of content distribution. And while there is a dearth of case law really flushing out fair use, and as Peter pointed out, there have been some pretty high profile cases dealing with content distribution systems, some of which have been good, some of which have been bad.

But pretty much any content distribution system you can imagine for pushing this content out has
come under some legal challenge. And I think it's important that, we're going to get into later about the damages point of it, that when you're dealing with how to get this stuff out to the market, the uncertainty inherent in the system isn’t amplified by crazy damages that will sink even the most well-funded startup.

It's great that YouTube has been this platform distribution, but if they didn't have the resources to fight the infringement dispute, we may not have YouTube as a content distribution system and we'd have a lot fewer remixes as a result.

And then taking a step back, we really need to bear in mind here that the culture that remix represents, this idea of repurposing and repackaging creative materials in new innovative ways is important for innovation throughout our economy. This is what startups do, it's this risk-taking enterprise, that yeah, there might be a distinction between a derivative use and a transformative use and whether that's legal or not.

It's blurry, but we want people to be going out and taking risks and pushing up to that line because that's where we get innovation. However you feel about Napster, peer-to-peer technologies are important. And it's walking up to that line and
creating peer-to-peer technologies that has created a huge number of jobs and driven innovation in the economy.

So it's really important that, and we'll talk about later, that we maintain a sensible framework for statutory damages when we're keeping this in mind just so we have the resources and framework to distribute this important creative material.

MS. CHAITOVITZ: Thank you. I saw Peter and then Corynne and then David.

MR. MENELL: I think I'm going to be alone in this view, but I will say that I think that a legislative solution has a lot to offer as we look out into the crystal ball and think about how copyright can deal with these evolving technologies and creative opportunities. So how do I get to that position.

Well, I see the copyright system as very much in turmoil right now. This is one of the manifestations, but there are many others, enforcement issues and uncertainties abound. We live in incredible uncertainty. Lawyers have a hard time advising clients. As Corynne has suggested, clients are not willing to take risks. And so we can look out there and see a tremendous amount of activity, but it's all done in a way that I think is contrary to an organized
market setting. It's done with tremendous I would say just risk taking by all parts of the ecosystem.

Now, if I were to step back from this and say how might we look at a longer term perspective, I think the goal should be to make copyright work for the internet slash post Napster generations. That's both the users and the creators. That kids growing up today ought to look at the copyright system and say that has appeal to me. I'd like to participate in that system as both a user and a creator.

And for the DJ I talked about earlier, I think they would feel the copyright system is something to be avoided at all costs. And that's unhealthy. I think that legislation can provide an infrastructure that could be very productive in certain areas.

So although this panel is talking about remix generally, at least the title is, I see remix as extending from appropriation art, to fan fiction, to music mashups. I'm only talking about the music mashup piece and I think that's pretty much what we've all been talking about.

But focusing only on that piece, imagine a system building on what our colleague from Oracle mentioned a compulsory license. What could that look like.
Well, the proposal that I have made in an article, and it's only at a very rough stage, would be to take the framework of the compulsory license we have now, which is 9.1 cents for a standard length song for copy, and to double that, to do 9.1 cents to the musical composition owners, all included, and 9.1 cents to the recording artist. And to use some technology, I'll use Shazam as an example, and create an algorithm that could, you feed a song in, and it would spit out. We would need the universal database, which is another issue on your list, but I would like to have that as well. You feed this in and it would spit out based on the algorithm. Now, the algorithm might say if it's less than so many seconds, then we wouldn't count that, we might deal with loops a little differently.

These are all details to be worked out. I realize devils are in details, but imagine the system, so now a new creative artist comes along and they want to do remix. They now could do it, wouldn't have to spend a lot on lawyers. And then you could create a legal regime that would enable money to flow to all of those people who have contributed pieces of the remix. And as a fan of remix or mashup art, I would like money to flow to the artist who remixes as well as the underlying artist. I think fans would embrace the
The other thing is in tomorrow's music world, music is not going to come through sale of records. And so this kind of system would create a tracking system. So as those works get onto the Spotify services and they're not on there very much and we want to channel people into those services, then money could flow seamlessly among all of those different players.

We could also as part of this put in an exclusion of statutory damages for people who take this path. I don't expect Gregg Gillis to take this path. I think he's made it clear he thinks everything he does is fair use, but I'll note that in one of the work that I enjoy of his, he has pretty much about one minute of a Beyonce song without really very much else going on. And I find that a little surprising, in fact, I was shocked when I heard it because it just kept going, going, going. Most of his work is much shorter clips. But the thing is we could create a mechanism, it would not undermine the current rap and hip hop marketplaces because mashups are different. They are intensively mashed up works. In which we would say here's this new area for people who want to do it. Now, if no one shows up, well, we've wasted legislative effort. But if people show up in droves
and it can work its way into the system, we've created an entry ramp for a lot of new artists. We've created a way for old artists to be compensated when their works are part of this new culture. We create the potential for safe harbors for a lot of these intermediaries that would like to host this stuff. And I think we could create a very interesting onramp into this new world.

MS. McSHERRY: Okay. So two points. One is -- so here's my problem with that idea and actually sort of generally with the idea of trying to create some sort of licensing solution, even just taking this example of music mashup. The whole point of fair use is if it's fair use, you don't need a license. You don't need permission. You don't need to seek permission. You don't have to sign up for a license. You don't have to do any of that. And I worry very much that if we create a licensing regime, then we create also an expectation that everybody will participate in that regime even if what they are doing actually they don't need a license for in the first place. So that's one problem.

And then there's a related problem which is that, you know, when I think about a remix community, I don't think primarily actually of commercial creators.
Remix artists range from 13-year-old girls in their bedrooms creating works, creating works of fiction, fan fiction and so on, to commercial artists. They include, you know, moms, dads, ordinary people who are just engaging in noncommercial creativity. Those people are not going to be interested in participating in a licensing regime and they shouldn't have to participate in a licensing regime when all they're doing is engaging in purely noncommercial uses creating works that they're just sharing with their friends and their fans and maybe audiences. They probably are going to have a hard time being able to afford participating in the licensing regime. It will just be very, very difficult for them to engage in it.

And again, if we're talking about works that are in many, many, many, many cases fair uses, we don't need a licensing regime in the first place because what they are doing is perfectly lawful already.

So I worry very much about going down this path and I feel a little bit like it's a sort of a solution in search of a problem. It's not at all clear to me that we actually have some big problem in some, you know, that all of these artists are somehow being deprived of revenues that they would otherwise get if somehow we had some licensing regime in place. So I
worry very, very much about this whole idea and I think it could be quite dangerous for future creativity.

MR. GIVEN: I'm finding myself in the unusual position of agreeing with my colleague from the EFF. And I think what's reflected in our opening statements to the task force is that there is a large consensus among us here, with one notable and very brilliant exception for ditching the idea of compulsory license regime in this particular context.

Now, I acknowledge, as I must, that there are other compulsory license regimes that are extant today that are out there, but the history of those, if you go back and look, is that they were a response to documented and very serious antitrust concerns, which I don't think you have anywhere near this particular issue.

The only thing I would add to what Peter said, I was talking about dystopia before and he's talking about utopia, Peter, what you've described sounds like something that already exists. You're talking about very sophisticated algorithms, for instance, and you're talking about large impressive if not universal databases. Well, you know, that's already there. I mean, those platforms exist in the marketplace. And, in fact, those platforms have engaged in licensing
activity and have gained what rights they need to promote their platforms and to promote this creative activity on their platforms.

    So, again, just coming full circle, I think that, you know, the idea that there's a serious problem here that needs to be addressed by a legislative solution is just, you know, in the absence of very compelling evidence to the contrary, it's just not there.

    MS. CHAITOVITZ: Okay. Yeah, I think --

    MS. DARE: Tiki.

    MS. CHAITOVITZ: Tiki and then Tammy.

    MS. DARE: My concern, Peter, if we spun this forward, this doesn't account for the video part. And the visual is so intimately engaged now. There's really not music separate. So much of what I see is video plus the music. And I think we have this structure in music, so it's very tempting to use that, but how would you figure in the video when you can have so many different photographers who are authors for copyright purposes of the video contributions.

    How would you do that. How would you measure copies. Because part of the thing is if you're just making a record like we could all do in 1971, it was really easy to track the number of copies. And even
with an amazing database, the numbers get so high so fast. So if you're multiplying 18 cents times every single artist who contributed to your mashup or remix times the number of hits you get on YouTube, you're in trouble fast. And again, that does swamp the small artist.

Would you do a fan fiction exclusion and then we'd have to define that obviously. But, you know, is there some sort of noncommercial exclusion that you get to very quickly because I think it's one thing to be a Harry Potter fan and, you know, write a different book seven as a friend of mine did before seven came out and it's a very different thing to start a theme park. And right now you only have the resources to start a theme park if you have some licensing going on.

But there's -- somewhere in there there's a line that needs to be drawn so I'm curious about that. Those are just, you know, three of the sort of problem-solving things I think you'd have to court before you put forth a legislative problem -- or a legislative solution. Again, I'm not sure we've framed the problem. So I want to see more evolution, I'm very much on that side. Those are some of, you know, kind of details I'd be interested in seeing spun out.

MS. CHAITOVITZ: Okay, Tammy. And I will give
you a chance to answer.

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

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

And then thinking about universal databases such as being able to get a simple sync license if you paid a dollar or two extra on Amazon or iTunes, I don't really feel that we're there yet in terms of the world of available content and one of the reasons for that is the pre-1972 sound recordings problem that recorders
that were made prior to February 15, 1972, are not covered under federal copyright law so that kind of opens up a really big can of worms in some respects. So and I'm also thinking too of students as well as the 13-year-olds, you know, doing their own remixing and mashups that are not selling this material. I feel very, very strongly that they can be relying on fair use.

MS. CHAITOVITZ: Thank you.

MR. ENGSTROM: I think I would like to just join the chorus of Corynne and Tammy expressing the idea that while a licensing regime would certainly go a long ways or at least some ways in diminishing uncertainty in the remix realm, it would be difficult to imagine an environment in which a licensing regime could exist without diminishing fair use and the legal regime around fair use.

So if we're talking about the best way to create the certainty that people can engage in this type of behavior, it seems like the cheapest and most effective way would be to have a robust fair use presumption for transformation, for transformative works along with, as we'll talk about later, diminish statutory damages.

I think it's instructive to note that maybe
part of the reason why we don't have a lot of
litigation on this fair use point is to the extent it's
a solution in search of a problem, it may be because
open source, open access doesn't necessarily
cannibalize the type of incentives and market for
licensed work.

A good example is just look at the nature of
open source development in the software community.
Open source has created Linux, all sorts of great
programs that don't cannibalize on commercial programs,
but, in fact, increase the market for commercial
programs. So you can see through things like Google
Sketch Up which is open community, it allows people to
contribute to a platform and has driven more interest
in 3D modeling.

You can see it broadly in the remix community
that these -- I haven't seen any studies that suggest
that remixes diminish the market for the remixed
content. If anything, they drive interest in the
remixed content. And you can see this through an
innovative start-up that I've been working with, Indaba Music in
New York which runs remix contests where labels
sanction this type of behavior, but encourage
independent artists to create remixes, upload them, and
it gives content to these labels that drive more
interest in the underlying song.

So we just need to make sure that -- it's not necessarily a strict dichotomy. Having open frameworks for innovation. Having a presumption for fair use and allowing the creative adaptation of existing material doesn't necessarily diminish people's incentives to create commercial works.

MR. MENELL: If you were listening to yesterday's event, I think you would have heard a much stronger pushback on a presumption. And I just think that part of the challenge here is dealing with the reality of coming-of-age artists and trying to think about whether to be in the copyright system or out. And if we had the legacy of open source or creative commons, there would be perhaps enough. But there are going to be people who want to work with catalogs that are not going to be licensable.

And in some ways my answer is unacceptable to both sides because I don't want to see the control exercised either. I would like any compromise to say we live in a reverent culture and people will do their creative work. We want to create or maintain the plumbing to allow the value to flow more fairly among the different players.

So let me specifically respond. So I would
like to hear after I finish how David would advise the
next Gregg Gillis. I don't think he has a good
solution. I don't think he could take on that case
because Corynne has already talked about the challenge
of representing people who want to go out into a
marketplace with that kind of work. You would have to
give them a lot of -- you would either say it's going
to cost a lot of money for me to try to get these
licenses, but the DiCola-McLeod book points out that
you could not have licensed any of the mashup works
that have attained a lot of success.

So licensing wouldn't work for a lot of these
works and to say it's all fair use I think is in some
ways taking away from the reality that these works are
successful in part because they build on other works
and we want to create a more healthy relationship
between the old and the new.

Now, Tiki makes some very good points, and as
I said, I'm not going to solve all of the problems
here. But let me respond very quickly. The video
piece is a separate piece involved. So a whole larger
range. And I think the music piece can be isolated
because when I listen to it over headphones, that's the
piece I'm getting.

So how do we commoditize this. Your point is,
well, 18.2 cents isn't going to make a lot of sense in a world in which most people aren't buying product. I agree. We don't really need to pay the 18.2 cents. That would apply to an iTunes. What you get by using this system is that when it streams over YouTube and there's some ad revenue that comes in, you could use the same formula for dividing that value.

When it streams over Spotify, now, I see the future of streaming and I think most people out there in the marketplace see the future is not ownership but it is streaming, and so this creates a platform by which you can have the data to reallocate. So fan fiction, I don't really see this as solving that problem at all and I think we should isolate.

In terms of noncommercial uses, well, it's fine if, you know, a son or a daughter decides to make something for their friends and it's distributed in a very small circle, I don't think that's going track. But it's not very hard for them to press the YouTube upload button. Well, now it's on YouTube, but it could work well within the content ID system once we get this kind of background in place because now, you know, some high school student or even younger person could put something up, it could go viral, and money would be flowing and that person could see money. But also, you
know, all of the tracks that are included. So it's in some ways just creating a way to tie into a database.

Now, the point was made by Tammy we don't have universal databases. We need to have universal databases. And I would say we could help that process through this kind of legislation because you say if you want to participate in this new commercial, this new compulsory license system, you better opt in. You better tell us who you are and how we pay you. And if you don't do that, this is a great orphan work kind of resolution. You are an orphan work and you're not going to get paid.

I think people would come out of the woodwork, register, get onto the databases because now, all musical compositions and all recorded music have another revenue stream. And overtime as we shift more and more to these streaming-type services, this would provide, I think, a new foundation for people to embrace the copyright system.

As far as fair use and song comparisons, I would agree with Tammy and I would say that I think that is something that could be fair use and people would have the choice. They don't have to go the compulsory license route. They could say I'm willing to do this on my own and there's nothing to prevent
Corynne's concern that we are not -- that this will change the world of fair use, that no one -- nothing will be fair use anymore because there's a market, that's always been out there. Frankly, if we get the pricing right, I don't think it's that big of an issue. But I do think that people who, like Gregg Gillis, in the future may say, you know, I don't mind doing this.

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

MS. CHAITOVITZ: Okay. I would like to jump in with a question that I think might be a little between your compulsory license and your no legislative
changes. And this was something that was brought up in
previous panels and suggested as a possible solution,
which would be a licensing collective similarly and
again like here, there the focus was primarily on
music.

A licensing collective is by voluntary opt-in
society like PRO, like ASCAP, BMI, SESAC, or like Harry Fox,
to eliminate the transaction costs and make it easier
to get licenses for remix works. And they would
obviously have a robust database too.

So what do you think of this idea. And I saw
Corynne, you were first.

MS. McSHERY: I guess I have a couple of
concerns. I'm still not convinced that we -- that
there's a need for this in -- for the majority of remix
works.

The other concern that I have is that when I
talk to musicians in particular, I don't hear a lot of
people who are loving their collective licensing
schemes that they're already involved in. So I think
that that would require some pretty serious
investigation to see if we could improve on the
situation that we already have.

So those are kind of two big, big worries
about that. And then I guess for that idea the
concerns that I've already expressed apply there as well. I think that if we create a sort of licensing scheme, then we create a situation where people feel like they all have to participate in that licensing scheme, when in many cases they really don't have to because they don't need license in the first place.

So I think that any time we're going to think about any version of a licensing scheme, we have to make sure that we're thinking very hard about how to organize it in such a way that it is not unduly influencing folks who don't need to get a license to feel that they, in fact, do have to do that.

MS. CHAITOVITZ: Thank you. And I can't remember if Tammy or Tiki was next.

MS. RAVAS: So I have a couple of concerns with this particular question. Again, I'll return to the pre-1972 sound recordings problem, you know, how does that -- how would that enter into a licensing scheme and considering the fact that many archives, they're trying to digitize such recordings, it's kind of difficult. That's kind of going away from remixes and mashups, but that's a really big concern that music libraries have right now.

