DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE
GREEN PAPER ROUNDTABLE ON COPYRIGHT POLICY,
CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY

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MS. PERLMUTTER: Well, good morning, everyone, and welcome to the third of our series of roundtables on digital copyright policy issues. We are delighted to be here in Los Angeles at Loyola Law School, and I want to thank all of our friends here for hosting us here today, and welcome to those of you who are joining by webcast.

I'm Shira Perlmutter. I'm the chief policy officer at the Patent and Trademark Office, and this roundtable is part of a process that was started by the Department of Commerce's Internet Policy Task Force in last year's Green Paper on copyright policy, creativity and innovation in the digital economy.

The Green Paper identified a number of issues on which the task force would undertake further work, and three of those issues are the subject of today's roundtable. The work on the Green Paper has been led for the Internet Policy Task Force by the Patent and Trademark Office and also the National Telecommunications Information Administration, NTIA, and we've also been consulting with the Copyright Office.

We began with a full day public meeting in
Washington which touched on all of these issues. We've had two sets of written comments from a very wide range of interests and stakeholders on these topics, and we've already held two roundtables, and through the roundtables what we're looking to do is really to broaden and to deepen the discussion on these issues.

We have been traveling to four locations around the country. We started in Nashville and Cambridge. We're here today and tomorrow in Berkeley, and the idea is to hear from a variety of stakeholders, and of course based on the locations where the various roundtables are taking place, each one of them has involved or will involve stakeholders from different copyright sectors, different communities and industries.

So today we've come to Los Angeles because, of course, its preeminent role as a center for creative production and to hear from all of you here, and we're delighted that we were able to accommodate everyone who asked to participate today.

So the goal of these roundtables is to have interactive discussions rather than to hear prepared presentations or statements of policy positions. So I'd like to ask everyone who's participating on the panel to make their comments responsive to the questions that the moderators will ask and also to keep the comments
relatively short so that we can have active engagement by all participants, and I think we found in the last two roundtables that was very successful and we were able to have a lot of back-and-forth which really elicited a lot more helpful comments than just hearing one person after another.

So we will begin today with the issue of the appropriate calibration of statutory damages, and what we are trying to look at here is a relatively narrow question which is how statutory damages are calculated in two particular contexts, and one is the context of potential secondary liability claims against mass online services, and the other is private individuals engaged in file sharing.

So we'd like to ask that you focus on these specific issues rather than the value or application of statutory damages more generally. We'll then have a coffee break and then come back and discuss remixes, the legal framework for the creation and dissemination of remixes.

Now, in the Green Paper, the way we've posed the question is to ask whether or not the creation of remixes in the U.S. is being unacceptably impeded by legal uncertainty and, if so, if there's a need for any new approaches.
And then after a lunch break our final topic today will be the relevance and scope of the first sale doctrine in the digital environment, and here I just wanted to say we'd like to dig deeper than just a debate over whether the answer is yes or no, that the doctrine should or should not apply to digital transmissions.

The Green Paper specifically asked whether there is a way to preserve the doctrine's benefits in the analog world when it comes to the digital world. So what are these benefits? Will the market develop to provide them or has it done so and, if so, how? And if not, what type of solutions would be appropriate?

So I think we're ready to begin. If any observers either here or online has comments, there will be time to raise them immediately after each panel session. And for those who are here to do so, please go to the microphones right there in the center. For those who are watching by webcast, you can call (800)369-3319 for our phone bridge. I feel like an infomercial. And the access code is 1981439, and these numbers are also on the agenda which is posted on the copyright page of the PTO website. You'll press star 1 for the operator, and then once the operator announces you, you'll be able to state your comment or question to the panel.

So I have to say I found it very gratifying
that we had excellent discussions in the Nashville and Cambridge roundtables with very helpful ideas being put forward and some constructive back and forth, and I think we did make a lot of progress in understanding the full range of perspective on these issues. So we look forward to learning more again from today's conversation.

So let me now give the floor first to John Morris, associate administrator and director of Internet policy at NTIA, then to Jacqueline Charlesworth of the Copyright Office's general counsel, and then finally to our former colleague from the PTO, Professor Justin Hughes of Loyola Law School. Thank you.

MR. MORRIS: Thanks very much, Shira. I just want to speak just for a second and join Shira in welcoming everyone to the third of the copyright roundtable meetings. I'm the head of the policy office at NTIA, the National Telecommunications and Information Administration, which, like PTO, is 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 on Internet and communications policy issues. The two areas really do come together on a lot of the issues that we're going to be talking about.
today, and the goals that the copyright Green Paper really were pushing was to try to address the legitimate and important considerations and concerns in all the different areas: The goal of ensuring meaningful copyright. A meaningful copyright system that continues to provide necessary incentives for creative expression is a critical goal and one that I think can be done, that we think can be done in tandem with preserving technology innovation.

So that's what we've been working on at the Department of Commerce to try to kind of figure out how to thread the needle there, and the roundtables that we've had so far have been extremely helpful in terms of trying to balance something through these different issues. So I look forward to this conversation today, and now let me just briefly turn the floor over to Jacqueline Charlesworth, the general counsel of the U.S. Copyright Office.

MS. CHARLESWORTH: Good morning, everyone. And as John mentioned, I'm Jacqueline Charlesworth, general counsel of the U.S. Copyright Office, and I want to thank Shira and her colleagues at USPTO as well as the Department of Commerce for inviting the Copyright Office to attend today's roundtable.

As many of you know, a little over a year ago
following a speech by the register of copyrights, Maria Pallante at Columbia Law School, house judiciary chairman Bob Goodlatte called for a wide review of our copyright laws to identify areas that may need to be updated for the digital age.

The U.S. Copyright Office is working closely with congress to support that review process. Among other things, we are studying the question of orphan works, the making available right and how it's been implemented in the United States as well as taking a close look at our music licensing system, and I see some of my friends from that endeavor out there in the audience.

The Green Paper, which was produced by Shira and her staff and released not long after Chairman Goodlatte's announcement, represents a highly impressive effort to identify important issues involving copyright and the Internet and to provide a framework for public discussion of those issues, and I really want to acknowledge Shira and her staff. That was quite an undertaking. I know it was a long process that led to the release of the paper, and I applaud her for that effort.

While the Green Paper process is separate from our efforts at the Copyright Office, the two are related
in the sense that the public record generated by the Green Paper will undoubtedly inform the congressional review process that's underway.

Last week, for example, congress held a hearing on copyright remedies, which included testimony on the role of statutory damages in our system, which of course is one of the topics today, the calibration of those damages.

Statutory damages and the first sale doctrine are critical aspects of our copyright system that inform many of the provisions of the Copyright Act and impact the practices of companies large and small as well as those of individuals and, in particular, creators.

The question of remixes and how our copyright system should accommodate them is perhaps a more discrete issue in itself but then again ties into larger questions of how music should be licensed as a general matter within our system. And I will say, I will add here that the opinions on how to license music are not what I would call discrete. People feel they can share them, and we've been happy to hear a lot of them at our own roundtable process.

It is a fact of copyright law that virtually every policy issue one might consider intersects with a host of others. Perhaps this is what makes the review
of our copyright system so challenging but yet so
captivating, at least for those of us who are copyright
nerds like me. I'm confident that we'll be hearing a
variety of opinions today about the issues under
consideration, and I welcome that, and I will be
listening with great interest.

Thank you again, Shira, for having me.

MR. HUGHES: Good morning, everyone. I'm
Justin Hughes, and I'm on the faculty here at Loyola Law
School. Some of you know me from former lives. On
behalf of Loyola Law School and Loyola Marymount
University, we want to welcome you this morning.

It's a great pleasure for our law school to
provide the venue for this Green Paper roundtable
organized by the United States Patent and Trademark
Office and the National Telecommunications and
Information Agency. We want to welcome our colleagues
and friends from those agencies as well as our
colleagues and friends from the Copyright Office, and so
many of the companies, organizations, groups that will
be critical in providing input for what will undoubtedly
be an important administration white paper and also the
input for overall what is going to be a very important
comprehensive copyright reform effort in Washington and
around the country, however long that takes.
I want to join in congratulating Shira and Ann Chaitovitz and Ben Golant and all of the people at the United States Patent and Trademark Office and NTIA on the work they have done to date and wish them well for all the work they have to do in the future.

And with that, Loyola Law School is very, very happy to welcome you and wish you the best wishes for today.