And also in terms of orphan works, you know, if -- in an ideal world if we had this wonderful global
database that put out by the copyright office and we were able to look up every single thing out there that was copyrighted, that would be beautiful. But reality dictates otherwise. So I'm just kind of curious, you know, how would orphan works, you know, be incorporated into this. And I know there have been discussions and comments being put out on orphan works right now and that's another really big concern with -- that I would have with a licensing regime.

MS. CHAITOVITZ: Thank you. Tiki.

MS. DARE: What I see is, going back to my concern about the video problem, because when I look at the way my children interact with content, they mostly listen to music with some kind of video on top of it. They're on a iPod. As we stream more and as there isn't the -- you know, the footprint and the bandwidth restriction of the visual, they are very often experiencing audio with video. And that's how they interact and they communicate with Snap Chat and Instagram. They do not sit on one platform. They are absolutely platform agnostic. They go to all of them.

And so I'm concerned that we don't have a mature market. I'm very concerned about clearly identifying the problem and scoping the problem that a licensing regime would solve. And, you know, very
consistent with Corynne, I think there are people who -- we need to be very clear about who doesn't have to participate in that. And I'm a little concerned again that this is a solution that is in search of a problem that we have today that is well articulated and well scoped.

Would it reduce the risk enough for a certain group of players to participate in this, because I just -- I'm concerned it's more narrow than some of the behavior, the copyright interactions that I see.

MS. CHAITOVITZ: Yes. Okay. Peter then David.

MR. MENELL: I generally support private solutions to problems and I think if this type of mechanism were to develop, I don't see any serious downside because it's not going to cover very much in my sense of this marketplace. I don't think that a lot of the legacy catalog of music is going to get into that kind of regime very easily. But just as major record labels today are seeding works into the mashup culture, it's not something that people talk about in an overt way, but we know that a lot of songs are being put out into these channels as a way of trying to get promotion in advance or in conjunction with release, that there would be some interest in doing it.
But my concern is to really open up the culture. I think that, you know, people ought to be able to mash up everything. And if I rely on fair use, I see that as really shifting people outside of an organized marketplace and I see it happening largely outside of any good, you know, plumbing. If it happens through licenses, that would be great. But I don't think many of the people we want to invite into the copyright system, the new generations, the people who we want to be excited about the copyright system and about a system where they could potentially have a career doing this, I don't think they are going to have any clout to work in even these kinds of channels.

And I think what's going on right now is if you've already got a little credibility as a DJ, then you might have a connection and they might seed you things that other DJs won't get seeded.

So, you know, we ought to, I think, face up to, you know, do we want to really open this up and I don't think you can do it through a voluntarily system based on what I heard yesterday.

MR. GIVEN: In direct answer to the question, I think all the same concerns that I I've previously articulated are true again in respect to the question posed about voluntarily systems. Again, in my personal
legal practice, I'm intimately involved with collective organizations like the PROs that represent large bodies of songwriters and seek out collective solutions. And I think to the extent that can develop in the marketplace sui generis, that would be a preferred solution.

So at least insofar as Peter is suggesting that could happen and that's a good thing, I agree with him as far as that goes.

I -- you know, I just want to say just one word about consent and the ability to control one's creative work. For the people that I represent day in and day out, be they songwriters or recording artists, performers, what have you, the ability to control one's creative work is paramount. I'll say that again. The ability to control one's creative work is paramount. In fact, it's a major deal point that we spend a lot of time on with publishers, like record labels and music publishers and the like, in negotiating those provisions to assure that our artists have meaningful control over their creative legacy.

It's very, very important, I think, just as a moral and ethical proposition to protect that right in the law as best we possibly can because in order to advance and progress the arts, which is fundamentally
what this is all about constitutionality speaking.

People have to believe that they are going have control over their destiny, over their legacy. And to put that in play cavalierly and to say, for instance, well, you know, the horse is out of the barn, it's too late. You can't control it. That's just a wrong-headed statement. And if that's so, we have to work diligently to make sure that that's not the case. We shouldn't embrace that.

MS. CHAITOVITZ: Thank you. I see Peter and Corynne. And I ask you if you could make it brief so that we'll have -- because we're running out of time and I do have one more question.

MR. MENELL: David, that ship has sailed. It's gone. You're not going to get it back. Sound Cloud will show you that no one has control. And YouTube, perhaps to a lesser extent because of content ID. But control is not really something that the American copyright system has embraced. I think going back to the original mechanical license, you know, when we open things up for people to rerecord, this is, I would agree, a much more open invitation. I would not as part of a system like this allow people to say I have the endorsement or I am in some way speaking for the people I'm remixing.
I think the important thing is to say that remix is part of our culture. It is happening. It will happen. Whether it happens within a copyright system or not, it is the reality, it will continue to be reality. Can we channel it into a more organized system and we could put into the law that the remix of works under this provision in no way endorse or agree with. But that is something that we have long lived with. That's the first amendment.

MS. McSHERRY: Just quickly, here's a place where I think I can at least partly agree with Peter, that horse has left the barn, but it's not that the horse has left the barn, it's built into the system. Fair use means you can't control every use of your work. You have rights under copyright law to, you know, certain enumerated rights and that's fine and to that extent an artist can make choices and make decisions about how his or her work is used.

But ultimately, again, remember, we're talking about remix. Okay. We're not talking about, say, copying entire works or any of that kind of thing. We're talking about creating the kinds of works that are likely to be fair uses. And I think it's actually really important that remix artists not to have to go and ask for permission from an artist in order to use
his or her work, again, in a way that is otherwise lawful because part of remix is commentary, criticism, talking back. And often an artist who is being spoken to, who is being responded to, might not want to give permission.

So I actually think it's a very, very valuable thing that's built into our culture that artists just don't have that kind of control. That's not a bad thing. It is a good thing.

MS. CHAITOVITZ: Okay.

MS. RAVAS: I would happen to agree with both Peter and Corynne about artists and other creators not having complete control over their works. For instance, I have written a book, I've written several scholarly articles, and I feel that it is, you know, people's in this country's right to be able to criticize or say it stinks or whatever or whatnot because of our first amendment rights and fair use.

MS. CHAITOVITZ: Okay. Well, we'll see how much time I have. So what I wanted to ask is especially a lot of you brought up first amendment rights. What about artists whose music is used to endorse a political viewpoint that they disagree with or to sell a commercial product that they disagree with, would you -- what do you think about -- okay. I
did see Tammy was first and then Corynne and then Peter.

MS. RAVAS: Okay. For me that's a pretty easy question to answer. I'm thinking in terms of Yoko Ono suing Premise Media for the use of John Lennon's Imagine in a documentary that criticizes the theory of evolution. Now, Imagine was written before 1972 and the New York court system decided that that was indeed a fair use.

So, again, I'm going back to what I said earlier in that it's a first amendment right and I believe strongly in that fair use is a safety valve within the copyright system to allow for creative speech.

MS. McSHERRY: So I'm going to give a lawyerly answer and say it depends. Okay. I think that an artist doesn't have a veto right on all the ways in which her work is used. That's why we have fair use. However, if, you know, if one's work is used in a way that goes over the line, that, for example, is used in a commercial to endorse Fritos or something like that and a great deal of the work is taken and so on and so forth, then, you know, that's probably not going to be a strong fair use argument, right.

So we already have built-in protections I
think in the law against, you know, folks that go over
the line and suggest, you know, level of endorsement
that isn't appropriate. So it's sort of just making
sure again the artist doesn't have the veto right on
all uses of her work.

But if someone is abusing her work, say, you
know, using all of a song that she did in a way that's
not appropriate that's purely commercial and not at all
transformative, well, then there's a copyright problem,
right. And so we already -- I think this question is
answered in the law already.

MS. CHAITOVITZ: Thank you.

MR. MENELL: I'll make this small point that
the proposal that I've made would not extend to
commercial -- the remixing for commercial endorsement.
I don't think it would be difficult to carve that out.
I think that's a whole separate issue. I'm talking
about just kind of music that we would listen to in the
sort of conventional ways of entertainment.

On the broader issue, I think this is a very,
very complex area. I see Ben Sheffner in the audience
and I remember him writing about these really complex
political fair use cases where you have political
candidates who use songs as part of their, you know,
their opening and it's their trademark, so to speak,
and that's a very sort of dicey area. I think that is something that the law, you know, that we will struggle with because that is very important to how people sell themselves and it really goes to, you know, music is such an important part of how our culture understands itself, you know.

And so I want to just say I think we can resolve some of the issues without getting into that topic. And I would say that that's, you know, that's a whole can of worms even well beyond what we've taken on today.

MR. GIVEN: Just to conclude by saying I find myself again agreeing with my colleague from the EFF. Corynne, you're really messing me up today.

I think the answer's to Ann's question is in the law. I mean, I've written these cease and desist letters before, I've engaged in these negotiations. They resolve themselves. The law has a pretty good framework already in place to answer the inherent tension between first amendment rights and copyrighted works.

MS. CHAITOVITZ: Thank you. I do have time for one more. Okay. So I know some commenters and some people here today have made the distinctions between noncommercial versus commercial works. And
some suggested a noncommercial safe harbor or noncommercial -- permission automatically for noncommercial uses. Others have noted that commercial -- that noncommercial works are often disseminated through commercial sites. And so I wonder, how should the element of commerciality be defined and what should be its relevance and how would you propose treating a noncommercial work that did cause commercial harm.

    Peter's first.

    MR. MENELL: I'll just say part of the beauty of a system where even people who are outside of the system can easily register a work, put it on YouTube, have a system like YouTube or other sites that may compete with YouTube. It really sort of gets around the question because you have in place a way to allocate whatever revenue is coming in. And so I think that we've lost the distinction between commercial and noncommercial in our culture in the sense that things that are done perhaps without a conventional commercial goal can have effects on the market for some of those works.

    If you go back in the 1976 act legislative process, you'll see that even there in discussing similars issues, fair use and others, there was, you
know, recognition that it's hard to draw that line.

And I just think that what we want to do is just create easy ways for people to get their works out there and to have that sort of work seamlessly. If we need lawyers to get anything out, we are seriously impinging on the ability to people to communicate.

MS. CHAITOVITZ: Thank you.

MS. McSHERRY: So I just made two points with respect to that. I think we need to be extremely clear if we're going to talk about the difference between commercial and noncommercial, which I think is going to keep coming up in these discussions that we are having in various fora on copyright. Putting a work onto a commercial platform does not render that work a commercial work.

The reason I want to emphasize this is because it comes up in litigation all the time that I'm involved in. And I think it's really important to understand that. The fact that you put something on YouTube does not automatically render your work commercial if it's otherwise an entirely noncommercial thing. People use YouTube, Vimeo, other services all the time to communicate and have no commercial intent whatsoever and it's abundantly clear often from the videos that they don't.
The second issue that I want to speak to you is you asked well, what do we do when we have a situation where a noncommercial work causes a commercial harm, and my recommendation with respect to that is that we make sure that we are very clear when we are talking about a harm, that we are talking about a copyright harm, right, because we know, the case law is very clear, that harms that are not copyright harms don't count for purposes of copyright law.

So are you harming a licensing market for a work? Okay. That might be a copyright harm. But if you're just criticizing a work or making fun of it or making people not want to buy it because you're making fun of it or whatever, those kinds of harms, while they may be upsetting for the artist and feel very harmful, they are not copyright harms. And any harm that isn't a copyright harm just shouldn't be part of this discussion.

MS. CHAITOVITZ: Thank you.

MS. RAVAS: Okay. Just really quickly, I'm thinking with respect to a commercial versus noncommercial, I think back to the case of the Bill Graham Archives versus Dorling Kindersley, where Dorling Kindersley won on the -- won their fair use defense. And I know that we're running out of time, so
I won't go into that any further.

And number two, I think that from a librarian's perspective who has some experience with copyright work, there are some really wonderful sources out there written by copyright experts that can assist users with these specific kinds of questions such as Kenny Crews' fair use checklist. I'll also refer to the various best practices and fair use for different disciplines that have been spearheaded by American University.

MS. CHAITOVITZ: Thank you. Now it's time for comments. So if you are in our live audience and have comments, if you could walk to the two mics, and I do know we have callers online right now. So if we would put the first caller -- right, you have to -- if you're calling, you have to hit star one to get through. And we'll start with our questioner here.

MS. KATTWINKELL: Hi. My name a Linda Joy Kattwinkel. I'm a visual artist and a copyright attorney for artists. And I would like to bring the visual art mashups into this discussion. We have been talking quite a bit about the musical works, but I represent artists on both sides of the line of mashups in the visual field. I have people who have done classic appropriation art in the fine art world,
collage work. I have a client who did a wonderful
mashup video about the history of San Francisco which
has become a classic tour here. And I represent Hello
Kitty and in that realm I'm on the other side of trying
to understand where is the division between fair use
and commercial exploitation that harms a licensing
market.

It's a very, very popular thing now to mash up
Hello Kitty with a bunch of other pop icons, and I
applaud that kind of creativity. I appreciate it. And
at the same time my client has actual co-branding
licensing schemes in place with some of the other
intellectual property owners, and we struggle very much
with this question. I do not think that it helps to just
say there is fair use and it's working because I think
where we are now is we're on the edge of trying to
understand where is a fair use and where is just a
derivative work and how do we understand that.

I also want to say I don't think it's useful
to talk about the noncommercial aspect of this work as
if that's a solution because I think younger people are
using this, are becoming creators in this kind of
mashup world with cultural commentary, and this is
their art form. Just because they're young and they
haven't figured out how they're going to make a living
at it yet doesn't mean it should be relegated to a realm of never being commercial and I don't think that whether or not the work is commercial is a particularly good way to figure out if it's fair use.

MS. CHAITOVITZ: Thank you.

Is there anybody online? Okay. Is that Sandra?

MS. AISTARS: Yes. Sandra Aistars from the Copyright Alliance. So I raise two examples in response to the panel yesterday of mashups that went beyond fair use and that were very troubling to the artists involved in the mashup use and that were made by noncommercial speakers, both of which I think would be permissible under the regime that Peter proposes, and both of which I know would be incredibly, you know, opposed by the artists involved. And I wonder, you know, what Peter's comments might be and what, you know, other's comments might be.

The two examples are, one, a recently settled case involving a photographer who had taken a photograph of the engagement of a gay couple and that photograph was used by an anti gay marriage group for propaganda against gay marriage and the photographer was able to sue. The court found that it was not a fair use and the case just recently settled a couple
weeks ago.

And the other example is a recent example
where the song Hey, Jude has been rewritten by the
Westborough Baptist Church in a very anti-Semitic way,
Hey, Jews, and is being distributed on YouTube and
other channels, I presume. And, you know, that song
written, by you, know Paul McCartney is a very -- you
know, tribute to his son, I believe, originally, you
know, obviously cares very much about, you know, his
work, I'm sure.

So I wonder, you know, what your comments
might be, Peter, on how we would address those sorts of
situations because, you know, I'm a very strong
believer in the first amendment and I understand, you
know, you can't prevent hate speech, but I certainly
think we should be able to prevent people making hate
speech with my speech if I'm an artist.

MR. MENELL: Well, I'll just say the proposal that
I've made, and it's in a print form as well so you can
read, it's not fully fleshed out because I think that's
the point of this kind of discussion is to try to
identify, you know, who should be in the room to try to
work out such a proposal.

My proposal would apply really to the highly
intensive mashup works. It would not go to, you know,
a single photograph, I'm talking only about music. And secondly, the Hey, Jude example that you give is not something that I would consider a mashup, at least in the very specific proposal.

On the first one, I think it depended what court you were in. I just think, you know, we have a lot of uncertainty based on, you know, who's the judge or who's the jury and which circuit you're in, and that's part of my concern about fair use is that I don't think you could easily advise a client on that kind of case. I mean, I would not give you, you know, it's clearly on one side or the other on the line.

On the second one, I do think, and although I'm offended by it, both personally and, you know, in a larger sense, I just feel, you know, the United States is a place where we tolerate that. In Europe it's a different question. So, you know, we fight speech with speech. And so I think that's probably how it would get addressed. But, again, depending on the judge and depending on the jury, maybe it's not fair use. I suspect that it would probably fly in our culture.

MS. CHAITOVITZ: Is there anybody on the line?
Okay, then.

EAST BAY RAY: Hi. I'm East Bay Ray, I'm a guitar player for the independent band Dead Kennedys.
And we have been an independent business for like 30 years. So I don't -- notice there's no one else on the panel that's actually been in the trenches as long as I have.

But the thing is I create original speech. I create original ideas. And we have, you know, worked with people and have had, you know, remixes and stuff like that and we work together. I mean, one of the things, you know, technology makes a lot of things possible, but I want to say that technology is not like the weather. It was created by men -- persons, sorry, and can be changed by people.