MS. PERLMUTTER: Thank you. And I'll turn the program over now to Ann Chaitovitz from the Patent and Trademark Office.

MS. CHAITOVITZ: Hi, everybody. Our first topic is going to be statutory damages, and I'll read a brief introduction, and then I'll ask everybody if they could go down and introduce themselves.

And throughout the discussion, when you want to speak, if you could do this with your name tag, and I'll try as best I can to see the order that they go up in and respond to you in that order, but forgive me if I miss.

So statutory damages are available under the Copyright Act as an alternative remedy, 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 of $150,000 upon a finding of willful infringement or lowered to a minimum of $200 upon a finding of innocent infringement.

So today we're going to address two specific contexts, as Shira mentioned, from the Green Paper. The first is secondary liability for large-scale infringement, and I'll be asking those questions, and then we're going to talk about statutory damages for individual file sharers, and Ben will be asking those questions.

With respect to statutory damages for secondary liability, there are competing arguments about the potential negative impact on investment and the need for 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 some large jury awards in the two file sharing cases that have gone to trial.

So if you could just go down the row and introduce yourself briefly, then we will begin.

MR. DREITH: I'm Dennis Dreith. I'm the executive director for the AFM and SAG-AFTRA intellectual property rights distribution fund. We process residuals and royalties for nonfeatured performers.
MS. MOORE: I'm Deborah Moore. I'm a film producer at the independent level at this point. I've worked both at the network level, the studio level and for the last ten years as an independent.

MS. STILWELL: Rachel Stilwell. I have my own law practice here in Los Angeles. I represent recording artists, songwriters, filmmakers and animators.

MR. BORKOWSKI: George Borkowski. I'm senior vice president of litigation and legal affairs at the Recording Industry Association of America. Before that I was a copyright litigator in private practice here in Los Angeles. I represented the record industry in the Napster, Aimster and Grokster cases among others.

MR. STOLTZ: I'm Mitch Stoltz. I'm a staff attorney at the Electronic Frontier Foundation. It's a nonprofit civil liberties organization. I specialize in copyright. Before that I was in private practice at a business litigation firm, and before that I was a software engineer.

MR. PIETZ: Hello, everyone. I'm Morgan Pietz. I'm a litigator here in Los Angeles. I've represented approximately -- probably getting close to 200 individual John Doe defendants who have been sued by various copyright owners, particularly porn companies.

MS. KAROBONIK: Hi. My name is Teri
Karobonik, and I'm a staff attorney at a nonprofit called New Media Rights. We primarily provide free and low cost services to artists, creators and entrepreneurs, and we also do policy work and educational work based on what we learn on the ground.

MS. HODGSON: Good morning. Good morning, everybody. My name is Cheryl Hodgson. I'm an attorney in private practice in Santa Monica, and I specialize in trademark copyright matters, and I do a fair amount of litigation in copyrights, and my background primarily has been representing publishers, composers, songwriters in various aspects of the music industry.

MR. BURROUGHS: Good morning. My name is Scott Burroughs. I'm a partner in Donliger/Burroughs on the Westside of Los Angeles. We primarily represent content creators in copyright litigation. We've handled hundreds of copyright cases over the last ten years. We've tried these cases to a jury. We've had the honor of asking the jury for statutory damages in a copyright cases and then being able to discuss with them afterwards how they arrived at that which was an interesting experience, and I'm happy to be here today.

MR. LAPTER: I'm Alan Lapter. I'm also with the U.S. Patent and Trademark Office.

MS. CHAITOVITZ: And I want to let you all
know that I hear that the mics are always on, so just
keep that in mind.

So commenters made a range of suggestions
about different ways to recalibrate statutory damages
for secondary liability, and they include -- I'll
mention four of them. One was a total damage cap. The
other was -- the second one is providing courts with the
flexibility to award less than minimum damages per work
when there's a large number of infringements. The third
is changing the innocent infringement criteria, and the
fourth is to limit the range of statutory damages when
there's good faith belief that the use is noninfringing.

So I have a couple questions for the panel
about those four ideas. What do you think of each of
them? And that's the first one. What do you think of
those ideas?

Okay. I got the first three. Mitch was first
and then Dennis and then Deborah, and then I lost it.

MR. STOLTZ: Thanks, Ann.

So copyright law has -- you know, its overall
goal is to promote the progress of science in the useful
arts. That's according to the constitution. And the
overall goal is not to stop infringement because
infringement is defined as we define it and it is
punished as we punish it, and those processes serve an
When we're talking about secondary liabilities, we're talking about liability against intermediaries, against really primarily technology companies, technology providers, middle men, potentially whose systems and businesses deal with, you know, potentially hundreds of thousands of different copyright works which, given the statutory damage provision with a minimum and maximum of per infringed work, really quickly sends the potential damages into the stratosphere greater than the market capitalization of most companies and sometimes many small countries.

I think one thing to keep in mind, statutory damages -- sort of the common rationale given for them are compensation where damages are difficult to calculate and deterrents, but when we talk about deterrents, I was happy to hear you say rational deterrents are calculated deterrents.

When you're talking about large companies or any company really sort of doing business openly selling or providing a technology, the sorts of folks who end up as defendants in secondary liability cases, they're not difficult to find. They are out there publicly, and they are open about their activities. That means there's less of a -- this need for high penalties to
discourage people who think that they won't get caught.

   Everyone who goes into business knows that if
they are in fact infringing, they're going to be caught
because they're putting themselves out there. I'll
leave it at that for now.

   MS. CHAITOVITZ: Okay, Dennis. I think you're
next.

   MR. DREITH: I think coming from the
standpoint of an artist, first I want to say that the
notion of like innocent infringement is probably
nonexistence to us. There is no such thing as innocent
infringement. I realize under the law there is.

   I think my perspective might be a little bit
different than Mitch's. While coming from the artist
standpoint, we don't want to have a chilling effect on
new technology and commerce, but I do think that the
most important part of statutory damages really is the
deterrent. I think it should be used as a mechanism to
deter those who may consider -- not to the extent that
we want to disrupt commerce or chill new technology, but
I think it is important -- especially understand that
from the standpoint of many, many artists who are not
copyright holders, not the stakeholders, a number of the
nonfeatured performers, in fact, all of the nonfeatured
performers, we don't benefit from the statutory damages.
What we benefit from is people not infringing our copyrights. Therefore, I think the actual deterrent factor is the most critical for us.

Having said that, I also think it's very important to allow the courts a great deal of discretion. Oftentimes they're the ones who can decide not to put somebody out of business. I think the important thing is actually to keep the higher amounts sort of visible and in front of the public as a true deterrent.

MS. CHAITOVITZ: Thank you. And I do want to try and request that if you have comments about those four topics that were raised, you let me know those.

MS. MOORE: Okay. So don't get me started on this subject. It is so important to a filmmaker trying to survive in this environment to have these really high damages and, you know, basically let people know this is actually impacting our livelihood.

Ten years ago -- my whole entire focus in my career has been to protect the money, and that's what I do, which means that I protect the investor's money, and the investors are getting scared to come into the marketplace. They don't want to invest as much because they know they're not going to be able to recover because of piracy. There's other issues, but piracy is
such a huge part of this, and also the banks don't want
to lend against sales contracts because the foreign
buyers know that there are entire countries who we don't
even sell to anymore because of piracy. That doesn't
impact, you know, the U.S., but that perception that
piracy is such a big issue, is so rampant, has
completely moved the decimal point over in terms of the
amount of money that I can actually raise to make a
film.

So if I was making $10 million films ten years
ago, I'm now making $2 million films, and that not only
impacts my paycheck and my ability to survive. I'm a
mom. I've got two kids in college, but it affects
everybody down the line. It affects the actors. It
affects the crew. It affects the amount of people we
can hire, and it affects how many movies we can continue
to make for these pirates to infringe upon us. So it's
a huge, huge issue for us.

MS. CHAITOVITZ: Thank you. I'll trust you
guys to know who was next then.

MR. BORKOWSKI: Barring any objection, I want
to say one thing before -- I will try to address those
four questions. I do want to say one thing.

Holistically before that, it's fine to have a debate as
to whether the statutory damages copyright regime should
be modified in some ways, but I think you can't have
that discussion in a vacuum.