And one of the things that I'm seeing is just because it's easy that principles are changing, one of the principles, you know, like, okay, yes, doing remixes and stuff, but artists do remixes. I mean, I listen to records and stuff and then I process it and then I redo it a new way. And this is something I've seen most of the people, you know, people not being concerned with protecting that. That should be paramount, protecting original speech.

I mean, just uploading some -- for example, YouTube, people just upload their songs and they put the DK logo on it and people are calling that free speech. That's plagiarism. And number two, there's a
big elephant in the room and that's safe harbor is being abused in the sense that people upload to YouTube and then YouTube puts a commercial on it. They are making money.

And the moral human -- the moral human thing is I -- you know, as a society we should make sure that I get the benefit of my labor. I actually put blood, sweat and tears into the song. The band has. And at this point I have a band member -- money is being made on our music and I've put it to YouTube a couple times -- actually Google. They make more money off our band than we do. Through the search ads. Through YouTube through ads, their ad network that they put on pirate sites.

And this devaluation of like, you know, people talk about fair use, yes, it's making it zero. I have a member that's going into foreclosure while money is still being made. And I agree with Peter that we need to be paid. That's what the constitution meant.

And the problem -- the -- like the old school compulsory license, like for songs under the vinyl record was set at such a high level that it forced people in the room to negotiate. But right now in all the digital compulsory licenses like Pandora have are sharecropper wages. The guy in Pandora is making --
you know, he's selling stock at a million dollars a
month, you know, and he's going to cash out to Wall
Street.

And the fact that, you know, some of you that
are advocating fair use that don't even -- you know,
first it's -- you know, a noncommercial use on YouTube,
I'm sorry, that is a commercial use. Google is a
profit-making corporation. They're probably the second
biggest corporation in the world and they can afford to
pay.

I mean, the principles we're talking about
here is like, oh, let's encourage remix. Oh, okay,
let's solve starvation. Let's just let people walk
onto the farmer's land and pick the fruit. Yes, that
will help starvation, yeah, for about a year and the
farmer says screw this. Because if our whole culture
is just based on mashups and there's no original work,
there's going to be nothing left to mash up.

MR. GIVEN: Can I respond to that? You know,
that's a point that Jaron Lanier made in his book You
Are Not A Gadget, which I highly recommend to the task
force and their staff. It's well worth a read. And
the point that Mr. Lanier makes, and just by way of
background, Mr. Lanier was a -- one of the architects
of the worldwide web and he sort of -- he was one of
the guys that was flying the flag of innovation and
everything should be uploaded and free access and so
forth and he's turned completely 180 degrees in the
opposite direction. And he's taken on this

But he has -- he's echoed in many respects
what Ray has just said about the flattening of the
creative enterprise by the advent of these digital
tools that are readily available. And as Ray rightly
points out and as Mr. Lanier points out in his book,
just because they're available doesn't mean we should
courage their use to the detriment of what he calls
first order creative works.

And I do -- again, this just doubles back and
I'll conclude very quickly. This doubles back to the
point I was making before about the Epic Fail video and
the movies about Epic Fail. There's just a qualitative
difference between first order creativity and second
order creativity. And if we don't watch ourselves, we
are going to end up in a world where we're just living
with mashups.

MR. MENELL: Since Ray commented on his
interpretation of what I had said, I believe
compensation is a part of the system and I think it can
be built into an infrastructure. But I guess I don't
want to fully endorse the idea that this is the
organizing principle. I think copyright is about
promoting progress. And the question is, can we put in
place some mechanisms to enable the kind of original
and cumulative creativity that is what makes our
society great.

And I -- you know, I think that we could shut
down the system in either direction if we go to the
polls, if we -- if we are sort of at one end of the
spectrum and I'm hopeful that this process, and I think
it would take a long time, but the hope I see is that
we could develop institutions that would really open up
the creativity in such a way that all ships would rise.
And I think that's -- that's the message that I'm
trying to get out.

EAST BAY RAY: But I think the mashup
creativity is open. I mean, everybody agrees that it's
blossoming. The problem is is that song writers, film
makers, the people that actually come up with the
ideas, whether they be -- work for a corporation or
independent like I am, we are making approximately half
of what we were four or five years ago. And the tech
companies are making a hundred times more. It's about
eyeballs. And we draw eyeball ands they sell
advertising.
Peter, maybe you could work on a mechanism to get the advertising dollars into the people that draw the eyeballs, not the person that just happens to have the big billboard.

MS. PERLMUTTER: So just a word from your sponsor. We're running about ten minutes late. So I see there's a lot of interest in the topic and I think it's a very helpful conversation, so I don't want to cut it off. But if everyone can keep their comment relatively short so we can stay -- we can leave enough time for the other panels. Thank you.

MS. CHAITOVITZ: First I want to ask, is there an online question? Okay.

MR. SENTER: Good morning, I'm Daniel Senter. I both a lawyer and a musician here in the Bay Area. And I largely agree with the sort of assessment of the culture here by Peter that there really is -- seems to be a bifurcated or polarized sort of understanding of fair use and mashups, at least amongst my peers, folks whom will just go out and make a mashup and have total disregard for the law and folks who are so scared about the risks that they won't go ahead and contribute to the culture in that way.

What I'm seeing also just as a lawyer is that there are sort of private companies popping up your
Rumblefish or your Audiosocket, these companies that are creating clearinghouses of music, warehousing music and allowing for those rights to exist very easily to decrease the transaction cost.

And what I'm curious to know about, what my real question is for the panel is that if it is going to be a private solution, how do we create a system where those companies are in the right way sort of policing the content over Vimeo, over YouTube. And one specific question is, these companies want to sort of crawl and scan YouTube and Vimeo, is that something that we're comfortable with for these companies to independently go on and start trying to figure out whether these mashups or these properly licensed creations are legal or not. And then how do they go about policing this content. So I know it's a broad question, but any thoughts there are welcome. Thank you.

MR. GIVEN: I think inevitable, I think it's inevitable that the content owners and the online platforms are going to become meaningful business partners. I mean, it's just a matter of time. It's already happening. And we weren't there ten years ago. I mean, the content providers were -- the content owners were largely trying to sue people out of
existence. You don't see as much of that anymore.

I mean, there is a realization. We have come -- my constituency has come to the realization that we have to do business with these people. I mean, I think these parties will get together and figure it out.

MR. MENELL: I'm a little less confident. I think it will take a long time. I think the Google books case is an example where it just took a very long time to get to what is a sensible or I hope moving in a sensible direction.

I thank you for speaking up because in some ways I feel that's a voice that I'm trying to channel. I hear it from my students, from my kids, from that generation and I just think it's hard to get that into this discussion. Most of the people here are professionals related to the copyright system and it's the next generations that I think should be at the forefront of how we think about these issues.

MR. ENGSTROM: Just to quickly note that there is already a pretty robust enforcement mechanism where content owners are searching and removing material like this. It is difficult when you're dealing with mashups. Obviously if courts who have a full range of information and time to deal with whether or not these
things constitute fair use, you're going to get
overzealous content owners removing things that are
probably transformative and the law as it's currently
set up doesn't really provide significant
counter-measurers for folks who disagree with the
assessment of whether or not their mashup is
sufficiently creative to not violate the underlying
copyrights.

And obviously that's a question for -- a much
larger question for another panel. But it's important
to know that this is an issue that we need to think
about.

MS. PERLMUTTER: And again let me say in an
advertisement for another part of our work on the Green
Paper that we do have a multi stakeholder forum which
is open to the public which is examining the operation
of the notice and takedown system and how to improve
it. And I know a number of people in the room are
involved. If you're not involved and you want to
become involved, you can find information on our
website. And the next meeting of that forum is going
to be September 10th in Alexandria in our offices.

MS. CHAITOVITZ: Anybody online?

Okay. So I think Fred was there first and
then you go. And then that's it unless it's somebody
online.

MS. PERLMUTTER: These last two comments from the audience and then we'll break.

MR. VON LOHMANN: Great. I'm Fred von Lohmann from Google. I just wanted to correct some factual misconceptions that I'm afraid -- you know, we've heard a lot today about YouTube. We've heard a lot today about a number of online platforms. I just want to emphasize, I know that many of you are aware of this, but just for the benefit of everyone, you know, YouTube does represent the kind of private ordering solution that many members of this panel have been encouraging, unlike Professor Menell's suggestion that somehow the older catalog material is not effectively licensed on YouTube, that's just not the case.

We have done licensing agreements with an enormous number of music publishers, the major labels, a number of independent labels, motion picture studios, television networks, not just in the U.S. but around the world. And all of that has been done in a private ordering mechanism.

So today, many people may not realize, but today if you watch a video on YouTube and on that watch page you see advertising and that content includes content, pre-existing content, second order creativity
as David Given suggests. I disagree with him strongly about the notion that that creativity is somehow inferior to other kinds of creativity.

But when you see ads against that kind of creativity, it's because content ID has a match and the so-called original creators, to use David's phrase, are being compensated, or at least the original rights holders. Whether or not the original creators are the ones who still own those rights is a very separate problem which has plagued copyright for a long time.

But a lot of private ordering has been going on and YouTube I think is quite proud of the fact that we have paid more than a billion dollars to the music industry alone in the last several years as a result of those private ordering mechanisms. Not only has it gotten rights holders compensated, but it has also enabled an enormous amount of this new creativity that we've seen online.

So I just want to make a sure we're all clear that, you know, players, internet players, including folks that it seems East Bay Ray thinks are part of the problem, we have, in fact, been part of the solution here and we'll continue to do that and continue to try to grow that. Now, it's not to say there aren't problems. That's not to say there aren't problems, but
there's a lot we've already done.

MS. PERLMUTTER: Let's let the speakers at the mic do the speaking.

MR. VON LOHMANN: I just want to emphasize one final point that I think is important here. I think we have a real challenge going on online today as amateur creators often starting on sites like Sound Cloud or YouTube or other sites want to become professionals. There is today a very difficult divide for those creators.

I think copyright, the copyright system should be encouraging that transition. That's the whole point is to encourage creators, create the possibility for creators to make a living in their creativity. What we've seen frequently for YouTube creators is that transition is made much harder by copyright law because things they have done that they have been familiar doing in their amateur life, as soon as they want to step into the professional word, they confront a very different clearance culture that is very difficult for them to navigate consistent with the community and the fans and the art they've already built.

So that's a challenge and, you know, of course we at YouTube are working hard to try to solve that as well, but I just want to make sure in this discussion
of remixing we don't forget that we not only -- you
know, we want to protect professional creators, we want
to protect amateur creators. But we also want to make
it as easy as possible for people to cross that line so
that they can get paid professionally for their work.

MR. MENELL: If I can just clarify, I was in
no way suggesting that YouTube was not getting
licenses. My comments were just saying that we could
have more works coming into that environment. If I
want to look for a lot of remix works today, I have to
go outside of YouTube because apparently that hasn't
opened up the channel widely enough and I think that
there would be tremendous opportunity if we created --
I'm viewing this proposal I made as a safe harbor that
would allow a platform to just accept that work and to
not have to worry about those details.

MS. PERLMUTTER: Okay. Last have the last
speaker and then we'll break.

MS. KRAY: Hi. I'm Stacy Kray, I'm a
singer/songwriter and an attorney and a graduate of
Boalt Hall. It's nice to see you again, Peter, after
25 years or so.

So I just wanted to say -- to make -- to
strongly disagree with the commentators who said it's
either early too or too late for a solution on this.
As an artist, it's incredibly frustrating not to have clarity on these issues on both sides. And I will say that I'm -- I rely on fair use in my own work. I also want to be paid for my creative work.

So I do think that there's a complex network here of copyright protection and the first amendment which needs to be address. I'm really interested in the idea of a sort of collective solution, either through the PROs or through some sort of compulsory license. And I feel like we have enough data at this point to understand how something like that might work and I'm really happy to hear that people are talking about it and bringing out the solutions, including the technology companies.

My question is about, you mentioned fair use -- or sorry, this compulsory license as sort of a safe harbor, and I'm wondering how they interplay with -- if there would be an interplay with fair use kind of judicial doctrine and/or compulsory license, would there be a situation in which you go and you pay the compulsory license, but it's not enough or it violates fair use in some way so that it throws you back outside of this statutory scheme.

MR. MENELL: Well, I'm trying to open up the debate and I think that we could come up with a whole
bunch of characteristics that could be, you know, discussed hypothetically to come up with what is sort of an optimal mix for a unique form of art that has emerged thanks to technology, and I think it very much does have a history going all the way back. We as humans want to engage with the art and this technology has enabled us to do that in a very distinctive way.

So, you know, we can go narrow, we can go broad. I'm proposing a somewhat narrow approach. I think Corynne's concern is a serious concern, that, you know, courts would say now everything would have to go through this mechanism. On the other hand, congress writes things into fair use, for example, we added saying the unpublished nature of a work does not change how this works out.

And so I see it as kind of a step-by-step process. But I will say that if my vision were to go into effect, it may be that the fair use issue fades away for a lot of this part of the market, people who were just saying, hey, I don't mind giving up a share what I do. Essentially you're buying into a system where you're saying, I want to borrow, I can borrow. There are some sort of -- some pricing, we're essentially resolving some of negotiation.

I realize that almost everyone on the
traditional music side doesn't like this idea because they're fighting compulsories in all kinds of ways and trying to withdraw from PRO, you know, consent. I just think that's a backwards system because the people who are growing up post internet, post Napster are not part of that culture and won't participate in that culture. We need to build a copyright system for them.

MS. PERLMUTTER: All right. I'm going to cut off the conversation. I think we probably could go on for another half hour or so, but -- so that we can reach the other important issues too.

So what we'll do is we'll take a ten-minute instead of a 15-minute coffee break and resume at 10:35.

(Recess taken from 10:24 a.m. to 10:37 a.m.)

MR. GOLANT: Hello, everyone. Thanks for being here. We have a great panel ahead of us. The same rules apply. If you have a question or a comment, please put your placard up on the side. And what I'll do first is read a little bit about what we're talking about today and then we'll have each of you from my side onward to the end introduce yourselves and let everyone know where you're from and who you are.

So we're talking about the First Sale Doctrine
today. And 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. 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, and the Copyright Office conclude so in 2001 when they said the doctrine should not be extended that way.

So, please, we'll start with Courtney and going all the way down.

MS. KLOSSNER: Hi, I'm Courtney Klossner, I'm a librarian and a digital media consultant. So I care about this both from a librarian's perspective and also for advocating for artists and fans in the music realm.

MS. McSHERRY: My name's Corynne McSherry, I'm the intellectual property director for the Electronic Frontier Foundation.

MS. RAVAS: Hi, I'm Tammy Ravas. I'm the visual and performing arts librarian at the University of Montana and I'm here as the chair of the legislation committee of the Music Library Association.
MS. DARE: Hi, I'm Tiki Dare. I'm managing counsel of trademark and copyright at Oracle Corporation.

MR. EVANS: Hi, I'm J. Scott Evans. I'm associate general counsel of copyright trademark and marketing and at Adobe Systems Incorporated.

MS. SAMUELSON: Hi, I'm Pam Samuelson. I teach here at Berkeley law school and I've been thinking and writing about copyright for 30 years.

MS. MOORE: Hi, I'm Stephanie Moore with the Entertainment Software Association and we represent publishers of video games.

MR. GOLANT: Terrific. Thank you, all. And I apologize, you might have heard some of these questions if you viewed our online webcast from the past three roundtables, but we have a new crowd, so we might have different answers.

I'll start off with the first and it goes like this. From a practical perspective, is there a need for a secondary market for online music, video and video games analogous to a secondary market for physical media.

Who would like to take first crack at that question?

MS. SAMUELSON: So I'll start by saying that I
think that exhaustion doctrine, first sale, whatever you call it, is a doctrine that’s had many functions and many functions for hundreds of years. So I think that secondary markets have increased access and lowered price and meant that more people are able to get access to things. And so while I see that markets are changing and not everyone is going to agree to allow their thing to be resold, I think that we have to have an important conversation about not just the importance of secondary markets but also other functions that first sale has performed such as helping to preserve prior works, avoiding censorship, protecting consumer privacy, supporting consumer-driven innovation, and enabling some personal uses that actually are important too.

So I think that when we're thinking about digital for sale, let's not just think about secondary markets. Let's try to have a broader conversation because this exhaustion doctrine has deep roots in our law and our legal tradition and even if we can't carry it over quite as easily today in today's environment as in the past, I think it would be a mistake to say, oh, there's no need for any digital first sale at all.

MR. GOLANT: Thanks. I think next is Corynne.