The statutory damages scheme is part and
parcel of other parts of the Copyright Act. I don't
think you can just modify or talk about modifying just
one part without seeing how it might impact other parts.
The statutory damages ranges that we have now were
increased by congress in 1999. That was the same time
that congress passed the DMCA and other legislation that
recognized the rise of technology and how those
technologies can have -- can cause -- create an
environment where there can be rampant infringement, and
so what congress did is it gave technology companies and
technology intermediaries certain safe harbors that
would protect them from secondary liability as long as
they did certain things.

However, because congress recognized that
there was a true danger of extensive infringement
because of developing technology, it raised the range of
statutory damages. So if we're going to do something
that might lessen or change the way statutory damages
are applied, we need to look at whether parts of those
other -- the other parts of the statute, whether the
DMCA or others might need to impose greater obligations
and intermediaries so that whatever deterrent effect is
lessened by lessening statutory damages is offset by allowing -- by putting more obligations on intermediaries to fight piracy and infringement, so I think it needs a broader discussion not just focusing on these.

But I will address those four questions just briefly. I think, as Mitch said, the goal of copyright law -- the goal may not be to deter and punish infringement, but it is to try to enhance creativity. You enhance and help enhance creativity by deterring and punishing infringement because otherwise the people -- the creators are not going to be creating. They're going to be creating a lot less and they're going to be getting a lot less for their efforts if there's rampant infringement and deterrents -- I mean and no punishment or no effective punishment.

With respect to those four questions, on a total damages cap, I don't think that's a good idea because I think each case is very fact specific. I think there's a wide range of statutory damages that are available in any instance, and I think that when it gets to a jury, the jury gets to process all of the facts that are before it. They will be given a jury instruction. Most likely that will give them several guidelines and guide posts that they should follow.
before they establish the established figure.

Those guide posts, maybe that's something that can be uniform so that all juries have to consider them and all judges have to make that charge. That is something that I think is worth discussing, but I think that each case is fact specific and, therefore, a total damages cap is not a good idea.

Similarly the court's flexibility to lessen the minimum statutory damages if there's a large infringement, again, I think it's a jury issue. I think the range of statutory damages is broad, and I think that will take care of that issue, that problem, and it also -- this seems to me would encourage large-scale infringement because the more you infringe, the less you're on the hook for the infringement, and that seems contrary to what the goal of deterrents should be.

I will not change the innocent infringer standard. It is a strict liability tort type regime under the Copyright Act, and the jury can take into account whether there's an innocent infringer. $200 is not too much to ask someone to pay for an infringement even if it was innocent.

And as for limiting the range when there's a good faith belief that it was not infringing, I think that also is subsumed under the current range of
statutory damages. You can get an innocent -- you can get an innocent ruling that's only $200. You can get something as low as $750 per infringed work. I think it's already taken into account, and the good faith belief that one is not infringing is a very powerful defense I would suggest, and I think a jury would consider that, and if you convince a jury of your peers that you had a good faith belief you weren't infringing, then I think the jury will take that into account when setting the statutory damages figure.

MS. CHAITOVITZ: I think Scott was next. I'm sorry.

MR. BURROUGHS: Okay. Excellent. A couple of things. First I would agree regarding the good faith basis. Adding another standard into an area of law where there's already so much -- so much gray area. Copyright law we're talking what substantial similarity was the idea, was the expression taken. There's already so much uncertainty there. Adding something as nebulous or fluid as good faith belief I don't believe is a good idea.

The Copyright Act says that nobody should be able to profit from committing an infringing act or selling an infringing product. It's a strict liability tort. To the extent that somebody is -- had a good
faith basis or was quote, unquote, "innocent" in doing so, in most cases they'll simply disgorge their profits. It will be restitutionary. They will end up in a position no worse than they were before the infringing conduct, which brings me to this next issue about the amount of statutory damages available right now.

The $150,000 cap that was changed not too long ago is probably still too low. Why do I think that? Because if followed the jury sheets or if you've been in jury trials involving copyright cases, statutory damages are almost never sought and almost never awarded by the juries.

You hear about the RIA -- RIAA cases in the news. Those are statutory damages awards but -- and I haven't done the math on this exactly, but I'd say 75 to 80 percent of cases that go to trial and the jury -- in front a jury, the defendants seeks actual damages. They seek a disgorgement of profits.

Why? Because if you have a group of infringers, which you often do. I'll use the example of -- let's say there's a Batman bobblehead doll that was created without the content owner's consent. That bobblehead doll had probably been created by one infringer, manufactured by another infringer, and sold by ten websites, each of which is an infringer.
The law right now says you can seek 150,000
for all of those infringements. So you have -- let's
say there's ten websites and three parties involved in
chain distribution. 13 parties, 150,000 statutory
damages. That's not a deterrent. Most of these
websites, most of these infringers will sell the
infringing product. If they get caught one out of ten
times, it's the cost of doing business. So the
statutory damages cap right now in this new digital
media worldwide economy that we're dealing with is
probably too low.

And getting into the secondary liability for
online providers, I'm going to look at it from a
commercial context. The companies in marketplaces like
Amazon right now, they have -- they could apply for the
DMCA safe harbor, and they do. So what happens in a
case like that, if this Batman bobblehead is being sold
by Wal-Mart, Wal-Mart gets brought to court. It's
strict liability. If Wal-Mart made a hundred thousand
dollars selling this Batman bobblehead, they'd have to
disgorge it.

Amazon is probably not the same thing. Amazon
can say, "You told me about it. You gave me the DMCA
notice. I pulled it down. Even if I made a hundred
thousand dollars selling this bobblehead doll, I get to
keep that because I qualify for the safe harbor."

That probably needs to change. We need some directive as to why Amazon.com can sell infringing bobbleheads and keep the profits while Wal-Mart can't do that. That's all I have for now.

MS. CHAITOVITZ: Okay. The rest of you, if you could just go in order back to me.

MS. HODGSON: Hi. I agree with Scott completely about the issue of the damages being too low. I think while the attention has been directed to these big award cases with multiple awards of statutory damages, that's not the everyday infringement. That's the cases you hear about on the news or that make the big decisions.

The everyday infringer can't afford to litigate a copyright case because they might have one or two infringements and who can take a case for them? 90 percent of these plaintiffs in a copyright infringement action don't have a lawyer or a law firm they can pay. So I hate to say it, but it used to be lawyers could possibly take these kinds of cases in a contingency.

I have a case in federal court right now. It should have been a 5- or $10,000 license, $25,000 license, but the defendant, a major TV network who will
remain nameless -- it's a cost of doing business. Why would they -- they wouldn't even get a license. They'd rather spend $150,000 in legal fees just to keep the case going.

So where is the -- I think you can't consider statutory damages for digital and talk about secondary liability for ISPs and not also talk about the average -- what's happening in the reality in the marketplace for statutory damages and copyright. They all go together. That's one thing.

And, number two, I think it's not just the ISPs as I just alluded to, and I actually think it would be really helpful on the issue -- and I know this is not the direct topic, but it's related.

What is willful infringement anyway? The decisions are sort of all over the place on what really constitutes willful infringement, and I'd like to suggest that it might be worth exploring some sort of what are the factors to consider in arriving at a statutory willfulness determination that can be part of the statute that gives rise to a presumption, perhaps in a digital environment.

Because I ask this question: If copyright exists from the moment of creation, if I know by law and by definition copyright exists by moment of creation and
I knowingly upload a song onto the Internet or I include it in a movie or on a digital trailer that's on the Internet for a year advertising the TV series, where is the good faith? I mean how could you not know that you're using a copyrighted work? Everything is copyrighted.

Now, as to whether it's registered or not -- and I've actually seen some recent cases that have talked about that as an issue as to good faith. Did they look it up? Did they know was there a registration for the work? But I mean there needs to be some discussion on that area, and it just seems to me that maybe there's a presumption in the recent act, the -- excuse me the -- not misstated because of the Fraudulent Online Identity Sanctions Act actually created a reversed presumption in that statute, and that was one of the things Professor Nimmer talks about at length as a presumption of going towards in the digital arena some sort of presumption of willfulness or bad faith in certain instances, and that could, I think, be helpful in this context. Thank you.

MS. KAROBONIK: So I think one of the most important things to keep in mind in the discussion of statutory damages is it really is supposed to be a deterrent effect. It has to be a rational deterrence
effect. Pulling numbers out of thin air and making it very random doesn't really have a deterrence effect because if people don't know what the consequences are or the consequences are so large to be totally inconceivable to them like they can't put those numbers into meaning, then there really isn't a deterrence effect.

So that's why I'm skeptical of the damages -- imposing some sort of damages cap since I think whatever number we choose, I just -- realistically I can't see -- I can't see legislation being proposed with such a number that actually reflects reality and sanity. So I'm very hesitant to go down that road.

I would like to see judges have some more flexibility in awarding damages. I think rather than adjusting the innocent infringer standard or limiting statutory damages alone, I think more of a comprehensive test where judges are given a list of options much like they are in Canada and Israel of options that a judge and a jury should consider when awarding damages. Not only things like they already considered the number of works, was this willful or not but also maybe did they have a novel -- is this a novel question of copyright law since the reality is I work with a lot of small businesses -- you know, the people that are taking
chances based on the copyright law they have, and it has
to be informed decision, and sometimes, as I think we
all know as copyright attorneys, you can't necessarily
give a black-and-white answer to someone who's really
pushing the boundaries of technology. And although, you
know, if they are wrong, maybe there should be some sort
of punishment, but the punishments right now under
statutory damages, they're not just business ending.
They're life ruining, and I think that's something very
important to keep in mind.

I also think that one of the things we really
have to look at is the importance of considering things
like fair use in the statutory damages -- in the
statutory damages context. The reality is fair use is
so important. And honestly, rational attorneys can
disagree, and rational attorneys will disagree, and I
think all of us have probably had at least one client
walk into our office with a fair use discussion where we
have been flummoxed because they fall right on that edge
where it really could go either way where they have to
make a rational decision, and I think that's something
that damages should reflect that, yes, it's a risk, but
it shouldn't be a life-ruining risk. That's just
absurd.

And I think another -- just another thing
since we've touched on safe harbors, I've always been skeptical of how we called it safe harbor. Is it really safe harbors? Is it a safe harbor if you have to litigate for seven years and spend millions of dollars? That's not a safe harbor.

Honestly, that's the type -- this type of litigation has destroyed businesses, and it will continue to destroy businesses. The companies that we've seen be able to fight these lawsuits, they're bigger companies. They have big legal departments and bigger budgets.

So I'd be very hesitant to raise the bar on what safe harbor is since it's already a pretty high bar. It's an "and" test. So if a company makes a single mistake they're kicked out of safe harbor, and that's an incredibly high bar especially for younger companies who don't have a team of copyright lawyers.

I think sometimes as copyright lawyers we tend to overestimate how often -- we tend to underestimate not only the availability of copyright lawyers for the average small company and average consumer but also their cost. The average small company can't -- doesn't tend -- I mean they really can't employ a team of copyright attorneys. That's unrealistic. Maybe they get the advice of one or two, but they're certainly not
full time and they're maybe, if they're incredibly lucky, have a general counsel who has some copyright experience, but that's the rare exception, and I think we need to keep this in mind as we go forward in statutory damages is that really, if we raise the bar too high, we will kill innovation and we will essentially create a world where the incumbents who have made it, they'll stay the incumbents.

MS. CHAITOVITZ: Thank you. I'm going to ask that we don't do repeats because I do want to move on a little bit. So --

MR. PIETZ: Sure. So you mentioned four ideas for reforming statutory damages, and I think they're all good ideas worthy of debate. What I'd like to talk about is a fifth idea which is really simple and which will solve a big problem, but before I get to the idea I want to explain the problem.

This is an iPhone. Can anybody tell me what this is worth? One answer might be -- I don't know -- $500, something like that. It's not the new newest one. I think this is the second oldest model, but here in statutory damages land, this phone is worth $500 million if we assume that it's chuck full of infringing music.

Now, I want to ensure our colleague from the RIAA that it's not, at least not this one. But that's
nuts. If somebody snatched this out of my hand and got
convicted of a crime, they would suffer less severe
consequences than would be the case if the RIAA choose
to put the screws to me for every song that was in this
phone. That's insane.

Let me tell you a story briefly which further
illustrates the problem. In a case that I litigated
here in Los Angeles against the now somewhat notorious
porn company and their lawyers, one of the things that
came out is there was some evidence suggesting that in
fact the lawyers were producing their own pornography
solely for the purpose of suing people for infringement.
I would argue that we've gotten pretty far afield of
promoting science and the useful arts when that's an
effect of our statutory damages regime.

So that's the problem. You have this huge
motivation out there where all of a sudden some crappy
piece of content that was never likely to be worth much
of anything, by the miracle of rapid online distribution
and sometimes mass joinder in the federal courts, some
two-second cat video becomes worth potentially hundreds
of millions of dollars in online infringement if we
assume that enough people are inappropriately sharing
it.

The Copyright Act was negotiated in the '50s
and '60s. It was passed in the '70s before they had even invented a fax machine. We need to substantially revise what we're doing in the statutory damage realm, and here's how.

There's a really simple way to fix the problem. There needs to be a fundamental divide in statutory damages between commercial and noncommercial infringement. If what we're talking about is me having thousands of songs on my iPhone for my own personal use when I go to the gym, the $500 million penalty seems outrageous. If on the other hand I have thousands of songs which I am ripping and posting online in order to drive advertising revenue to my website, that's a whole other kettle of fish.

It's basically unfair to treat the individual defendant who's downloading something to watch on Friday night with the family the same as criminal copyright conspiracies that are out there ripping off the studios, and right now the law employs the willfulness standard which is so vague and unclear as to be, you know, not particularly helpful.

The system now is essentially million dollar lightning strikes. Enforcement of statutory damages is about as frequent as being hit by lightning, and the effects are about as severe. What we do for the content
owners -- because what I'm proposing here is substantially capping the damages for noncommercial infringement. What you have to do to make it up is make it easier for content owners to punish both noncommercial infringement and commercial infringement. So basically what we need is something more akin to a small claim system for the individual noncommercial infringements. One of the problems with cases, with copyright infringement cases, particularly for cases targeted at individual defendants, is there is literally no way to sue somebody for copyright infringement without making a federal case out of it. The problem is that to get into any of these cases or to argue your fair use, to argue your nonwillfulness, you're going to spend hundreds of thousands of dollars in attorneys' fees, and for most people that's potentially life ruining. So there's a problem. There's a big problem. You see federal courts using words like "deluge, "tsunami," with the flood of individual defendant copyright infringement suits, but there's a really easy way to fix it. The next Copyright Act needs a divide between commercial and noncommercial infringement. That's my piece. Thank you.

MS. STILWELL: Okay. With respect to the
total damages cap, if that were to be removed, it would
be a big detriment to the deterrent effect of the
statutory damage scheme as it exists now. The
Megauploads of the world and the Limewires and the next
generations of BitTorrent or whatever the mechanism of
delivery is -- these are big, big businesses, and to
impose a total damage cap would make these organizations
very happy, and the artists and copyright owners whose
work is being infringed would suffer greatly.

And this applies, I think, not just to the big entities, the secondary liability situation, but even private individuals who infringe can be capable of causing a great deal of damage if one individual, even without a profit motive involved, distributes a recording or a film before its commercial street date, that causes a lot of damage, and so to remove the total damage cap I think would be a really big mistake.

With respect to increasing the flexibility to award less per work infringed, the innocent infringer -- bottom line the minimum amount of damages is already $200, which is plenty low from the perspective of an artist. There's no reason to change that.

With respect to -- I'm going to lump these together -- changing the innocent infringement criteria and limiting the range of damages if there's a good
faith belief that the use is noninfringing, these --
first of all, I think juries are capable of separating
out really bad actors from those who are not. So I see
no reason to change these, but also these two go to the
culpability of the infringer only and don't really
address the potential damage to the copyright owner that
is suffered.

So I represent artists. I represented the
heirs of an artist who is the subject of a website, the
sole purpose of which was to have a hub for users to
exchange bootleg recordings of this deceased artist, and
the site was nonprofit, no subscription base and it
wasn't ad revenue based. It was just a nonprofit
bootlegging operation, but these were the hardest core
fans of this deceased artist, and so nobody was making a
profit either from the perspective of the people who
were organizing the site or the individual users.

And if you look at the community of users,
there are varying opinions about whether these people
are bad actors. In their world they were making the
world a better place by making music available that
wouldn't otherwise be made available. But from the
family's perspective, the harm that was caused by this
site was quite great, both in terms of finances and them
not getting paid what they should have been paid but
also in terms of the loss of creative control.

So to bifurcate the statutory damages framework and impose restrictions on what a court can do with respect to so-called innocent infringers, it doesn't need changing, and it would harm the deterrent effect. So I think for each of these four proposals, I don't see the utility of it, and I think all four would be ill advised.