MS. McSHERRY: So mostly I'm just going to
agree with everything that Pam just said, not that surprisingly. Because I think that's right. I mean, as lawyers we're not supposed to fight the hypo, but I do think that it is crucial that when we talk about first sale we not just focus on secondary markets but rather all of the other benefits that first sale provides, particularly things like preservation, reuse, tinkering, repair, those sorts of things that people's -- basically people's ability to do with digital goods what they are used to doing with physical goods in ways that don't cause any commercial harm but are simply, you know -- I think one of the goals here should be trying to make sure that the rights and expectations that we have had with respect to copyrighted works in the 20 century can make it intact to the 21st century and first sale encapsulates a lot of that. So I think those things are crucial.

I also, though, do think that, you know, a secondary market for copyrighted works, digital works, would be extremely valuable. I mean, think about just your classic first sale kind of situation, maybe there's some music I might like to try on, maybe I'd like to listen to, but I'm not -- I'm going to feel a lot more comfortable buying that CD, again, taking us back to the 20th century, if I know that if I don't
like it, I can resale it and get some of my money back. Same thing for books, games and so on.

It would be, I think, valuable for creators for such markets to exist because people will then be more likely to experiment if they feel they can sort of get some compensation back if it turns out that they don't like the creative work that they have purchased.

You know, they're going to be a lot more comfortable doing that.

One other thing I would say, by the way, I just said purchased and probably part of the conversation that we're going to need to have here today is, you know, most of the time these days a lot of the digital works that we acquire, we think we're purchasing them but, in fact, we are only licensing them. So that's another can of worms we can touch on later.

MR. GOLANT: We'll talk about that soon.

MS. McSHERRY: We have to.

MR. GOLANT: Tammy, you're next.

MS. RAVAS: And I think I'll start to open up that can of worms right now. As a music librarian, I want to be able to add digital music files, whether they be available via download or streaming, to my collections so that it can be preserved for generations to come for
the reasons of research and scholarship. And the thing is is that what Corynne just touched upon is the fact that end-user license agreements govern these particular purchases, if you will, rather than I think a more correct term is purchasing a license and they are worded in such a way that libraries cannot buy them for collections or preserve them.

Recently Kevin Smith at Duke University on his Scholarly Communications blog, he wrote a little bit about this particular problem for music libraries. The main example that music libraries have been using in this particular scenario is a Los Angeles Philharmonic performance of Symphonie Fantastique by Hector Berlioz and that performance was conducted by Gustavo Dudamel and that recording is only available via iTunes and we -- we just have a real problem with breaking a license agreement or breaking the law in order to get materials into our collections. We want to be good actors. We want to follow the law. We want to be ethical when we are bringing in materials into our collections.

There were a couple of librarians at University of Washington who tried to negotiate with Deutsche Gramophone and Universal Music Group to try and get a copy of this particular recording into their
collections for preservation and negotiations kind of
broke down at the point where the licensing terms just
became untenable for the library. And, furthermore,
Universal Music Group said that they could only have a
two-year license to hold on to that particular
recording, which really defeats the purpose of being
able to preserve that item for generations to come.

So I'll just kind of end my summary at that.

Thanks.

MR. GOLANT: Thanks. Now, in terms of order,
we'll have Tiki, Stephanie and Courtney.

MS. DARE: Great. Thank you.

I am very sympathetic to Tammy's comments.
Since I'm not in the music world, it is really useful
to hear that there are some areas of licensing that are
just not working and that there are some gaps, and I'm
curious as to why those things would be. Like, for
example, did, you know, the music company not license
in enough rights to license them back out again in a
library scenario. So clearly there are some things to
solve.

But I really want to talk first principles and
why we have a doctrine of exhaustion or first sale in
the first place and I want to say that the verb I like
to use really is licensing. We are -- we are working
significantly to really try to tell people, no, it's not a purchase when you interact with us about your software, it's really a license. We try to be clear because one of the things I've already heard this morning is expectations, you know, Corynne is very clear. We need expectations to be set and we need to be able to act based on our expectations.

So licensing to, you know, to a software company is very important because that's what allows us to deliver innovation and choice. And we want to be able to deliver innovation and choice. And a right sized, a correctly sized bundle of rights to a library, to a university so that we can offer a lower price point, we want to be in a situation where maybe some people can sample.

They might get a try and buy so you pay something or you pay nothing to try it for 30 days, then you pay your commercial fee. Your commercial fee can be based on how many seats, it can be based on how many uses. That really delivers, the license delivers a tremendous amount of choice and flexibility and innovation because what we are all about in software is driving that innovation.

And when I was looking, when I was doing some research for this about what are the first principles,
why do we have a doctrine of exhaustion or first sale, a lot of it was about letting consumers have expectations or expectations realized about their tangible property. And so let's liken that, if you have tangible property that has no copyright or IP associated with it, it's a lamp. When you're done with a lamp, you can sell it at the thrift store, you can sell it at a garage sale, you can pass it on to someone else who's going to use it. And maybe that makes sense for a book or CD.

But when you start talking about software, that doesn't make sense pretty quickly. So, for example, if I -- a lot of the software that Oracle provides is really mission critical. What you do with software is -- it supports your telephone calls. It supports your bank transactions. It protects your personal data. It protects all kinds of functions that are absolutely critical for our society. And to do that, I need to have a more nuanced relationship with you.

I need to make sure you get patches and updates from me. So your expectations are met and you can continue to run these mission critical functions safely and securely and effectively. And for all of those reasons, we're very passionate about license and
not purchase and think that there's really not a place
for digital first sale in that environment with those
contingencies.

MR. GOLANT: Okay. Stephanie.

MS. MOORE: Yes, I agree with almost
everything that's been said. Starting out with
Professor Samuelson, I do -- I agree that secondary
market alone should not be the focus of what we examine
for copyright policy moving forward. But I associate
more with what Tiki has just said in terms of the
licensing model which certainly we have been pioneers
in the video game industry working with licensing.

I would also go back to kind of the first
principles. I think that what copyright law and policy
is designed to look at is whether or not the dual goals
of incentivizing copyright owners and serving the
public interest ate met. And I -- licensing, I
believe, does meet those -- meet those goes goals and
looking at whether, you know, some of the benefits that
first sale offered in the physical environment is not
necessarily -- there are benefits that we are creating
in the digital market that weren't available for first
sale for physical products, like greater access for the
consumers. Just this morning EA announced that they're
launching an online access gaming that will be at $30 a
year. So price points are different. We're just able
to give the consumer a much broader experience in the
digital environment that does not necessitate a change
to the First Sale Doctrine.

MR. GOLANT: Thanks for your comment.

Courtney, you're up.

MS. KLOSSNER: I want to address both what
Tammy and Tiki were talking about. I sort of disagree
with some of the things Tiki was saying. It applies to
software and databases in the library where things --
people -- they are licensed and we expect those things
to be updated. We expect patches. We expect that, you
know, online encyclopedias will be updated with new
information and current events and that sort of thing.

I don't think the same expectations exist for
media such as audio, e-books, videos, those things,
once they're made, they are concrete, it's a finished
product. And that's where I see libraries running into
a lot of problems with ownership. We don't own
e-books. We don't own some of the videos that we're
having access to. And we're unable to buy them and
we're unable to buy them lawfully and add them to our
collections, as Tammy said. And I think that's a real
problem. With licenses there's lot of surveillance,
there's a lot of tracking that goes on with who owns
what and where it goes. Public libraries have always
tried to preserve patron privacy. Some of that was
taken away under the Patriot Act, but I think that we
still need to hold that, you know, as part of the
profession and incorporate into the digital realm that
users have the right to privacy when they use
materials. And licensing takes away that privacy and
ownership allows us to have a little bit more privacy
in that area.

MR. GOLANT: Thanks. So next we'll have Pam,
then Corynne, then Scott.

MS. SAMUELSON: So I wanted to do my opening
remarks to say, don't just think about secondary
markets because first sale is really much more
important and much broader. And one of the things that
it does is that it lowers transaction costs, and that's
a pretty important function that it plays because if
I'm up in Napa Valley, as I was this morning, and I
decide I want to give an old computer to one of the
local schools, that's a transfer of ownership. It's
going to have some software on it. I will have bought
a new copy of the software when I get my new machine.
But that's an example of something where there is, in
fact, from my standpoint, I'm a copyright person, but I
think from the standpoint of most people to be able to
give away an old computer, to give away my iPod to my
sick grandmother is something that actually also is
important. And I'm not going to get in touch with
every single one of the software companies that might
have licensed software for that machine.

Also think about the internet of things, all
right. So if you -- if our refrigerators, our
toasters, our -- every device in our household is going
to be software, are we really going to have a thing
that if there's software in it, it can't be resold, it
has to -- you have to go back to the original
manufacturer and get a license to transfer it or you
have to just destroy it because, you know, there's no
digital first sale.

So I think as you're trying to think about
this, I understand the point about the enterprise
software is not exactly the kind of thing that we're --
that we're -- is part of a digital first sale
conversation. There are going to be different parts of
the market where a digital first sale issue will arise.

But I think if we just sort of say, well, the video
game people are doing this and the enterprise software
people are doing that, therefore, there isn't any need
for digital first sale, I think that's a mistake.

MR. GOLANT: Thanks for your comments.
Corynne.

MS. McSHERRY: I got to stop following Pam because she always says what I want to say right before I plan to say it. So at that -- I don't want to be repetitive, though, so I will just agree with her that part of the conversation needs to be a recognition that more and more goods come with software in them. Our cars come with software in them. Everything comes with software. And that is going to increasingly be true and software is copyrighted and that means that you may buy a car, but you're actually licensing the software that helps run that car. And that's a problem.

It's a place where -- what I would like to emphasize is an additional problem is that can mean that copyright can create a competition problem. So, for example, if an independent repair person needs to be able to access the software in your car in order to fix your car, there might be a problem if, for example, the license agreement that's attached to that software says that you can't go to an independent repair person, that, in fact, you need to only go to the authorized dealer, right. So suddenly you have a situation where you think what does copyright have to do with repair, that seems wrong. But, nonetheless that is a problem that can emerge.
Just to give you a specific example, someone just sent me an e-mail this morning pointing out that the Nook, the e-book reader the Nook comes with a license agreement that forbids the purchaser, in quotes, from servicing their own device. So that means that if your Nook breaks, you can't fix it yourself according to the terms of the license agreement. That just seems wrong.

And so related to that I want to -- speaking back to Tiki's point, not just Tiki, but something I hear a lot in these conversations from content owners is they will say, look, we have more and more flexible licensing regimes to help people have access to creative works. You can access it on six different devices according to X license or whatever. It's really crucial that we keep in mind that people want more than access to works, right. A license that only gives you access under a whole set of conditions doesn't really give you much except for just that.

I represent people who want to tinker with the works that they purchase. They want to tinker with their stuff. They want to modify it. They want to improve it. They want to innovate. And we need to make sure that those rights and expectations are preserved and right now in the digital context it's very
uncertain.

MR. GOLANT: Thanks for that.

Scott.

MR. EVANS: You know, I'm speaking for a company that's going through an evolution and changing its business model. We no longer sell off-the-shelf software. Everything now is downloadable and will hopefully morph from there as the innovation grows.

And I think that, you know, one of the reasons we went to a business model like this, we've always licensed our software, even our software that was in a box that you bought, was to lower the price point and make it more accessible to users of the software, but also to be able to bring as much spontaneous innovation to the products as possible so that users weren't always having to re up to buy software in a different version and make another huge investment in a large boxed system.

And we are amazed that what we see now is there's also been a robust secondary market and there's always been a robust licensing regime. And what I think we're most concerned with is because there are new issues coming up with how licensed software is being embedded into other products, somehow that justifies the destruction or the deconstruction of
licensing models that have been in place for years with various and sundry types of things, music, with regard to software. And. 

I think that's where we're most concerned is rather than parsing the problem dealing with the new issues that come about and are challenging in a refrigerator that has licensed software or a car that has licensed software or a Nook that has licensed software, how does a user who purchased this deal with those issues and has a license gone too far most. 

But I think what I'm most concerned with is when then you have lobbying efforts to throw everything into that basket and say now let's begin to destruct every licensing model that we're uncomfortable with or we don't like. And I'm not sure that's necessarily solving the new issues. I think it's just deconstructing models that people seem to not like. 

And there is an economic benefit to allowing a software owner be able to get some economic benefit from the innovation that they put out into the market. And the most efficient system in the software industry for many, many years has been the licensing model. 

And I think that's what we're most concerned with is, you know, we do make in Adobe's system we have different pricing models. We have some limited
transfer rights within that as long as they are not being abusive. So I think it is imperative that also the industry recognize that it has some sort of obligation in this debate to build systems and licenses that take into account archival needs and libraries. That's some responsibility.

But I'm not so sure we need a legislative fix for that. I think we need industry-led innovation into the contractual relationships to do that. And I think those models already exist from people who realize that there has to be some sort of reasonableness in the business models that they construct.

MR. GOLANT: Thanks for your comment. So we'll go with Tammy, then Tiki and then go on to a separate question.

MS. RAVAS: So to get back to some of what Scott was saying, I think ultimately what we really want in terms of libraries is we would like to have some sort of an exception where -- that would immunize a library from liability when pursuing their normal collection-building activities and lending activities when it comes to streamed or downloaded works. It would allow us to basically complete our missions. And also honor the rights of rights holders too.

So that's really what we're looking for. I
know that these roundtables aren't really meant to
discuss solutions so much as it is to describe the
problem, but I just wanted to throw that out there.

One other thing that I've noticed myself as a
practicing music librarian is although I know that my
two colleagues at University of Washington did not have
any real success negotiating with UMG over the Dudamel
recording, it has been possible for me to reach out to
some independent artists, specifically alumni of the
institution for which I work, and to actually purchase
CD versions of their music that is only available via
download. And that has been somewhat of a successful
model, but it's kind of like finding needles in
haystacks, so to speak.

So that's one area where I've had some
success, but it would be so much better if libraries
were able to have the ability to be able to get access
to these files and to be able to preserve them and to
advance their mission as cultural institutions.

MR. GOLANT: Thanks. Tiki.

MS. DARE: So I want to go back to the
internet of things, examples, and all of these do go
back to the, you know, the what do you do with your
personal property and how can you -- how can you
dispose of it and transfer it without exceptional
transaction costs and in a way that administerable. I think a lot of it again is about setting up expectations in the beginning and I can certainly see, you know, the Nook example where you have something that your license says that you can't repair it, you can't do it yourself, you can't take it to an independent, those are certainly, you know, frustrating things in the road. So I think there's a lot of evolution of licensing.

And the questions asked here are good. I'm very interested in what kinds of -- what kinds of core principle, first principles we can articulate around the internet of things. Because that really is the thing that's coming next, we're not there. Most of us don't have refrigerators that talk to us. I don't want one, actually. I'm very comfortable going on record that I am often frustrated that my car is not mechanical and I have replace expensive computers every couple of years within the car instead of just, you know, being able to manipulate mechanical things.

But so what are the first principles that we can articulate around making sense of software that is embedded in a they think in the internet of things.

MR. GOLANT: Thanks. I know, Corynne, you have your card up. Let me ask this because it might be
on the topic you might want to talk about. And that is
consumer expectations.

So what are consumer expectations when they
buy a movie or a television show or a game online
through iTunes or Amazon and how clear are the
contractual terms, and do most people think when they
buy something, they can resell it when they purchase
it?

MS. McSHERRY: That actually was something I
was going to speak to, which is I think that part of
this discussion needs to be a recognition that is now
verified by empirical research of what we all know,
which is no one reads these licensing agreements.

Okay. I mean, but fortunately some very
helpful academy researchers a few years ago went out
and verified that so we can cite to something for it.
But we all know it is true, right. So much of our
activity is governed by a complex web of contracts and
terms and licensing agreements that no one reads and no
one is aware of but nonetheless, unfortunately, the
case law suggests, are nonetheless enforceable against
us.

So it's kind of funny when we even talk about
consumer expectations. It's almost hard to have a
rational conversation about consumer expectations
because when it comes to consumers as opposed to
perhaps enterprise -- the enterprise context, their
expectations may be based on a whole set of assumptions
that have no relationship to the reality of what they
have actually been agreeing to.

On the flip side, though, we also know from
other research that's been done with respect to privacy
in particular, that the transaction costs, let's just
say we tell consumers, okay, everyone go read those
EULAs before you sign them. That is also untenable. I
mean, thing about that, the hours that people would
spend reading EULAs figuring out and trying to figure
them out, you know, I just don't think that's the kind
of national investment that we want people to be
making, which is why I think Pam's point earlier about
first sale and transaction cost is so important.

We really need a sort of rational approach
that doesn't require complex licensing agreements, at
least when it comes to sort of basic things that
consumers would expect to do, like be able to innovate
and modify their devices or give it to a friend or
recycle it and so on, right. Those things should be
permitted without someone having to read a contract
first.

MR. GOLANT: Thanks for that.
MS. KLOSSNER: I just want to speak about consumer expectations within the library. No patron understands why there's a wait list for an e-book. Consumers understand that these things are easily copyable and that we need to acknowledge that there's a big gap between what people expect within the public library and loaning materials.

We may talk about the short term loan problem later, but there is a need to understand that people want to borrow electronic materials and return them to the library in a legal framework and we're prevented from loaning a lot of those materials because of these EULAs.

MR. TILL: So can I just jump in and ask, Courtney, what is your solution? As a librarian, are you urging that you can buy a single copy and then loan it out to multiple people at the same time?

MS. KLOSSNER: I would love to see libraries be able to buy a single copy and own it and loan it in a digital format. One of the reasons I got really involved with this was because I used to work in inter-library loan, I spent a lot of time mailing CDs and DVDs out to people and the head of the department said we would never see a day we could loan digital
copies to other libraries. And I would like to see that happen one day.

MR. TILL: But loan multiple copies of the same original? In other words, are you and are libraries okay with the idea that if you buy a single copy, you can only loan it to a single person --

MS. KLOSSNER: I'm okay with -- I think libraries are okay with buying a single copy and loaning one, but there's a little bit of education on the patron side of why we only own one digital copy at a time.

MR. GOLANT: Tammy.

MS. RAVAS: So just to kind of echo what Corynne and Courtney have just said, my average patron who comes up to me and says oh, okay, well, I'm just going to buy this on iTunes and, you know, go and do whatever with it and ask me further questions about it with respect to, you know, how much they can and can't do with it, I said, well, have you read the end-user license agreement and some of them say what's an end-user license agreement. Others say oh, really, I can't do whatever I want with it, and I say nope, you can't you. You mean it's not really mine, nope, it's not really yours.

So I just wanted to go on record as saying
that. And I also agree with Courtney in a sense that, yes, I think that there is an education aspect to all of this where patrons in the general public I think need to be made more aware of the content that they purchase, they're not really purchasing it.

MR. GOLANT: We'll have Tiki and then Stephanie.

MS. DARE: So especially because we have two librarians on the panel, I had a couple of questions. One of the examples that I really like in this area is the e-textbook to explain how different that is from the old textbook. One of the points that Courtney made when she was talking about library and library ownership was certainly when I get a digital book, I should just be able to add that to the collection. That's one of the things I need.

And she'd made the statement that the digital book is basically finished. There's not more coming. It's not interactive. I mean, basically it is content that someone or multiple people wrote from start to finish and it's done; whereas the e-textbooks now have some real dynamic properties. And examples are it's not just not the content, but you can immediately link to additional resources online. You can get to videos that are streamed. You can get to still photos that
help articulate the content. You can get to experiments and instructions. You can get to exams and exam preparatory material. And you can get things scored. So your e-textbook comes a much more rich and dynamic learning tool basically.

And so I think we would not -- first of all, it's hard to define where that content ends because there's so much supplemental content and I think it certainly makes sense that instead of an outright sale, you would have a license because what if you're a professor and you want to make the exam materials available to, you know, all 100 students in your, you know, your freshman survey course or, you know, maybe it's a seminar and it's fewer. But you're going to still have -- you're going to have those differences.

So I wanted to just point out that there is this example of content that doesn't finish basically. And I'm interested again in more ideas about how you manage that content because licensing seems to be the most flexible way to go, understanding that setting expectations and having a license that is readable where there would be a fair expectation of reading it and understanding it something that the panel is pulling out as a thread.

MR. GOLANT: Thanks. Stephanie, you're on.
MS. MOORE: Yeah, this is a pretty free-ranging conversation here we're having, but I guess I want to return to something that Corynne said, I guess. And I would note that, I mean, the complexity of EULAs is not, you know, unique to copyright. I mean, we're in a digital era where the complexity of licensing agreements kind of transcend everything that we are dealing with. I mean, tech companies are struggling with and FTC is struggling with trying to figure out how, you know, privacy policies are made more digestible to consumers.

But when we talk about consumer expectations and consumer desires, I still think that, you know, while very, very important, and obviously all of us here with businesses that we represent try to develop our business models that are responsive to consumers, that's not always synonymous with what's in the public interest in terms of copyright policy.

So, I mean, I think a lot of these questions that are being examined represent kind of an intersection of a lot of positions and competition policy and contract clarity and changing 109, which is the subject of this panel. I just, I don't see an effective legislative solution that has even been offered here that would respond to the questions that
everyone has been raising.

MR. GOLANT: Thanks for that.

Pam.

MS. SAMUELSON: What a nice segue to what I was going to say, which is that the Berkeley technology law journal will very soon be publishing a paper in the next great Copyright Act symposium that we hosted here at Berkeley in April, and the title of the paper is Legislating Digital Exhaustion.

One of the things that it does is it both gives some examples, if you were going to try to accommodate some digital exhaustion, there's a rules approach that's suggested and a standard spaced format also. I don't know if this is up on the web yet but it will be in the next week or so. And I think it's much worth looking at because it picks apart what sort of the specific issues might be if you were going to try to take digital exhaustion at least some of the way that exhaustion has been over time.

And so the fact that consumers bought a particular digital good where it says buy now, click here, that's going to give the consumer an expectation that, in fact, it's a sale, that it's a purchase, and "buy" is a word that in ordinary discourse, maybe not in licensing discourse, but in real discourse among
real people means I bought it. I own it. And so there
is actually, I think -- so if you say license this now,
that's going to set consumer expectations in a somewhat
different direction.

But what I see is, in fact, that a lot of
times digital goods are, in fact, "buy me now" is
something that lends -- leads people's thoughts in a
particular direction. And so that's one of the factors
that Perzanowski and Schultz suggest should be taken
into account as consumers -- how did the transaction
set up consumer expectations.

I think another factor which hasn't been
mentioned but which is obvious, at least, again, not
with respect to software because licensing models have
been in play in that space for a longer period of time,
but we're used to buying books. We're used to buying
music. We're used to buying movies and other types of
copyrighted works. And it's the same music whether I
buy a CD or whether I buy it on iTunes. And as an
ordinary person, I don't see why the medium should
change that so much, at least in terms of way that the
general public understands and interacts with things.

And so the fact that historically for decades
and decades and decades, books and other things have
been sold. I also will tell you I don't buy e-books.
I don't like them. But also I'm a really, really great sharer of books with other people. And so, you know, I'm going to be really unhappy if there are books that I want to read that are only available in e-book format because not being able to share things with my friends is really like a violation of my strong desire in this particular space.

Can I say one last thing?

MR. GOLANT: Go right ahead.

MS. SAMUELSON: And that is that there are some e-books that, in fact, are sold outright. Okay. My husband actually is the author of a book and he's making his e-books available for sale to his students at $10 a pop. So it's not the case that everything that's an e-book necessarily is, in fact, a licensed transaction and therefore consumers' expectations have changed entirely. I don't think that's right. I think that we're in a transition period for sure, but I think the consumer expectation issue is a really important one. I'm glad you asked the question.

MR. GOLANT: Terrific. Tiki and Tammy.

MS. DARE: So I want to go on record saying I have successfully loaned and been loaned Kindle books, it actually -- it works. Maybe not as smoothly as handing your friend your paperback, but it's there.
Pam, I was hoping you would spin out for me a little bit the model of selling the used iPod or selling the used computer because I actually, I purchased an iPod off of either Ebay or Craigslist and, you know, what I really wanted to put on it was something different than the young man's music that was present.

So I guess the question is, is model that when you go sell it, you know, certainly you have no obligation to strip stuff off at this point, but do you have -- is your model that you would be giving rights to all the songs that are on there? I mean, as soon as you update it with your own playlist, you know, everything then defaults to your bundle of rights that you have as a user essentially. So that's -- I'm curious what your thought is about that.

And then separately, just because it's bigger, if you go through the details of the used computer, you know, often because of data theft you want to do something about that drive. But if your primary motivation at sale time isn't privacy, then is the model -- would you think that you could make available, you know, the Microsoft Word and Excel package that's on there, you know, the Adobe Photoshop package that's on there, you know, all of that stuff. I'm sorry to do
that, Scott. So I'm curious what your thought is about
selling that in a used transaction.

MS. SAMUELSON: We don't know the answer to
that question in the sense of -- it's not just about
me, right. It's about people give away computers all
the time. I think they may strip out some things -- I
think people give away computers all the time. And I
think that they do it in a way that makes them think
that I -- you know, there was a purchase of the
Microsoft program when I bought this computer, I'm
buying a new computer, I'm buying a new copy of that
software. That's what ordinary people think.

And since computers are given away all the
time, I agree that privacy should be one of the things
that people should pay attention to. But I'm just
telling you as a realistic matter, what I would do is
different from what ordinary people would do because
I'm a copyright lawyer. So I will at least notice that
there is this issue that I would have to grapple with
but, you see, I actually believe that -- digital
exhaustion has been in the statute since 1980,
Section 117 actually allows the transfer of software
along as you delete your copy that you're giving away
or at least you buy a new one, which is what my
reselling the computer or giving the computer to a
school might involve.

And there has been this lingering question, which I Know is a lot of the source of the anxiety among some of the people on this panel about whether when I bought that software package, was that really and enforceable license that means that nothing can be transferred, or was that, in fact, a sale. And there are a number of indicia of a sale, at least for software that is going into the private possession of individuals.

And I just -- you know, it's matter of reality. I think that people have not thought, oh, I can't give this computer to my grandmother, I can't give this to my school because I'm only licensed to use this software individually. I just think that's not the way people think.

MR. GOLANT: Thanks. This is how it's going to go because I saw the time was called. We'll have Tammy, because you had your card up first, and then we'll go to the last question and then we'll go to the audience. So please, Tammy, go ahead.

MS. RAVAS: Okay. So a few things, going back to what Courtney was saying about privacy and also what Pam was saying about privacy, it also matters an awful lot to academic librarians and music librarians too.
A couple of other points that I wanted to make. When I think about licensing and copyright, I'll just go on record here as saying that I'm not a lawyer and I've never played one on TV, but I think that when we're talking about copyright and licensing, they are two definitely different things. They are separated, kind of related, but they are separate.

So one other scenario I just wanted to bring up is the notion of -- going back to Pam's point with buying versus licensing. And let's say that, for instance, I was working with a graduate student or a scholar who wanted to critique a recording that was only available online via licensing and he or she wanted to play it during a scholarly presentation, would that violate the end user license agreement? What if they wanted to publish it. Publish, you know, snippets of it just to demonstrate a particular point in scholarship.

If they were doing that with a physical CD, they would be able to do that under fair use. The concern that I have is that these licenses are pretty much unilateral. There's really no wiggle room for a consumer to negotiate with the rights holder on them and it's setting up a separate regime to what we already have existing within copyright law.
So that's all I got. Thanks.

MR. GOLANT: Thank you for that. So I'm going to follow up with this question. Everyone can chime in.

Would a voluntary best practices regime establishing standard definitions, terms and conditions for online rentals and purchases be useful. And how could such a regime be constructive so that it takes into account the needs of both creators and consumers.

Okay, Tiki, you're first.

MS. DARE: We would always prefer voluntarily than having it legislated because I think there is so much understanding in the industries about who our customers are, what innovations we want to deliver to them, what choices we want to give. I mean, certainly there's been some criticism today about end-user license agreements for consumers and is there some work to be done by industry there. I think, you know, that's a fair point.

I'm very interested, again, you know, going back to the idea of first principles and what's on the statute. I mean, there's that idea that, you know, you can transfer it as long as you delete your own copy. Just like we don't think anybody reads end-user license agreements, we don't think anybody deletes their copy.
So that's -- you know, there are 
administrability concerns. Again, I think industry has
the expertise and thoughtfulness and the raw
information to do that, and I think we know also as the
industry where we want and need to innovate. Another
element is we want to give not just flexibility in
terms of what the end product is but also, you know,
innovation and flexibility and choice around pricing so
that academics can access it and do all of the things
they needed to do and libraries can access it.

So we could price in more transferability, for
example, if more transferability is desired. And
again, I think we want to deliver the widest range of
choice available so all of those things converge on a
voluntary set of principles.

MR. GOLANT: Corynne.

MS. McSHERRY: So I think one of the tensions
that that actually speaks to, also, but I think for the
past 45 minutes we keep hitting is tension between
different contexts within which software, for example,
and digital goods appear. So a set of best practices
that might sense for enterprise software I fear
wouldn't make a lot of sense for consumer goods. So it
may be that we might want to have more than one.

But I think a simpler approach might be to
just agree that certain rights aren't waivable in a license. And because one of the concerns, and I'll be frank, that I have in all these conversations that we're having about copyright reform is that we will fix copyright law in any number of ways to make it better and more fulfill its purpose of encouraging creative expression.

But then all of those changes will go away in the form of end-user license agreements that everything will become attached to. So we will all spend a lot of time and energy on legislative solutions that will simply be waived by consumers entirely unknowingly when they click "I agree" or "buy."

So I think that one of the things that should be on the table is a simpler solution, hard perhaps politically but more elegant and more logical, is to simply agree that certain rights just shouldn't be waived.

MR. GOLANT: Thank you, Pat.

Tammy.

MS. RAVAS: I just want to add to what Corynne was saying in that, well, since I've been a librarian, libraries have been negotiating with database distributors on those very things with respect to we will not waive our right to fair use. So if we
download an article from a particular database, our
users can still make fair uses of that material, for
instance, that might be one way to kind of look at it.
That's all I had.

MR. GOLANT: Thanks. And Courtney.

MS. KLOSSNER: I want to build on what Corynne
said, but also -- and I feel like this is kind of not a
great popular thing maybe to say in front of recording
artists, but one of the things that's great about first
sale and ownership is that you buy something once and
then after that you don't have to worry about tracking
payments back to the artist or to the license holder.

And I think that's really important if we do
come up with a set of standards to acknowledge that
with first sale a lot of times the money only flows
back to the creator the first time and that in future
uses that maybe the money won't be flowing back to the
same person and how to account for that, whether
through some other kind of residuals or licensing fees
or something. Again, I'm concerned about the tracking
involved in all of that, but I want to acknowledge that
sometimes the artist and the copyright holders don't
get money they may deserve because of first sale.

MR. GOLANT: Thanks for all your comments.

We'll open it up to the floor. Anybody who wants to
have comments, questions, please go ahead. As you
know, we have mics on both sides. Right, if anyone is
online -- thank you.

We're going to start with Mr. Sheffner over
there to my right.

MR. SHEFFNER: Thank you. Ben Sheffner with
the Motion Picture Association of America. I first
just wanted to talk briefly about this idea of consumer
expectations. I find the discussion fascinating.
Obviously over the last 15 to 20 years the internet has
revolutionized a lot of different industries. We have seen
established industries crater. We've seen new
industries grow up. We've seen old established
businesses fail and new multi billion dollar ones grow
up. Which is great. Creative destruction, change, and
we all celebrate it.

It's really interesting to hear the talk,
though, about consumer expectations. There seems to be
this almost a consensus that consumer expectations are
this static thing that should never change even though
the world is changing around us. I think we have to
acknowledge that consumer expectations, just like
everything else in this world, are changing. One
aspect of that is the change in consumer expectations
and the consumer desires from ownership to access. And
it's not one or the other. I realize there are shades of gray here. But the world is moving in that direction. I used to buy a lot of music. I used to buy lots and lots and lots of CDs. I haven't bought a CD in years. I buy access. I buy it through Pandora. I buy it through Spotify. Same thing even with books. I subscribe to Audible.com. I drive around a lot. And it gives me access to a new book every month, I think it's great. I don't own a thing.

And it's happening even in a lot of things that have nothing to do -- in the physical -- that are more based in the physical world. I know there's business models where people, for example, they don't own tools anymore, they have these websites where you can go and rent tools from somebody. Which is great. My point is simply that consumer expectations change. We see that in the media world as well, whereas I once bought CDs, I now have access to them. Whereas I once bought DVDs, I now have access to them through things like Ultraviolet or Disney movies anywhere. So we don't want to try to preserve or change the law in a way that makes -- that sets consumer expectations in stone.

Two more really brief points. On end-user
license agreements, I understand no one is going to stand up here and say it's great that end-user license agreements are 40 pages long in eight-point type, nobody loves those. But consider what the alternative is, and I'm going to steal an anecdote from Allan Adler from the publishers who spoke at the event in Cambridge.

He says, you know what, when you go and rent a car and you're standing there at the airport and you're really frustrated because there's ten people in front of you and they're having you look through this long thing and decide, you know, are you going to take this option or that option or get this kind of insurance, well, consider the alternative. Consider if you had to bring your lawyer and Avis had to bring their lawyer and negotiate that thing from scratch. Talk about lowering transaction costs.