MS. CHAITOVITZ: Thank you. So what about -- what do you think about allowing the court to calculate damages that are not based on the number of works infringed but based on the actor and the actions?

MR. PIETZ: I think it's a good idea, and in particular, you know, say you get this situation, which I have seen, where you get people who are downloading stuff who really just don't understand that the stuff on BitTorrent isn't all available there because it's free content. Now, maybe in today's world that's a rare case, but it does happen. There are people like that.

In that circumstance, you know, say that they've been making the same mistake but over and over again for -- you know, meanwhile they've downloaded 2,000 various movies, songs or other things. Even if they're successful in proving innocent infringement or perhaps they fall short of innocent infringement and
they just -- you know, they can't afford to hire a
lawyer to get the findings of innocent infringement, and
even if they just get the minimum statutory damages of
$750, it's still a big problem.

In my view the appropriate calibration for
noncommercial infringement is some multiple of what the
license fee ought to be to buy the work in the first
place. I think once you start talking about four or
five times multiples of the license fee, that's still
going to be a deterrent effect, but it's more like a
parking ticket kind of deterrent effect as opposed to if
we catch you, you're going to get the death penalty, or
at least the financial death penalty.

So I think in terms of -- I'm not sure that
the per-work statutory damage model is the right way to
calibrate it, at least in all cases. I think certainly
within the context of considering what to do about the
next Copyright Act, there ought to be room for
additional concepts beyond just the pro work or perhaps
alternatives.

MS. CHAITOVITZ: And also the question was
mostly about to allow judges discretion for secondary
liability for mass online infringement so that it
wouldn't be necessarily judged to the number of works,
but the judge would have the discretion to look at the
business.

I think you were next, George.

MR. BORKOWSKI: I think there's a lot of exaggeration and speculation in terms of these types of life-ending events that supposedly will result from statutory damages. I don't think there's much empirical evidence to support it. The problem I have with your suggestion is that there's been a transition already since the older copyright acts. The earlier acts, I think the 1895 act and maybe even the acts that preceded it, all of which have statutory damages, they allowed statutory damages to be imposed per copy, and eventually that moved over into what is interpreted as allowing statutory damages per work infringed. So it's already moved away from the per copy scenario which in the digital environment would truly be life ending.

Um, but -- so it's already been weakened or lessened to that extent. I don't think -- I think you do need to take into account the number of works infringed. I reject the notion that -- I know you're talking about secondary intermediaries, but just to harken back to one comment made earlier, I reject the notion that an individual who downloads 200 movies has no idea he's violating copyrights. That's nonsense.

With respect to intermediaries, I think the
amount of works infringed or that -- that -- that they
enable infringement of is part and parcel of the conduct
of that intermediary. So I don't think you can separate
the two. I think how bad the conduct is and how bad the
business model is is one thing, but you have somebody
like Megaupload who arguably is the largest secondary
infringer in history. The number of works that he
helped infringe is really significant. I think in the
calculus, and I don't think you should take away the
focus on the number of works infringed. If it's a
startup business model that kind of has something
interesting going on, I think you have a compelling
argument that, "Look, we thought we were on the right
side of the law. You said we're not. So, you know, we
shouldn't get popped too much for it." I don't think
there's a lot of statutory damages that are over the top
in these cases.

I will say one last thing. Then I'll pass the
mic. The pornography example is a bad example. I know
it's a really big problem. I grant that, but I think it
is really kind of unique to kind of sleazy lawyers in
that part of the world who are really trying to shake
people down, and they have done a lot of things which
are questionable ethics, and I think courts are starting
to recognize that, so I would hope that that isn't
driving the whole discussion because I think it is kind of unique to that part.

I think you should take action against it because I think some of this stuff is really terrible, but I don't think that should drive the discussion. I think that's somewhat of an outlier.

MR. STOLTZ: Very quick on that point about the phenomenon we call copyright trolling, abusive litigation against individual Internet users primarily by pornography companies. There are also some others, but there was an empirical study this year by Matthew Sag, "An Empirical Study of Copyright Trolling."

Among other things, he noticed that copyright trolling, which he defined as multi-defendant John Doe lawsuits, again, primarily porn, they were one-third of all copyright suits filed in the United States in 2013. In four states they were the majority of copyright suits filed. So that's not a niche. That's really a pretty major component, a pretty major effect of the statutory damages regime.

Getting back to your point, I think we can talk for secondary liability talking about taking into account the nature of the business and sort of what we think of as a good actor and a bad actor. I don't know that we need more flexibility. If anything, the regime
as it is right now is a little bit too flexible. There are not guidelines for how to apply these notions of good actor or bad actor. Those are very subjective notions that will contribute to even more unpredictable statutory damages awards, and unpredictability I think is an enemy here. Certainly it may deter infringement, but it deters a lot of conduct that the Copyright Act is supposed to promote. It's going to deter the use of exceptions like fair use. It's going to deter reuse of works, preservation of works. It's going to deter lawful speech, frankly, speech that all of our law is supposed to promote. It's going to deter investment.

I there were some folks that were talking about investment, but if -- if a business started in good faith and with a reasonable legal position on which, you know, reasonable minds might disagree -- is facing the potential of, you know, up to $150,000 per work that it touches, that really dries up investment.

Again, I'll point to another paper by -- Michael Carrier did a paper. I think this was mentioned in one of the earlier roundtables called "Copyright Innovation, The Untold Story," speaking mostly about the aftermath of the Napster litigation.

What he said was investment in digital music businesses all but vanished for several years after the
Napster litigation, and that was due in part, large part because of the fear of statutory damages. So any investment in technologies that were really going to drive the market for -- the lawful market for content for music especially was scared off. The venture capital and the investment money went elsewhere.

I think regardless of whether we take into account sort of good actor, bad actor for secondary liability for intermediaries -- and this is really especially true in the secondary liability context that we have to start with the actual harm, either the actual somewhat -- some attempt to measure the actual harm to a copyright holder or the actual profits to an infringer which is really going to be just like pretty much any other area of law.

Copyright is unique in this way, and it's really unique among copyright laws in the world in this way that it really can be completely divorced from actual harm. Now, it's easy to say, oh, well, this can come up. The judge can talk about actual harm. The jury can hear that. They probably do, but they don't have to.

An award of statutory damages can, under our system, be based entirely on emotional factors, on sort of painting the defendant as a bad guy or the plaintiff
as a suffering victim, again, divorced from any notion of actual harm.

I think if we start with actual harm, it doesn't rule out a notion of punitive damage, a notion that more deterrence is needed. It's just that it should start with actual harm as it does in personal injury law, as it does in this sort of other complex statutory civil law like antitrust or civil RICO any sort of complex regime similar to copyright.

The courts have evolved, you know, not perfect but pretty good processes that folks generally agree lead to, you know, a figure. You know, this is our best guess. This is the jury's best guess based on evidence, based on science, based on facts and testimony that this is what will make the plaintiff whole or this is what will disgorge unlawful profits, and then maybe we multiply if there's willful -- if there's sort of egregious or malicious conduct, but I think the more we start talking about adding factors of, you know, is this a good guy or a bad guy? We already have that, and that's what led to, you know, verdicts like the Thomas-Rasset case and the Tenenbaum case where we're talking about $9,000 a song.

Say what you will about Jammie Thomas and Joel Tenenbaum. Maybe they were bad actors, but those
verdicts, I submit -- those judgments, 9,000 a song, $675,000 for 30 songs -- really just life-destroying verdicts. We're based on appeals to emotion and not on any notion of compensation and, frankly, not based on any rational notion of deterrence.

MS. CHAITOVITZ: We've got time -- we're running out of time, so if -- I'll continue. I don't know if Cheryl or Dennis was next. I'll go with you, Cheryl, and then Dennis. And just --

MS. HODGSON: I'll make it brief. On the issue of deterrence, I think there's already a certain amount of that built into the notion of willfulness which goes back to my earlier comment. I think some clarification on the factors to be considered in willfulness, whether it's secondary liability or primary liability, that all needs to be addressed, and I think you can't talk about amending one aspect of statutory damages without clarifying it all.

For example, right now there's a huge issue in statutory damages that's largely been created by two factors: One statute that says a compilation is to be regarded as one work for purposes of calculating statutory damages, and that got brought front and center in many of the cases involving secondary liability and music digital cases where the court said, well, even if
there are 15 songs on an album or ten songs on an album, that's only one work.