End-user license agreements, while imperfect, and they can always be simplified and improved, are a tremendous lowerer of transaction costs.

And just lastily and briefly, on the idea of the buy, the buy button on a website and how that misleading, I think it is probably more accurate to say what you're doing is you're not buying a physical item, of course you're buying a license. But that's not
strange or unusual or even misleading. I mean, think about all the different kinds of transactions where you might think about in common parlance that you're buying something, but you're obviously not buying a physical item.

One example, I flew up here on Southwest Airlines today. All my transaction was online. I went on the website, I bought my ticket, there was a thing that said "buy" or "purchase," I don't remember exactly. I'm not getting a physical thing. I knew I wasn't getting a physical thing. What I was buying was the right to board the airplane and have it take me from Burbank to Oakland this morning.

So, yes, can there be improvement in the way that these things are described so the consumer knows exactly what he or she is getting, absolutely. But it doesn't mean that saying that you buy access to a movie or a piece of software or piece of music is necessarily misleading. Thank you.

MR. GOLANT: Do you want to say something, Corynne?

MS. McSHERRY: Just one quick point. I can't stress enough though that the people I represent want more than access, right. Remix artists, for example, want more than access. They want to be able to take
content, remake it, rework it and create something new
and exciting. Tinkerers, makers, they want more than
access to the goods that they buy, including the
software that may be contained within those goods.
They want to modify the things they buy. They want to
improve them. They want to make them better. They
want to repair them. Maybe they want to recycle them.
Those are all good things that we should be encouraging
and I think that copyright law really shouldn't be in
the business of discouraging.

MR. GOLANT: Tammy.

MS. RAVAS: I would say, indeed, yes, consumer
expectations have changed. It's so easy today to
purchase a digital file and they are very, very
convenient, you can take them anywhere with you. But
what I would say has not changed is what a consumer
thinks that they can do with that material.

And going back to what Corynne said earlier
about end-user license agreements with having certain
rights not being able to be waived I think might be
something to really seriously consider. And to go back
to the idea of purchasing an airline ticket, even when
you do purchase an airline ticket, there are certain
rights that can't be waived and there are those
particular -- that particular transaction has certain
aspects of it that are governed by federal laws.

That's all I got, thanks.

MR. GOLANT: Thanks. We have two over here to my left. Please go ahead.

MR. STANFIELD: Hi. My name is Scott Standfield. I'm the CEO of a software company called Vertigo Software. I live here in Berkeley so it's an easy commute for me. He have about 60 employees working out of our Point Richmond office and Portland as well. We build apps. We build apps for big media companies like HBO, Showtime, new media companies like Go Pro. We did the winter Olympics, March Madness. We build these apps for our clients that run on your Windows phone, your iPhone, android, desktop, X-Box, et cetera.

So we have some experience in this. We're hired to build the software. But what's really driving this new business in my space and what allows me to hire more people is the apps market. So I want to distinguish the word software from apps. And I want to distinguish both of those from media. I have a music background. I purchase music. I purchase movies. I have no problem with paying for static content even if it's delivered in electronic form.

And there's a comment earlier about what do
you do when you donate a computer that has bundled software on it. And the idea of boxed software with digital keys, I kind of think it's a thing of the past. I pay a lot of money to Adobe for a Creative Cloud subscription. I don't expect to be able to resell that. So I'm okay with that.

What I'm concerned about are the unintended consequences of extending this world into the new apps market. This apps market, as much as I really don't like the word app or app store but it's easier to think about it, didn't exist six years ago. It's a $60 billion market in 2013. Last year, 5 billion. Next year, well, by 2016, should be about $140 billion. This is from Javelin Research. It's a huge, huge space. It allows me to hire more people.

So here's what I'm -- I'm worried about two potential consequences. I'm trying to think how this plays out. I'm working with a local book publisher who has a cocktail book called 901 Very Good Cocktails? And I can attest to maybe 100 of them. They are very good. And he literally drank and made 901 cocktails over the course of three years, three cocktails a night.

MS. McSHERRY: I don't think copyright is his problem.
MR. STANDFIELD: Yeah, copyright is the least of his problem.

So we worked with him to have -- I want to make his book digital because I can't be flipping through a big book when I'm trying to make a cocktail for my friends.

So we're literally making this thing right now, and the way it's going to go, we're going to sell it on the app store for about four bucks. That's what we're thinking will support this market. And we're going to have it released and ready to go in about two months along with iOS 8.

So now I'm thinking fast forward to the ability to -- the secondary market for reselling apps. And I see two really scary problems. Number 1, there is no distinction between used software and new software, especially with an app like this. Almost by its very definition, the used software, if you strip away the state, it's identical. Like if I want to sell my wallet, I'll strip away the state. I'll remove my driver's license, my credit cards, all the things that are personally identifiable about able and the things that are important for my privacy, I can get rid of and sell the wallet.

Now, the wallet's definitely not in new
condition, and also my market will be Craigslist or Ebay. It's not like I'm going to take it back to the store where I bought it and put it side by side with the new wallet. And if I did that, a consumer would clearly know, oh, is a used one cheaper. It's been beat up. It's been in my back pocket for ten years.

So there's a distinction that doesn't exist in an app store and it scares me to death. Because if I could sell 10,000 copies to cocktail enthusiasts, which is a polite way of putting the space of our market. Let's say that my total space is 10,000. If I sold all 10,000 on day one, I'd be very happy. If I didn't sell any more, if I forecast 10,000 copies, I'd be fine.

But what's more likely to happen, let's say I sell 3,000 in this first month, 3,000 four months later and 3,000 four months later. If those 3,000 people, half of them don't like it, they'll put that app right next to mine in the app store and I'll get nothing, and I'll lose all that future revenue. And, again, it's not like selling a used LP that has scratches and dings. By it's definition, it is mint in box.

There's probably some economic study or modeling or simulation that we could do to figure out the impact of this. But I think it's going to be bad.

My second point, let's say we solve that.
Like maybe Apple is not allowed to resell and put my app next to my used copy of the app which is identical but costs less. Let's say I'm building an app, let's say it's a camera app and the camera stores my -- the camera app is very good, but it also stores my images in the cloud. When I go to sell that app, I have to strip that state away, like taking my ID out of my wallet. I have to take those cloud photos off before I go and resell the application.

That's going to create a big burden for me, not for the cocktail because there's no state. There may be a favorite cocktails, big deal. So the consequences are small. But the consequences can be much greater if it's now up to me as the app publisher to service the used copies from clients I'm no longer making revenue on but I'm now responsible for the previous owner's privacy and their cloud storage or subscription.

This is not to mention the ramifications it would have on in-app purchases. Candy Crush, it's a free game. There's an article -- if you search for Candy Crush in-app purchase, it's the third link, this guy spent $260 on color bombs and extra lives. Do you resell those.

What about subscriptions. A lot of apps are
ad-supported apps for free, so reselling those don't
really make much sense. I'm not so worried about that.
It's mostly the in-purchases, the app itself and
potential future ad revenue.

So there are areas where the business model
will survive, but I'm more worried about the fact it's
going to kill this innovation in this really important
market that's really driving a lot of the jobs in tech
sector, especially here in California, but across the
U.S.

MR. GOLANT: Thanks for that comment.

Appreciate it.

So Steve Tepp and then the person online.

MR. TEPP: Thank you. Steve Tepp representing
the Global IP Center at the U.S. Chamber of Commerce.

So there was some discussion about cars and
refrigerators and whatnot. I want to come back to that
for a minute. First to be clear and avoid a conflation
of issues, if the topic of this panel is a forward and
delete model that's commonly known as, if not
accurately known as digital first sale. Refrigerators
and cars have absolutely nothing to do with that. No
one is texting or e-mailing cars or refrigerators to
each other, right.

So it's really about hostility to particular
licensing terms on the part of certain individuals or entities. And the proposed solution that we have heard from a couple of panelists is an unprecedented hindrance of freedom of contract. So I think it's both a separate issue and a very dangerous one for the free mark to undertake that sort of a drastic solution.

Certainly software is in a lot of different things that we use. It makes our cars safer. It makes refrigerators run more efficiently. Those are great things. But I'm not aware that there's a problem reselling cars or refrigerators because of any copyright issue.

So one other point I wanted to make with regard to Section 117 that was raised, that is not the same thing as forward and delete, the digital first sale. In fact, the provision of 117 is narrower than the First Sale Doctrine as codified in Section 109(a). So suggestions that that's -- the digital first sale forward and delete has been in the law already I think is not correct. Thank you.

MR. GOLANT: Thank you.

Can we have the person on the phone, please.

MR. KARI: Thank you. This is Douglas Kari from Arbitech. I spoke on yesterday's panel in Los Angeles. And after we were done, the court reporter
was chatting with me and she related to me that her 
stenographer's machine that she used to own had, of 
course, software in it as stenographers' machines do 
nowadays. And when she wanted to sell that machine, 
she couldn't find the instruction manual for it so she 
called the manufacturer and said I'd like to get 
another copy of the instruction manual because I'm 
intending to sell my machine. And the manufacturer at 
that point tried to hit her, not for a charge for a 
copy of the book, but what they called a resale fee of 
$300 because they contented that permission was 
required in order to transfer the machine. And this 
was inconsistent with her expectation.

So following up on the comment that was just 
made about no one has heard of intellectual property 
rights being used as impediments to the movement of 
tangible goods, it's definitely a problem in certain 
kinds of technology products. And if an unthoughtful 
approach is taken to these issues, just as Pam and 
Corynne indicated, rights holders will use these as 
mechanisms to attempt to control the movement of 
tangible goods. Rights holders have not historically 
shown themselves to be restrained in how they exercise 
those rights.

We've seen that with the Recording Industry
Association and others that sometimes they run 
roughshod until the law puts them in check. And this 
is -- I believe the Kirtsaeng case was an example of a 
rights holder running amuck.

And following up on something Scott said, 
we're concerned about licensing being used to 
deconstruct fundamental consumer expectations and legal 
principles regarding alienation and ownership of 
property that extend back hundreds of years.

Following up on something that Tiki said, she 
doesn't want a talking refrigerator. You have a 
talking refrigerator. Your refrigerator has a mother 
board in it, I guarantee you. You can't buy a 
refrigerator that doesn't have embedded software, nor a 
car, nor a television set, router, or anything with a 
digital display.

Therefore, it's imperative that whatever rules 
are devised -- someone made the point, I think it might 
have been Tiki, I wrote it down, said there's no place 
for the First Sale Doctrine in software. That is 
fundamentally wrong. There needs to be a First Sale 
Doctrine in software at a minimum where software is 
embedded in and becomes an immutable part of tangible 
items.

MR. GOLANT: Thanks for your comment.
MS. PERLMUTTER: We are now running seriously behind. So I know there are others who would still like to make more comments about the additional comments, but we are going to end this panel now.

We are going to take a lunch break and resume instead of at 12:30 with statutory damages, we'll resume at 12:45. So see you all then. Thank you.

MR. GOLANT: Thanks again.

(Recess taken from 11:48 a.m. to 12:47 p.m.)

MS. CHAITOVITZ: Welcome back. I hope everybody had a good lunch. So we're now moving on to our final panel of the day and of all the roundtables actually. So we're going to talk about statutory damages. Statutory damages are available under the copyright Act as an alternative monetary remedy to actual damages and profits. 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 $150,000 upon a finding of willful infringement or lower to a minimum of $200 upon a finding of innocent infringement.

So on here today we're going to talk about two specific contexts. Secondary liability for large scale infringement and second context is for individual file
sharers. So 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.

So first we're going to start with the secondary liability question for mass online infringement and I'll be asking those questions and then we'll move on to the individual file sharing questions that Ben will be asking.

So this question is not new probably, so if you -- oh, yeah I'm sorry. First -- where's my brain -- if you could each go through and introduce yourself and then we're going to follow the same rule that when you want to talk, go like this. And as you all see, I can get the first two and then I'm lost anyway.

MR. ENGSTROM: I'm Evan Engstrom, the policy director for Engine Advocacy, a nonprofit group that advocates and performs research for tech startups.

MS. HADJIPETROVA: I'm Ganka Hadjipetrova and I'm in private practice and I specialize in representing mostly cloud-based -- cloud companies and
internet startups.

MR. MENELL: Peter Menell, I'm a law professor at UC Berkeley.

MS. SAMUELSON: Pam Samuelson, also a professor at UC Berkeley.

MS. SHECKLER: Vicki Sheckler, I'm with Recording Industry Association Of America.

MR. SHEFFNER: Ben Sheffner, vice president of legal affairs, Motion Picture Association of America.

MR. STOLZ: Mitch Stolz, I'm a staff attorney at Electronic Frontier Foundation.

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

MS. CHAITOVITZ: Thank you. And I'm going to again ask that people use these because as I look down, I don't see everybody but I can see all those; otherwise, I could miss you.

So the first question and we've asked about these topics in our other roundtables as well, so some of you have heard this before. But the comments that we've received have made a range of suggestions about ways to recalibrate statutory damages for secondary liability. Four that were suggested, one was a total
damage cap. The second was providing courts with the flexibility to award less than minimum damages per work where there are large numbers of works infringed. The third would be changing the innocent infringement criteria. And the fourth was to limit the range of statutory damages where there's a good faith belief that the use is non-infringing.

So what do you think of these four suggestions, anything that you like, anything you don't like?

MR. MENELL: I'm going to kick it off, but I'm sure many more will follow as soon as I say a few words. But I would generally favor reopening the entire framework of statutory damages because the framework that we have was originally designed to deal with very different problems. It assumed that judges and not juries would be deciding it. It was then ramped up using the same framework rather than reshaping the framework to address digital viral issues.

And so each of the elements that you talk about I think go to tailoring the remedies in light of the experience of the modern copyright age. And I will just pick one of them just because I think it kind of captures several subcomponents. But limiting the range

...
based on various other factors or categories.

So, for example, we talked earlier today about mashups, and we don't know the answer on whether it's fair use or not, but it seems to me that that would be a category that would make sense for really tamping it down because a mashup involves, you know, 20, 30 or 40 works and you multiply that by, you know, even the $750 number, it could get to a very large number quickly.

And so I do think that as you look across all of the different reform issues that you are covering, that this provides a very useful reframing to get statutory damages back to the principles that were set forth in the original Copyright Act or principles that we might want to recreate.

MS. CHAITOVITZ: Thank you. I was watching to see who got it up first.

Okay. Ben and then Mitch.

MR. SHEFFNER: I do think it's important to maintain the availability of statutory damages in the context of large scale commercial infringers on the internet, even those where the numbers can get quite high given the volume of works which they infringed.

First of all, let's remember, we're only talking here about imposing damages following a finding of liability. So we're not talking about anyone who is
sort of an innocent bystander here. Unfortunately, as many gray things as the internet has produced, it's also produced a lot of people who like to label themselves entrepreneurs and innovators, but what they're really trying to do is basically find ways to run a business based on copyright infringement and not have to pay for it.

Statutory damages are an incredibly important way of deterring and in certain cases punishing this behavior. It is true that the numbers can add up to quite large numbers. At the same time we have also seen that these companies achieve great benefits from the large number of works which they touch on and in some cases infringe.

You don't hear internet entrepreneurs or people who call themselves that clamoring for a cap on market value. At the same time they should not be -- they should not be subject to a cap on statutory damages when they cross the line and build their business by infringing other's works.

MS. CHAITOVITZ: Thank you, Mitch.

MR. STOLZ: I just wanted to say I'm really glad that the task force is taking on the issue of statutory damages because for a couple of reasons. There's, I think, although I suspect some folks here
are going to try to prove me wrong on this, there's
really a remarkable amount of consensus around the
basic idea that statutory damages and copyright are
broken and that some changes are needed. You're really
going to hear that from a lot of people in industry, in
academia, in the nonprofit and educational. There's a
pretty broad consensus that something needs to be done.

And the other thing about statutory damages I
think is particularly appropriate for this process is I
think a fix for damages changes, specific changes that
would make it more fair, more rational, more
predictable, and more in line with other areas of law
and with the law in other countries. All of those
things make a lot of the other problems in copyright a
lot easier to address, including some of the ones that
this task force has taken on.

So I think the issues surrounding remix and
reuse of work and fair use and in that sense, those
actually become a lot easier when the -- getting it
wrong doesn't mean a adjustment that will bankrupt.
And someone can have the certainty that, you know, from
the start that, you know, getting the question wrong is
not going to be, you know, life altering. The
financial death penalty as some people call it. Which
can and does happen.
Another is the orphan works issue which I know the Copyright Office has been deeply involved in. That one becomes a whole lot really easier problem to deal with when the consequences at the margin are, if nothing else, predictable.

And just quick about this -- this notion that companies, businesses, technologies that touch on copyrighted works should, you know, the -- you know, should be massively liable if they are found to infringe. I think that ignores the point that there are close cases and there are cases on which reasonable minds can disagree. And I dare say there may be cases where courts might get it wrong.

And I don't think we want the stakes to be essentially a game of roulette which is what statutory damages can be.

So, you know, take -- you know, if you take those accusations, you know, this was -- this is a business built on infringement. This frankly was an accusation leveled against the VCR. It was leveled against the MP3 player, the DVR, various other things that I can name. All things that are staples of the -- of creative economy now that have created entire markets. And, you know, some of those were safe from court challenges in very narrow ways.
I'd even mention Aereo. I know some folks here are going to obviously going to be of very different opinion as to the -- you know, whether the Supreme Court's decision in Aereo was correct. But let's just face facts, you know, three courts found Aereo to be a lawful business model. This was again an internet TV startup using thousands of small antennas. Three court and three Supreme Court justices found that lawful.

The next company like Aereo that comes along, we -- I would -- copyright and the copyright system encourages uses that are lawful. But if the consequences of, you know, having, you know, five instead of four Supreme Court justices rule against you is bankruptcy, then people aren't -- people are going be directed away from that and we are then creating a disincentive for things that copyright is actually really supposed to create an incentive for.

It is on those margins, it is in those close cases that the progress is made and markets are created.

MS. CHAITOVITZ: Okay. Thank you. I tried to keep track. And so what I have is Evan, Steve, Peter, Victoria, Ganka, Pamela. And I hope I didn't mess that up.
So, Evan.

MR. ENGSTROM: So to build off some of the stuff that Mitch was saying and to address a point that Ben made briefly, it's not really talking just damages after finding of infringement and it's not just about fining ways to deter large companies that are engaged in the distribution of content. This affects the whole range of innovation, the whole range of the innovation economy, all types of startups.

And the reason it does is when you're talking about the multiplier figures that you might face when you're dealing with secondary infringement, this is enough to deter virtually any startup. Most startups I think it said they raise about an average of $80,000. And most startups fail.

If we're talking about even a single infringement where potential damages are as high as $150,000, that might be enough to deter them from entering the market and it would certainly be enough to deter investor from trying to put their money in innovative technologies.

So it really isn't just about the end result. This is what a jury is going to award. It feeds back all the way through the system to the incubation of these companies. And it is important to bear in mind
that this has had a disincentivizing effect. If we look at the technology like how you send big files through the internet, there really haven't been a lot of options until recently. And a lot of that has to do with some of these potential liability problems.

And it's great that we have large companies that litigating these issues, but they have the resources to do so. Startups don't necessarily have that. So it's going to really disincentivize activity at the edge at the startup stage and it's delaying the introduction of technologies that do have very great beneficial uses to society.

MS. CHAITOVITZ: Thank you. Steve. Did you have it up before? Okay Peter.

MR. MENELL: I'm going to disagree with Ben in the sense that just because liability has been determined does not for me establish that it was clearly a violation. We have a whole bunch of doctrines in copyright that make it a, you know, a judgment call when we're dealing with both the infringement doctrine which is itself, you know, involving lots of subjective elements as well as the fair use adjustment which is very, very subjective.

And so I would at a minimum say we ought to distinguish between what might be just, you know, sort
of supplanting copies, you know, take a major motion picture, someone's put that in a place where it's accessible, as opposed to someone who's doing a remix.

And -- but the way in which statutory damage applies to the two situations I think is worthy of distinguishing in the law, that these are different types of acts and we ought to avoid over -- you know, we should avoid windfalls in the situation where we don't think that there is, you know, some intent, you know, where there's some legitimate reason to think that I thought this was okay. I think within, you know, your category of how you would perhaps fine tune it.

The other issue, the first one you raised was the damage cap. I think that's probably the one most relevant to the secondary liability situations. And there is perhaps reason to have deterrence when you're dealing with sort of large scale activities. But there's no reason to go that much beyond what it would take for people to enforce.

And so what we're trying to do is make sure there isn't under detection and to get into the, you know, the billion dollar multiplier cases doesn't make any sense. If you use the basic theory of deterrence, we just need to have enough incentive for people to
enforce.

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

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

MS. CHAITOVITZ: Thank you. Victoria.

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

And the purpose, you know, is to deter the infringement activity from taking place. It is not just to replace what profits may have otherwise been there. We need to keep that in mind. That is the
purpose. If it's just to, you know, be like contractual damages, it's not going to serve that purpose.

Second with respect to the idea that statutory damages chill innovation, I would point out that in 2011, Limewire sold for $105 million during the statutory damage phase. That same year there's a 34 percent increase in investment in music services. So at least in our experience it isn't true.

MS. CHAITOVITZ: Thank you. Ganka.

MS. HADJIPETROVA: I think everybody on this panel recognizes that statutory damages have been a great tool to bring both parties to the table because they do provide some predictability in an area in a context where it's quite challenging to calculate damages otherwise.

But I think in the context secondary liability in particular, I think the question of damages goes hand in hand with the effectiveness of finding the underlying liability first, which means we have to first fix our safe harbor rules. And from there on I think we got to move to the damages question, in particular statutory damages in cases of secondary infringers, secondary liability infringers where we could be talking about really huge numbers of infringed
works. Courts will have -- will need the flexibility that fairness requires much more than maybe in smaller cases.

So in that respect I think also looking at some of the suggestions that you mentioned earlier, namely lowering the minimum of statutory damages per work infringed, putting a cap or redefining the -- rethinking the definition of innocent infringer will be -- will all have their place.

MS. CHAITOVITZ: Thank you. Emma.

MS. SAMUELSON: So the statute actually aims to make statutory damage awards just. And right now sometimes they may be just and sometimes they aren't. But I think that having studied the legislative history on the development of statutory damages both under the 1909 act and under the 1976 act, there was really an effort initially to calibrate by type of work in a way that would be kind of this is the kind of damage that might happen in this particular domain. And in '76 we moved away from that. And part of the reason we moved away from that and moved toward per-work liability was a way to make damage awards less excessive.

And so the concern of the broadcasters at the time was if I, let's say, even inadvertently broadcast something and it reaches 5 million households, I don't
want to be liable for 5,000 or 5 million times some statutory damage number. That actually doesn't seem fair, so they made it per work. So now the broadcaster would only be liable up to at the time the '76 act was passed $50,000 rather than kind of all the money in the world.

And what we've done instead of really developing a set of guidelines by the judges through common law kind of adjudication, we haven't ended up developing principles yet. I'm still hoping that that will happen. But the statutory framework is too broad and too open, especially in this day when per work actually is the cause of excessiveness of some awards and not the solution to the problem.

So in terms of caps on liability, there are a number of countries that have caps both for noncommercial and also for other kinds of uses. So it would not be unknown in the world to have cap like that. That actually doesn't seem to me to be the optimal solution at least for the secondary liability because there are just too many different kinds of situations that we might be needing to address.

Giving courts discretion to lower awards is a much better idea from my standpoint because the awards are supposed to be just and judges are in a better
position to kind of decide about what awards are just
and they should be thinking about how to make awards
just, not just saying okay, it's kind of like somewhere
in the middle of 750 and $150,000 thousand and we
have -- we can just kind of wing it. That just seems
wrong to me.

Doing something about innocent infringement so
that it's actually a meaningful thing I think would be
a positive development. Again, I read hundreds of
cases involving statutory damage awards and I found
exactly one in which a lower amount was awarded. And
it was to somebody who was like a little mom and pop
Korean guy who kind of didn't know he was dealing with
counterfeit goods, but that's the only case I ever saw
involving that. And so it's not really a meaningful
thing.

In terms of my proposal and statement that I
submitted before was in the cases of secondary
liability, that there be a limit to -- on statutory
damages to approximating actual damages if -- unless
there was a proof that no reasonable person could have
believed the conduct was unlawful.

So if we're dealing with a situation where you
have the guy who's in the -- the guy who's building a
technology and inducing infringement, that's not
something that you can reasonably think was lawful. So
don't have the cap on that. But it seems to me that if
you want to actually realistically try to stop the
chilling effects that are actually happening out there.

And the other thing is that these statutory
damage ranges have given rise to the copyright troll
problem that is extracting rent from people even who
probably are making fair uses, but do you really want
to go to court and face a liability of that much, I
think probably not.

And it actually is interesting to me, Ben,
that you want to talk about statutory damages as
punitive. I'd rather have that in a statute because if
it's in the statute that it's punitive, then the
Supreme Court's jurisprudence on due process limits on
punitive damage awards would actually be applicable.
So I'm actually in favor of that.

MS. CHAITOVITZ: Thank you. Steve and then
Evan.

MR. TEPP: Wow. So there's a lot to cover
now.

So I agree with the characterization that
Congress has historically sought to keep statutory
damages in a range or at a level that is just and
avoids exorbitant awards. I think Pam did a good job
of articulating that, how that happened under the '09 act. I've been looking at statutory damages legislative history as well all the way back to 1790.

The change to the per infringed work standard that of course we have now that occurred in the '76 act I think was not simply to avoid exorbitant awards. There was a reference to some broadcaster concerns in the 1961 report of the register of copyrights to the house judiciary committee. And that was a sub issue.

That same report noted that the Copyright Office felt that the concern of multiple exorbitant awards in multiple infringement cases is more theoretical than real. And although in that report the Copyright Office did recommend an overall cap on damages per case, it reversed itself four years later in the 1965 report to Congress.

I think -- I think the whole change that we saw from the per infringing copy to per infringed work in the '76 act was a prescient one because historically, as we know, the reason we've had statutory damages since the beginning of the republic and even prior to the constitution and state laws is precisely because it's difficult or impossible to prove the actual harm in many cases.

Today if we had to try and prove the number of
copies that were made during the course of an
infringement, particularly in the online space, that
would be extraordinarily difficult and unproductively
time consuming and expensive.

So what we ended up with instead of this
amount for public performances of dramatigal musical
works, this amount for copying literary works and so on
that we had for 188 years is, yes, it's a broad range.
We have a broad range in the statute. It applies to
all types of works. It applies to all volumes of
infringement of that work. It applies to innocent. It
covers willfulness. It covers close calls and it
covers blatant criminal enterprises.

We trust the court to do its best to get it
right. It's correct that in 1976, statutory damages
awards were usually determined by the judge. Of course
in 1999, the most recent time Congress touched
statutory damages, it was aware that juries would be
deciding that and it didn't choose to change the
structure, even though that structure predated the
Feltner decision from 1998.

It seems to me that when we talk about some of
the close cases, we would have to recognize that they
involved necessarily an entity that doesn't have a
license, that pushed the envelope for fair use and
didn't get it, but didn't qualify for the safe harbors, and thus they're on the hook for some liability. The courts can, of course, take into account that scenario.

But given how easy it is to destroy entire markets in the online space, the mere compensatory aspect of statutory damages, I think there's a real danger of undermining that if we start putting per-case limits or lowering the entire range because of the scope of harm that can occur. And compensatory damages by definition are never exorbitant. They are merely compensatory.

MS. CHAITOVITZ: Thank you.

MR. TEPP: I'll cover the rest later.

MS. CHAITOVITZ: Well, I see Evan and Ben and then Pamela. But since it's your second time at the mic, if you could try to make the comments brief so we can get on to a couple more questions.

MR. ENGSTROM: I will be brief. I just want to push back on the idea mentioned earlier that -- or the suggestion that somehow large statutory damages, liability doesn't really have an effect deterring innovation. I don't think it passes logical muster to say that it can defer infringements but won't discourage innovation. These are two sides of the same coin, that it simply doesn't make sense.
And I don't think it's particularly instructive to point to something like Limewire's sale during the statutory damages phase to say well, look, here's an example of value in light of potential damages. Let's not forget that they got to the statutory damages phase. We're talking about companies that are just starting out.

And I don't think the solution to problems with infringement is to prevent use agnostic services from starting. However you feel about the operators of Limewire and Napster, it's difficult to argue that these technologies, these use agnostic technologies underlying these services don't have value. If you were saying the VCR had no value, I think it's pretty clear that it has value. I think we've seen from -- obviously YouTube is instructive. That has value.

And to prevent these things from starting because of the threat of potential damages clearly has a deterring effect on innovation. And it just -- I just don't think it makes any sense to say well, we can deter infringement, but let's not worry about innovation because invariably if you're trying to make a decision whether to get into a murky marketplace with unclear statutory damages, unclear safe harbors, it just does not make financial sense to take a risk in
such an opaque legal framework.

MS. CHAITOVITZ: Ben.

MR. SHEFFNER: I just want to address one particular point that Professors Menell and Samuelson both made, I believe, which is that the statute itself is so vague that it leads to unpredictable results. It's of course true that the statute just says that the court shall award statutory damages in an amount it considers just. And since Feltner we now know that court actually means jury.

And if that was the entire story, I would agree there was some weight to that argument that the statute is too vague. But of course juries are not simply instructed to do what's just. Juries are instructed with specific instructions. And I can't speak for every single district court that's ever instructed a jury about statutory damages, but I know here in the 9th Circuit and in the 7th Circuit and I know that the ABA has model jury instructions on statutory damages that, in fact, take into consideration many of the factors that Professors Menell and Samuelson have mentioned.

I'm just going to tick off a few of them that are mentioned in some of these statutory damages jury instructions. Things like the duration of the
infringement. The willful -- the degree of willfulness
of the infringer. That helps differentiate between the
cruly bad actor who is out there to induce others to
infringe against a remix artist who has made a close
fair use call and turned out to be wrong.

The profits reaped by the infringer. The
revenues lost by the copyright owner. The value of the
copyright. The cooperation of the defendant in
figuring out how much infringement has actually taken
place.

Those are just a number of the factors, but
again, it shows that, yes, juries are not simply given
the instruction to go back in the jury room and do
what's considered just. They have heard evidence in a
trial and they are given a number of factors and juries
do what juries do. Is it sometimes unpredictable, yes.
Juries are unpredictable in all areas of law, not just
copyright. That's the nature of the system that we
have.

And there's certainly -- just to wrap up.
There's certainly nothing wrong with having
instructions like that properly done that allow the
jury to take into account, again, many of the factors
that Professors Samuelson and Menell have mentioned
already.
MS. CHAITOVITZ: I'm going to just butt in right now with a question that you can work into your comments because it builds off of what you just mentioned and what you have mentioned earlier, Professor Samuelson, about guidelines.

A variety of commenters talked about creating guidelines for judges and for juries when awarding statutory damages. So I was wondering you thought about this idea and what should be in the guidelines.

And furthermore to what Ben was talking about, to what extent do you know that jury instructions in the recent litigation, whether they have or have not spelled out factors to be considered and what do you think are important factors that should be considered in the guidelines and should there be some kind of standardizations of guidelines from -- instructions from jurisdiction to jurisdiction.

MS. SAMUELSON: So I think jury instructions can be part of a solution. I don't know that they are the solution altogether because by the time the jury has a list of ten factors, it's hard to really sort them out. I think judges are more careful about trying to do that kind of sorting out. And of course a lot of what I would guess happens in these cases is sometimes the judges use guidelines and sometimes they don't.
And so guidelines that stood outside of the jury instructions I think would be more useful. In my article in the William and Mary Law Review, I gave a set of principles that actually I would recommend be part of it. And in the interest of time I'm not going to try to remember each and every one of them.

But one that actually not only was appealing to me but was appealing also to some of the folks that I worked with on the Copyright Principles Project, it was really sort of trying to think about statutory damage awards in terms of multiples over actual damages and profits, depending on the degree to which the person, in fact, was just stepped over the line, in which case something that approximated actual damages and profits was a small multiple over that would be appropriate.

And for the baddest of the actors, a much large multiple over that. That at least I think achieves a deterrent effect across the board better than the range that we have.

So suppose that actually you are a bad guy and you make 5 million copies of a particular work, statutory damage awards as to that could be no more than $150,000. Now, I'm not going to suggest that we
should raise that to 5 million because that's going to make the range of statutory damages much, much greater. But what I'm saying is that if, in fact, you infringe this many works only once, you could end up with a much higher statutory damage award than somebody who made 5 million copies of one work.

So there's something that's not well calibrated now and something that focused attention on damage and multiplied it just seems to me to be something that has deterrent effect that actually is more likely to be relatively just and is in keeping with due process actually.

MS. CHAITOVITZ: Thank you. Okay. I lost the rest of the order. So we can go from -- why don't we start with you, Ganka, and then go down.

MS. HADJIPETROVA: In fairness I was probably the last one.

MS. CHAITOVITZ: Okay. So then we'll start with Steve and work this way.