Well, that leads to a very unjust result if that's the blanket rule. That may be the rule for ISPs or secondary liability, but it certainly should not be the rule in the case of individual infringements, and I will give you a very specific example. With the consolidation of the music industry, we're now left with three major labels that own massive amounts of the content.

Under the current law, most of the judges -- and I've read three decisions recently, and I think actually they're all wrong not because they didn't get the law right but because it wasn't explained to them correctly. If I'm a music publisher or administrator, third-party administrator, I may not even own the rights but I hold title to the copyright. If I have an entire album of material that's infringed, I'm limited to one award of statutory damages as one work.

However, each of those ten songs may have ten different copyright owners. They may have ten different composers. The composers have different royalty obligations even if it is the same. Let's say it's Sony music owns the album and Sony music owns the publishing. The royalty obligations that they incur and where those
damage awards go are completely different for the
masters than they are for the songs, and yet if you go
to court now, that is all considered one award of
statutory damages, and a lot of that confusion has been
brought about because of the arguments made by the
technology companies when they were sued for
infringement, and that was the way they got the damage
awards limited.

I'm not saying theirs shouldn't be limited,
but I do think there has to be a distinction between
that situation and really taking away the copyright
protection in effect by saying it's one work when it's
not one work.

And, by the way, I'll close with this: The
test of the courts is is that copyrighted work capable
of living its own life, it's own independent economic
life? Well, now that people aren't selling albums, who
could argue that a digital download of one song is not
an individual economic life? Yet if you go to court on
an album with songs that are infringed, there's one
award. So I just think that whole thing needs to be
clarified together at the same time.

MR. DREITH: That's exactly correct that any
longer albums are really not a single work and they
haven't been for many, many years.
However, speaking to the question about secondary damages and where there should be some flexibility, I first want to say that truly bad behaviors should face a business-ending event. If somebody is engaged in bad behavior and there's a volume of that, I think the sympathy that we don't want to put somebody like that out of business is ridiculous. They should be put out of business. They don't deserve to have a business that continues.

Having said that, I think there are circumstances, especially in a case of secondary uses and secondary liability, where really some of the behavior may appear to be widespread but is not a company that should be put out of business for doing that, and I think there should be some flexibility allowed in the courts, and I know that that creates uncertainty. I still think the deterents should be in place, but I think the court should be allowed some flexibility in situations because it's just not a one-size-fits-all situation.

MR. BORKOWSKI: I'll try to be brief. I actually agree that it would be good to have a discussion as to whether certain uniform guidelines should be applied when it's making a determination as to both the amount of statutory damages to be imposed and
whether there was willful infringement and whether the
damages should be enhanced because of willful conduct.

I agree that there isn't enough guidance out
there. I think some judges do give very detailed jury
instructions to juries on these issues; others may not.
And I think that some kind of uniform system would be
something to discuss. I think that is something that we
would definitely consider.

I just want to make two brief points in
response to Mitch. I think the second study that you
cited also said something like 89 percent of all
companies would rather do business under the U.S.
copyright scheme than in Europe where they don't have
statutory damages. So I'm not quite sure that that
study entirely shows that innovation or that statutory
damages are cutting back on innovation.

I also don't think there's much evidence
of that. There are currently 2500, at least, licensed
digital music businesses out there that we are aware of,
2500 using all sorts of technologies, and that's just
music, and there are plenty in other areas.

And the last thing I'll say is you can't -- in
my view, you can't focus on the actual harm because that
is contrary to the nature of statutory damages. The
whole idea of statutory damages is that you don't have
to show actual harm. You don't have to show actual
damage because it's difficult to show and that this
protects a public good and that copyright -- copyright
is a public good that needs to be protected.

Ever since the Williams court -- the Williams
case that the Supreme Court came down with decades ago,
and the whole notion is that it needs to be
disproportionate to the harm in order to have
deterrence; otherwise, what you're doing is you're
imposing a compulsory license on the content owners, and
if somebody gets caught, they essentially pay the
license fee or maybe a small multiple above the standard
license fee, and that's not the purpose of the statutory
damages which I do not think are unique. They are not
unique to the copyright realm. There are other areas of
law that have statutory damages, and they serve very
different purposes than compensation.

And, you know, I'm not going to get into the
discussion of Thomas and Tenenbaum, though I can, except
to agree with Dennis that bad actors need to be punished
more than not bad actors.

MR. BURROUGHS: Okay. I just want to add real
briefly, though we're running out of time, something
Cheryl said about the sufficiency of statutory damages.
The example of the online context is even worse for the
artist or the content creator because those ten songs, if they're uploaded by or obtained by ten websites from the subloader, you're going to be limited to $150,000 award against all ten of these websites. So if they can use that material to drive advertising revenue to drive traffic, it might be worth it for them. It might be a cost of doing business to upload an album that they know is widely disseminated because they know the statutory damages are going to be limited to this $150,000 award for this one chain of infringement. Now, we can fix that easily by saying that the $150,000 award should be discrete for each website for each actor in the chain. I don't think that would cause much of an issue, and we can also make it easy for content creators in today's Internet age to bring a case by getting rid of the timely registration requirement.

It just made sense 20 years ago if you're a musician and you release your album through Universal, there's attorneys there. They're making sure that you're doing registration and you're doing it properly. Today a guy in his bedroom with pro tools can create a couple of songs and he posts those to his Web page. Those are taken by, let's say, a car company and used in a commercial. He probably doesn't have an attorney. He cannot seek statutory damages, and if the Copyright Act
is there to spur innovation to protect contact creators,
we have to be cognizant of the fact that content
creators now are not always going to be part of a
company. They're often individuals or they're part of
small companies without the resources in a lot of cases
to seek registrations. So we might want to revisit the
requirement of a timely registration for seeking
statutory damages.

MR. GOLANT: Thank you all. We're going to
switch gears now, and I know time is limited. So I'm
going to do a quick one-we are going to go toward the individual
file share questions that I have before me, and this one
is should individual file sharers be treated any
differently from individual nonprofit-seeking
infringers?

So thinking about in that context, we're
talking about secondary liability, and now we're going
to look at the individual. Any ideas on how to answer
that question?

MR. PIETZ: So I think it's a great question.
And in particular, there was an example earlier today
about the nonprofit website that's sharing bootlegs, and
how is that different than from, say, somebody
downloading movies to watch them for their own personal
use?
I think the difference ought to be reflected perhaps in the realm of actual rather than statutory damages. What I was struck by the example of the website with bootleggers was that although what they're doing -- they may have had a good faith belief that what they were doing was allowed by the Copyright Act, there's actual harm being caused by that website potentially. It's measurable.

So I think that to the extent that statutory damages under a future Copyright Act were calculated based on some multiple of actual harm, there would be a provision to potentially differentiate between individuals and, say, nonprofit organizations.

MR. GOLANT: Thanks.

Does anyone else have any responses to that particular question?

MR. BORKOWSKI: I think a lot of our earlier comments that several people made did kind of answer at least our views on it. I think the focus should be on the nature and extent of infringement rather than the actor because I think you can have bad individual actors or not -- or less bad or close to innocent individual actors.

I think the same is true with intermediaries and companies. So I think it's the nature and extent of
infringement that should be the focus rather than the type of entity.

MR. GOLANT: Very good. Dennis.

MR. DREITH: I actually tend to agree with George. I think that while the sympathy seems to want to say we want to treat people or not-for-profit situations different than those who are profit-making entities, I really think it has to be the extent or the circumstances that really has to be weighed more than whether it's a profit or nonprofit entity.

MR. GOLANT: Very good.

Mitch, you're next.

MR. STOLTZ: I think when it comes to individuals, I think there's a faulty logic going on regarding deterrents. On some trivial level any increase in penalties or potential penalties increases deterrents up until the point where a person has to declare bankruptcy, at which point it's kind of all the same above that, but at what cost?

We can talk -- we can say -- you know, it's easy to say any increase in penalties increases deterrents, and therefore any decrease in penalties will decrease deterrents. You know, the real question is at what cost? At what cost in incentive for abuse of the system? What cost in over deterring creative work that
the Copyright Act is explicitly supposed to promote.

And it's interesting there's a disconnect on
some comments here. On the one hand, I feel like we're
hearing the broad range of statutory damages exist to
give judges and juries flexibility. The upper end is
rarely used. There's really no need to focus on the
upper end. It's just there for flexibility, and then on
the other hand we're hearing we need to keep higher
amounts visible to the public, and that's a real
interesting disconnect because I think that's a
recognition that those high amounts -- that 150,000, you
know, which shows up in the warnings before a movie. It
shows up in the labels on a music CD. You know, it's in
news stories. It really is put before the public that
that number and discussion of it and this -- you know,
the message that that law sends has at least as much
effect as actual jury awards.