MR. TEPP: So on the issue of guidelines, I think not only are there jury instructions, there are guidelines in case law. There are number of different cases that have outlined some of the relevant criteria. A fair process amongst stakeholders to work out something that's reasonable, you know, that seems like
a reasonable thing to do.

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

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

MS. SAMUELSON: That's not true.

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

With regard to abusive litigation, these --
first of all, there has not been proof that there is
abusive litigation at a significant level. The article
that's been cited talks about suits against file
sharers and the article itself noticed that --
recognized that that's infringement. So you have a
copyright owner with a copyrightable work vindicating
the rights against what's established in the law to be
infringement.

Now, if they used particular litigation
tactics that are unsavory, there are tools to deal with
that both in the Copyright Act and in the Rules of
Civil Procedure. I don't think it's helpful to our
conversation to characterize copyright owners who are
vindicating their rights in meritorious claims with
some sort of villainizing term. And it certainly
shouldn't bear on what statutory damages should be.

And then finally with regard to the concern
that excessive statutory damages awards could chill
innovation, of course we do have empirically a
significant amount of innovation going on. And the
reality is when you look at the numbers, statutory
damages range today is no higher, in fact, lower
adjusted for inflation than it was in 1978 when the '76
levels came into being and in 1909 when that -- when
those set of levels were enacted.
So statutory damages are, in fact, lower today than they have been in the past. So I don't think it supports this claim that there is inherently a chilling effect from them; quite the opposite, we see that there are instances where statutory damages are insufficiently high, 5 million infringements of a single work was a good example of that.

I'm not asking for them to be higher, but we can see a shortcoming there in reality. And it comes back again to in the theoretical sense you can imagine a calculation that's very, very high. In a couple of cases people have seen judgments that they don't particularly like. Those judgments could have been lower within the range had the Court thought that was just, but it didn't.

None of that proves that the system or the current range is flawed. It just proves that you can imagine a range that you don't think is reasonable or you can find a case that you don't agree with, but it doesn't prove that the system is, as one of my fellow panelists said, broken. Thank you.

MS. CHAITOVITZ: Thank you.

MR. STOLZ: So on the point about guidelines, I do think guidelines would be really helpful. I know they are a feature of some of the small number of other
countries that have statutory damages and copyright do
include specific guidelines.

I think it's well and good to say courts can
produce predictable results, but the empirical evidence
here, and there's quite a bit of this in Pam's article
with Tara Wheatland is that courts haven't. The cases
are -- the damages awards, they are all over the map
for the same conduct or for very similar conduct.

Empirically, when I'm counseling a client,
whether it's a small software developer or an amateur
videographer or various other kinds of clients and they
want to know what is the possible outcomes here. Often
I have to say well, you know what, I have to tell you
it could be 5,000 and it could be 100,000. Could be
1 million. Those are actually equally possible in your
case based on case law and base on my review of jury
instructions.

So, yes, those things have the potential to
help, but they haven't. I think including guidelines
in the statute might.

The second point, I want to push back on this
mantra that damages are difficult or impossible to
prove in copyright cases. It's a categorical statement
that is far broader than any possible evidence for
that. And it's -- frankly it's an out-of-date notion.
I think the origin of that idea and then the origin of statutory damages in copyright were in an era before civil discovery. And then before modern expert witness practice.

But you look at any other area of law and there are plenty of them where, generally speaking, damages are hard to prove. Look at personal injury law. Look at pain and suffering damages in a tort suit. Look at you economic harm in a complex anti-trust suit. Look -- there's really -- you can almost say in any area of law and you can see categorically, you know, damages are hard to prove, yet the law requires that the plaintiff prove damages with evidence.

The law doesn't give the plaintiff an automatic out, a pass from actually putting on a case to the jury as to how much their harm was or how much the defendant profited. It is really, with a few minor exceptions, only in copyright that we have this sort of religious notion that in any copyright case, damages are hard to prove.

There may be some. There may be -- and there should be ways to deal with that. Statutory damages can deal with that. But this notion that, you know, if the subject of those case is copyright, then damages
are necessarily hard to prove and therefore you
shouldn't have to prove them. And, yes, it can be
expensive, but it's expensive in an anti-trust case.
It's expensive in, say, a toxic products class action.
But it's still required. It's required because it
forces our notions of due process and fairness.

It's an extraordinary claim I think to say
that in copyright, in copyright alone, American
copyright alone is proving damages not a factor.

And third point about, well, I guess I
wouldn't say trolls because Steve is insulted by that
word, so I guess I'll use some words that some federal
judges have said they've called it. They've called it
akin to extortion. They've called it a shakedown.
They've called it outmaneuvering the legal system.

I think it's heartless, heartless, to look at
the actual numbers there and the actual people who,
many of whom did not infringement, many of whom really
bore no legal liability or responsibility, you know,
who were, you know, extorted. And the numbers are
high. And we cannot sit here and talk about statutory
damages and not talk about the incentives that it
creates for that kind of behavior.

I mentioned this yesterday, but the troll
suits that's defined as multi defendant John Doe suits
in copyright, they were one-third of all copyright
suits filed in the United States in 2013. These are
not small numbers. This affects thousands of people.
And they don't go to judgment. So you cannot say that
every one of those people, or even most, you cannot say
well, they were infringers so it doesn't matter how
they were punished.

These cases don't go to judgment because of
the intimidation factor and the potential for
bankrupting damages is so high that they settle, you know,
regardless of liability, regardless of defenses. This
is something that we just really have to keep in mind
here.

Ms. Perlmutter: What we're going to do, I
know there's still some people, since we're running out
of time, so first of all if we can ask people to keep
their comments a bit shorter. And we do have one other
question about individual file sharers. So Ben will
ask that and then those who still have their cards up
can fold that into their comments.

Mr. Golant: Thank you, all. This has been a
very fruitful conversation but I did want to get this
one question in and this is in regard to individual
file sharers. It goes like this, should individual
file sharers be treated any differently from the
individual nonprofit-seeking infringers. And your
comments are welcome.

MS. SHECKLER: I think that the solution of
guidelines is something that should be explored for
that question as well. There are guidelines, I think
guidelines that could be placed out there. There is a
difference, I think, to some extent with somebody
that's a borderline fair use case versus someone who
willfully infringements and willfully distributes
thousands of individually copyrighted works and then
lies about it.

There's a big difference between those two
types of activities. And the damages associated with
that should take into account the difference in those
type of activities.

And Evan, just to hark back onto something
else you said earlier, it sounded like you were
suggesting that the only way to innovate was to
infringe. I hope you didn't mean that.

MR. GOLANT: Please go ahead. Fold in your
answer responses to what Ann had said as well as to my
question.

MS. SAMUELSON: So I think when it comes to
individual file sharers, Ben and I had an exchange
about some of these issues. And in connection with
that, I did some research and discovered that in all of the cases in which judges had rendered statutory damage awards that were reported in the case law, judges were ordering $750 per infringed work for damage awards that were in the kind of five figure level. And even that I think to most people might seem pretty excessive, not necessarily the person sitting next to me.

But I think some part of a reason to try to think about a cap on liability, I'm not going to say this specifically for file sharers because I wish they didn't do that too. But for noncommercial infringement activity, having cap on liability I think is a reasonable thing if you want people to respect copyright law.

I have a real strong sense from having talked to people all over the country about the Jammie Thomas and Joel Tenenbaum cases is they just think that that makes the law look outrageous and ridiculous and it can't possibly be just. Canada, as I think you probably know, has a $5,000 Canadian cap on liability for noncommercial infringements and it would seem to me that that actually would be something that would be worth considering in trying to make a copyright law that people could actually respect.

I really think that the disrespect issue is
even more serious than the troll issue that Mitch was
talking about. And of course the thing is that while
I'm very glad that you're focused on two of the bad use
cases, that ones against secondary people who may be
secondarily liable and the noncommercial file sharers,
there are problems with statutory damage awards across
the board. These are not the only two situations in
which there really are outrageous things.

And I'll say one last thing, which is that
very, very few of the developed countries in the world,
the ones that we think of as having strong copyright
industries, have statutory damages at all. All of the
ones that have statutory damages, and there only five
of the developed countries that have them, have caps
and limits on their statutory damage awards. Much more
sensible than the ones that are in our statute.

MR. GOLANT: Thanks. Peter.

MR. MENELL: We are right now waiting for some
sort of results from the Copyright Alert experiment.
So I'm feeling that, you know, we might get some
information about whether or not that mechanism is
valuable. There's also discussion about small claims
tribunals, which strike me as a much better way to deal
with these kinds of questions if we can't resolve them
through the kind of informal ISP-related alerts.
But in any case, I think it's in the long term best interest of the industries that are often fighting for the, you know, retention of strong punitive measures, it's in their interest to move away from it. I think if -- now that we have services like Spotify, we have Google Play, we have Netflix, we have a lot of great services that are emerging and I think the system ought to be recalibrated to channel people into services and in some ways saying, well, I had this service, that might be a way to help to calibrate. Because that's the goal. The goal is not to be making money off of people who are using the internet. The goal is to get people into markets that are much more sensible for the activities.

So that deals with the small scale. I just want to make a couple comments about the big issues. Number one, I'm not convinced that judges or juries are better at dealing with this. I mean, we have the MP3.com case. It was a judge case, but it was a ridiculous award, well beyond what anyone could have proven as actual damages under even the most adventurous theories.

The closest analogy we have in the copyright area is perhaps -- when we're talking about secondary infringement on a large scale, is to anti-trust law.
And those are always kind of make up your economic theory. They are really hard to deal with. And I would just take the YouTube Viacom case as an example. I'm very -- I'm not sure there was any actual net harm to Viacom. I think the result of the litigation produced content or at least contributed to producing a much healthier ecosystem.

But there's no reason to have a billion dollar risk out there. And so I think we could look at the cases and we could identify situations. From an economic theory, the big issue is under detection. That's why we put in a little extra. That's why we have treble damages in anti-trust.

So if we look at that question from an economic lens, we would really want to get evidence of is this going to be under enforced and try to think through that calculus rather than saying we can't prove harm. I think it's really trying to look at all of those issues in a way that ensures we're getting the right amount of enforcement.

I think we're getting under enforcement in the file sharing area. We may be getting over enforcement in the secondary liability area.

MS. HADJIPETROVA: To continue the conversation about guidelines and basically simplifying
the system because it seems to me that the more we slice and create multiple schedules for secondary damages, secondary versus individual, the more difficult and less practical the system would be naturally.

So instead of dividing the different culpable parties into what type of -- whether that's individual infringers or entities, I would rather say that a much more sensible division would be along the lines of commercial versus noncommercial use. And to make this even more useful and effective, we could follow the example of 107 and put that and legislate that rather than leave it to jury instructions that may or may not be followed.

Another way to possibly diminish the draconian effect of statutory damages if we are keep them is probably to find a way to aggregate or redefine work instead of -- and I know I'm going here into the very nitty-gritty, but it might be helpful also too look at these issues as well.

For instance, with musical works, rather than looking at a song, we could look at a whole album. And there might be also other ways to aggregate. If there's a number of infringers, if we're talking secondary liability infringers, we might instead of
count all the individual infringers, the foundation or
that -- the underlying cause of the infringement, we
could just look at, again, a single work and we could
redefine that as well.

MR. GOLANT: Evan, go ahead.

MR. ENGSTROM: Just to quickly respond to
Vicki's question on what I mean. Let's be clear,
innovation is not synonymous with infringement. There
are all sorts of quality innovations that people in the
content industry called infringing that weren't. As
Mitch mentioned, VCRs, MP3 players, peer-to-peer
software, Bit Torrent.

The technologies themselves are not evil
technologies. Sure, people can use technologies in a
variety of ways and as someone representing startups,
we don't want people to engage in bad behavior. And a
lot of these startups that we represent depend on IP
protection.

So it's not that we're saying oh, well, we
need to make sure that the world is free for
infringement. Far from it. We need to make sure the
world is free for innovation. And a lot of these are
close calls. That's the point. It's not easy -- it's
too simple to say well, innovation equals infringement.
That's far too simplistic.
It's the difficulty in making some of these determinations that reveals what a dangerous effect large statutory damages can have. A lot of these companies that might be getting into a business that sure, it's unclear under the law. I mean, clearly the law isn't that clear right now. They're going to be disincentivized from doing the stuff.

Obviously, to touch on Steve's point earlier, that there's no empirical evidence of chilling innovation and therefore statutory damages don't chill innovation, I think that's kind of a misleading counter-factual. Obviously it's difficult to measure how many companies didn't start because of the risk inherent in the marketplaces in which they're innovating.

And we need to recognize, obviously, that times have changed. There are very difficult questions that copyright law has to answer. And it's this gray area of trying to navigate a way to prevent infringement but to encourage innovation that makes fixed large scale statutory damages seem like such an inappropriate mechanism for sorting out very nuanced issues that aren't so clear and if we have these huge potential penalties aren't going to get resolved in a fair way through the judicial system.
MR. GOLANT: Thanks for all your comments.

We're going to be moving now to the audience. Anyone who'd like to come up to the microphones, your time is now.

And Hollis, anyone on the phone?

MS. PERLMUTTER: Let me just add we have to stop at two. So we need to have quick interventions at this point. Thank you.

MS. SEIDLER: Good afternoon. My name is Ellen Seidler and I'm an independent film maker, blogger, college processor, teach digital media and film. And I just want to say that I think a lot of time here has been spent focusing on individual infringers, and as someone who's been outspoken fighting piracy, I don't care about individual infringers in the slightest.

To me the focus should be on the enablers of piracy and those who profit from them. And I certainly also think that we should remember that artists are innovators. Tech does not have a corner on that market. And so often is spent we have discussions where we say we don't want to hurt innovation. We don't want to stop innovation. Meanwhile, when you look at what's happening with online infringement, that is hurting innovation every day and diminishing the
content, the quality and the diversity of creative works that are available.

And so the focus needs to be on those entities that enable piracy for profit. And we all know who those folks are. And, anyway, like I said, I don't care one bit about individual infringers downloading a torrent. That's not where the battle should be.

Thank you.

MR. GOLANT: Thanks for that. Anyone else?

MR. GIVEN: David Given, I was on the panel this morning on remixes. I just want to address one of the points that Professor Menell was making about under detection and over detection and under policing and over policing. Built into our copyright enforcement regime, of course, is the difference between timely registered works, which of course qualify for statutory damages, and works that aren't timely registered in advance of the infringement.

There is a whole body of those works, and in my personal and professional practice, a large number of those instances where people have unregistered works that have been knocked off abandon their claims. So in terms of working out an economic model or mathematics to figure out where we fall, I think you do have to give due consideration to that body of works that in
the first instance because of the way the system is set up don't qualify for statutory damages.

The only other point that I would make for the panel's consideration and for the task force's consideration is that, again, in my personal and professional practice, the ability to pursue statutory damages is a very important tool in my toolbox when I am prosecuting defendants for copyright infringement.

On the other hand, when I'm defending and corporations in copyright infringement claims, I have other tools in my box pursuant to the Rules of Civil Procedure and other places that I could go. For instance, Rule 68 which allows my client to offer judgment to cut off attorney's fees awards, for instance, that are, you know, already built into the system and that give defendants in copyright infringement cases where there are the prospect for large statutory awards some control over that.

MR. GOLANT: Thanks for your comment. Anyone else?

MS. PERLMUTTER: We wanted to really extend our heartfelt thanks to everyone who's come today and in the other roundtables and taken part so enthusiastically and actively. This is, as we said, the fourth and final roundtable. There have been
dozens of panelists and hundreds of audience members both live and online who've participated as this series has unfolded. And it's been an extremely productive and enlightening series of discussions.

This will help us greatly as we start thinking through how to come up with some conclusions and recommendations as part of a White Paper coming out of the Green Paper ideas.

So I would like to reiterate, first of all, our strong appreciation for the hard work by the USPTO team that made all of these events go so smoothly and so successfully and that's Hollis Robinson, Linda Taylor and Angel Jenkins. And we could never have done it without them. And also to extend a special thanks to the Berkeley School of Law and the Center for Law and Technology for hosting us and for such generous hospitality from our friends and colleagues.

And just administrative notes, there will be a transcript of today's hearing and a recording of the webcast available on both the USPTO and the NTIA websites next month. And if you want to be kept apprised of ongoing work on all of the Green Paper work streams, you can sign up for our copyright alerts at the USPTO web page, there's a -- website. There's a copyright page and that will show you where you can --
there's a big button to get on to the alerts.

We expect to be issuing a White Paper that touches on all of these issues and draws on everything we've heard and learned over the last few months at these roundtables. That is likely to be -- we'll be working on it over the next few months. It's likely to be issued towards the end of the year or sometime early next year.

So please do stay tuned and, again, thank you, we really appreciate your help and your input.

(Proceeding concluded at 1:56 p.m.)
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DATED August 12, 2014