MR. GOLANT: Thanks. I think we had Rachel.

I think you were next.

MS. STILWELL: So with respect to treating
individual file sharers differently, individual file
sharers, as I said before, can cause great harm. If an
individual is leaking copyrighted work before its street
date, it causes substantial harm, and the courts should
have the present level of discretion to address the
really bad actor individuals just as well as they do
the big entities for secondary liability, and in the
case of -- similarly in the case of the bootleg site --
by the way, I want to clarify that artist did write
all of his own work, and so it wasn't just bootlegging
laws being violated. It was copyright infringement.

In the eyes of the family, those individuals
that offer bootlegs that they know that or they believe
that the artist would not have wanted released, that
that caused them a great deal of harm, and they would
want a judge to be able and a jury to be able to
consider those factors, and, you know, I just don't
think it's necessary to treat them differently.

MR. GOLANT: I think, Teri, you had the card
up. We'll take your response, and then we'll ask if
anyone has any comments from the audience and then
break.

MS. KAROBONIK: Okay. I'll try to keep it
short. I think the distinction between individual file
sharers and small nonprofit file sharers might be a
false distinction. I think the reality is a lot of
these individuals, no matter what side they're on, I
think we overestimate how much the public really
understands, not only our area of law but the
technologies that govern copyright law. Yes, there are
some bad actors out there who do know exactly what
they're doing, but I do work with on a daily basis a lot
of younger creators.

So think about yourself in high school. Think
about yourself in college. Would you have had the
sophistication to deal with complicated copyright
exceptions like the archive exception? Honestly I'd
like to think I was fairly savvy in college, but I think
that's something that I would have struggled with, and
the average high schooler, you know, college-age student
or even someone who just doesn't have that level of
sophistication, they probably won't have access to an
attorney.

So, you know, it's really hard to group those
people who are -- you know, who make mistakes just
because they misinterpret the law with those clear bad
actors, and I don't think they should be grouped
together.

MR. GOLANT: Great. Thanks for all of your
responses. Anyone in the audience have any comments?
Just comments. Not questions.

MS. CHAITOVITZ: And online too. So if you're
online, you can call the phone bridge.

MR. GOLANT: Steve.

THE OPERATOR: This is the operator. I show
no questions from the phone bridge at this time.

MR. TEPP: I'm Steve Tepp representing the
Worldwide Peace Center of the U.S. Chamber of Commerce.

Just a few observations about a couple of things that
were said during this discussion.

It was suggested that the purpose of copyright
is not to stop infringement. My free right speech is
being infringed.

So there was a suggestion that the purpose of
any copyright system must include an element to prevent
violation of the rights it provides or it's meaningless.
So clearly one of the purposes of copyright law is in
fact to prevent or stop ongoing infringements. That's
fundamental.

It was also suggested that infringements are
not difficult to find. In some cases that may be true.
Unfortunately, in all too many cases, they are very
difficult to find. Very difficult to find the people
who are behind them even if you can identify the
infringing activity, and in fact the legislative history
of the 1999 amendments that brought us to the current
level of statutory damages focused on exactly that
problem as a rationale for the increase at that time.

Third, there's a question of abusive
litigation. I think there certainly should be and are
ways to address abusive litigation tactics both in the Copyright Act and in the rules of civil procedure, particularly where you have a claim that is meritorious where there is a copyright owner with a copyrightable work that is being infringed. I think trolling is an inappropriate term and villainization of copyright owners is probably not the best way to have a discussion about the proper level of statutory damages.

But to end on maybe a positive note, one of the suggestions seemed to be that a small claims system could be a useful approach here because, of course, as the Copyright Office report on the subject has indicated, that would be up to a certain level of monetary awards, and I think when the parties are voluntarily before such a body, that is a useful way to approach at least some of this issue and maybe a way forward that's not particularly controversial. Thank you.

MR. GOLANT: Thanks, Steve.

MR. STOLTZ: Steve, your organization, the U.S. Chamber of Commerce has called statutory damages a serious burden on small business owners and an invitation to lawsuit abuse. That was in the context of junk faxes. I was wondering why you believe copyright is different from junk faxes as far as the incentive for
lawsuit abuse.

MR. TEPP: I'm not familiar with that particular quote, so I can't verify it, but copyright is property right. It's been shown that the harm from copyright infringement is difficult, if not impossible to prove, and so I think it's quite fundamental, and that's the reason statutory damages existed before the constitution was ratified and state copyright laws and has been in U.S. federal copyright laws since 1790 without interruption.

MR. GOLANT: We've got one more comment.

MS. ROSENBLATT: Very briefly. Betsy Rosenblatt from the Organization for Transformative Works. I have a comment that goes a little bit to the willfulness question that Cheryl raised and also the -- also Morgan's suggestion about profit seeking versus nonprofit seeking.

There's a huge difference in the place that I think many of the panelists are coming from between wanting to deter and punish piracy on the one hand and on the other hand behaviors that may be very close to the line of infringement. I'm about to be on the remix panel, so you can tell what's on my mind, but I think any regime for statutory damages would do well to take into account that there's a huge difference between
piracy and forms of infringement that are closer to the line.

MR. GOLANT: Thanks for the comments. We have one more minute. Does anyone want to respond to what these two people from the audience have said?

Morgan.

MR. PIETZ: I just want to make one really sort of brief and fundamental point about deterrence. If you wanted to draw up a law on economics calculations for how to effectively achieve deterrence -- right? -- we're here today really focused on the wrong variable, which is what's the punishment?

You know, the bigger variable when we're talking about effective deterrents as far as copyright infringement goes is what's the likelihood of enforcement?

So I guess my comment is this: We've heard from people on one side that for the bad actors, however that's defined, the penalty should be higher. At least my message here has been on the low end of the scale. When we're talking about individuals in the noncommercial context, the statutory damage number needs to be lower.

I propose the commercial/noncommercial divide, but my point is just this: A more effective deterrent,
even if you lower the number for statutory damages for noncommercial infringement, if on the other hand you increase the likelihood of enforcement for that, you end up with a net overall increase in deterrence despite the fact that you've lowered the statutory damage down to something that I think most people would see as a lot more reasonable. So that's all. Thank you.

    MR. GOLANT: Thanks for that, and with that comment we wrap up our statutory damages panel. We'll have a half-hour break, convene back at 11:00 for remixes, and we'll see you then.

    (Recess taken.)

    MS. CHAITOVITZ: Hello. And welcome to our second panel today. Our second discussion is about remixes. So advances in digital technology have made the creation of remixes or mash-ups easier and cheaper than ever before providing greater opportunities for enhanced creativity. The Green Paper defines the term remixes as creative new works produced through changing and combining portions of existing works.

    These types of user-generated content are the hallmark of today's Internet, in particular video sharing sites, but because remixes typically rely on copyrighted works as source material, often using portions of multiple works, they can raise daunting
legal and licensing issues. So there may be considerable legal uncertainty given the fact-specific balancing required by fair use and the fact that licenses may not easily be available.

So before I get to my first question, I'm going to ask that we go down the panel and that everybody introduce themselves, and also as I ask questions, when you want to respond, if you'll just turn your card this way, I'll try and remember the order that they get turned around.

So Gerard, do you want to start?

MR. FOX: Sure. I'm Gerard Fox, and I'm with the Law Offices of Gerard Fox, and I'm a trial attorney who litigates quite a few copyright cases across different industries.

MS. LaPOLT: My name is Dina LaPolt, and I'm a transactional entertainment lawyer in Los Angeles at the firm of LaPolt Law. We represent creators, authors, actors, any owners and controllers of intellectual property. In addition, I teach at UCLA extension a class in music law, and I'm also a musician. My undergraduate degree is in music.

MS. KAROBONIK: Hello again. I'm Teri Karobonik from New Media Rights. New Media Rights is a nonprofit organization that provides free and low cost
legal services, primarily providing transactional to
artists, creators and entrepreneurs of all kinds.

MS. ROTHMAN: Hi, I'm Jennifer Rothman. I'm a
professor of law here in the Joseph Scott Fellow at
Loyola Law School. I specialize and teach and write in
the areas of copyright and intellectual property, and I
also advise clients in those areas. And in a prior life
before I was doing IP law, I was also a filmmaker, both
independent as well as working with some of the major
studios and doing documentary and fiction works. Sort
of a nexus of the two worlds.

MR. FREUNDLICH: I'm Ken -- I'm Ken
Freundlich. I'm with the firm of Freundlich Law. I'm
an intellectual property litigator. I have offices here
and in New York, and among my clients are artists,
producers, filmmakers and copyright owners of all
different kinds, and I've had a fair amount of practice
across all industries in various copyright issues.

MS. MUDDIMAN: I'm Helene Muddiman. I'm a
composer and a songwriter, and I just started a company
called Hollywood Elite Composers which is aggregating
catalogs from composers and song writers.

MR. TURLEY-TREJO: My name is Ty Turley-Trejo.
I here from Bringham Young University over in Utah, and
I work as a licensing administrator in our copyright
licensing office primarily dealing with music licensing, and I also am a student. I'm a -- I got my undergraduate in music and getting my masters in orchestral conducting. So I'm a musician as well. And I also, before I worked as a licensing administrator, ran a private clearance company for music clearance company for film and television.

MR. COOPER: My name is Jay Cooper. I double on saxophone, clarinet and flute. That's where I started my life.

I'm the founder of the entertainment department at Greenberg Traurig here on the West Coast. My practice is principally on the -- representing artists in music, television and motion pictures.

MS. ROSENBLATT: I'm Betsy Rosenblatt, and continuing with the theme, I actually am also a former musician and composer, but now I'm a professor at Whittier Law School where I run the center for intellectual property law, and I'm also here on behalf as legal chair of the organization for transformative works, which is a nonprofit focused on protecting and preserving transformative noncommercial fan works and fan cultures.

MS. CHAITOVITZ: Thank you. So our first question is many of our commenters, both owners and
users, point to a large number of remixes that are available online and conclude that fair use, combined with marketplace mechanisms, function.

Do you agree? Is the current case law interpreting fair use handling the issues appropriately and is the creation of remixes being unacceptably impeded by legal uncertainty?

MR. FOX: I'll jump in here.

MS. CHAITOVITZ: You've got to put up your card.

So Dina, you were first.

MS. LaPOLT: No, but I'm going to defer to my colleague.

MR. FOX: Well, first of all, I'd just would like to say that there's a lot of confusion, and that's the most important thing to note, and the uncertainty is created by the fact that media entities like You-Tube now are developing their own processes for handling this. For example, You-Tube content, if you qualify for the program, you can actually take down what you consider to be an infringing use. And then, you know, that overlooks concepts such as fair use, which is very complicated, and gives the copyright holder, I think, too much authority.

And in terms of dealing with this situation, I
think one of the things that has to be looked at very seriously is a small claims copyright court because no matter how you're looking at these issues in the real world application, often the amount and controversy is simply not enough for the court system to be used, especially with the attorneys' fees provisions, and I think there's been a lot of discussion, both on the congressional level and elsewhere, about a small claims copyright court.

So those are some just opening comments.

MS. CHAITOVITZ: Thank you.

MS. LaPOLT: Thanks, Ann.

Why are we talking about this? I mean, I'm going to tell you the system is not broken. Okay. So if you own a property and someone wants to use your property, you need to get permission. And I know that in the Green Paper that we -- you talk about the remix issue and you don't -- you don't advocate nor do you oppose any compulsory licensing or government regulation.

However, with these roundtable sessions, these issues have been raised, starting with the first session in Washington D.C. on December 12 when Peter DiCola was on the panel. He was the first one who talked about compulsory licensing, so it set the tone for the rest of
the roundtable. So I need to address that issue even though you have not written about it specifically in the Green Paper because I represent creators, music creators largely. My passion is advocating for their rights. I feel as though I have to get my statements on the record.

And the issue with the remixing is it's a derivative work. We are not so -- we don't have the moral rights of authors the way they do in Europe. So the only thing we have is the derivative right, and we put any limitations on the derivative right or we oppose any type of compulsory licensing or any portion of derivative right, it will substantially devalue music.

Okay.

This is a perfect example of the way it works with the willing buyer, willing seller standard. And by the end of the day, if someone says no, you can't use it, you can't use it.

Now, I've been on the other side. I've been on both sides of the spectrum. I represented the estate of Tupac Shakur for almost 13 years, and I'm telling you, sometimes we try to clear samples and we were told no. I went to the ends of the earth stalking people to try and get clearance because we needed a Tracy Chapman song. She doesn't approve anything. So I accosted
her -- well, at the dessert table at the American Music Awards. I saw her and I went up to her and I explained to her why I needed the song, and we actually got the clearance, but the point being that it was her right to say no, and sometimes it was very difficult to call the client to say we couldn't get the sample clear or the remix clear, but that's the breaks.

On the other hand, representing someone that says no. You know, I appreciate that, you know, people will call me up and try to explain their plight and why they think the remix or the mash-up and the sample should be approved. But at the end of the day, if it changes the artistic integrity of the song writer or the recording artist intended when they recorded or wrote this song, my clients have the right too say no.

Specifically, Steven Tyler with "Dream On." That's a song that has great meaning to him. Every time the song is covered, which under Section 115 is a good example of why we have these compulsory licenses that don't really help the artist or the songwriter. So when anybody covers "Dream On," if it's a cover version that he doesn't like or that's upsetting to him, he's very, very upset on that. And explaining to him that people are allowed to cover his songs is always a conversation that I have to have and it's a difficult conversation.
Now, on the other hand, if someone was allowed to create a remix of his song or mash it up with another song, it changes the artistic integrity of what he intended when he wrote song, that's a painful experience. I wouldn't even want to call him and have to go through with him.

So I'm sure we're going to have other comments from the panelists, but I did want to get my statements on the record. Thank you very much for having me.

MS. CHAITOVITZ: Thank you. I couldn't see the order that everyone else put up their thing, so we'll just go in order.

So Terry, you can be next and then we'll just go in order.

MS. KAROBONIK: First, I wanted to briefly address the music licensing issue just because it came up. I think with licensing we often at these panels create this false sense of -- almost that it's easy to get a license that, oh, yes, absolutely. Just get a license. Well, I've had the "just get a license" conversation with a wide variety of users. Some of them have been high school students that don't have jobs. Some of them -- understandably some of them have been college student. Some of them have been young documentary filmmakers.
If you do not and cannot afford a zealous advocate -- a zealous advocate who is a music copyright licensing attorney, often the licensing is pretty much closed off to you. That's just the reality, and I think that's a problematic world.

I think one of the things that's really great about the U.S. is that we have things like fair use that really have that right -- that preserve our right to speech, to comment, since ultimately that's what creativity has always been. We're always commenting and critiquing other people's creativity.

Before I went to law school I was a creative writer, so I understand how painful it can be sometimes to see someone do something to your work that you didn't think of, but that's one of the things through fair use that we do allow some room for because it does add value to society, and I think that's something important to remember.

But getting back to the original thing, the original question, I think it's kind of a false statement, and it's a statement I hear a lot and a myth I deal a lot with with some of my clients that just because there's a lot of something on the Internet doesn't mean that there's a problem. Often enforcement can be huge. Just because something has been taken down
doesn't necessarily mean it's okay.

So I think just showing that there's a proliferation that's allowed to exist in a vacuum just because someone hasn't had time to enforce it yet or has for whatever reason decided, um, no, maybe I'll enforce it. Maybe I won't. Maybe I'll just ignore it for now and see what makes the most financial sense.

I think one of the key problems here comes down to education once again. Now we have -- every person has the tools to become a creator. Every single person from middle school students to college students to all sorts of independent creators to even grandmothers. The reality is we've all been brought up in a system that teaches plagiarism and not fair use.

Plagiarism and copyright law, while they have some similarity, they're not the same. So we've created a generation, indeed an entire culture of creators who don't understand the very basics of copyright law, the law that governs what they do.

We have done some education, but a lot of that education has boiled down to don't pirate. Essentially we've given the keys to the cars to a kid but without teaching him how to drive, just telling them not to drink and drive and we're upset that they're landed up on the lawn. I think we should be grateful that they
ended up on the lawn and use this really as an
opportunity to start some comprehensive education and
that education -- I'll emphasize this again. It has to
be comprehensive. It has to include things like fair
use. It has to include the basics because if it
doesn't, it's not going to help create a society of
creators who know when things are fair use and when they
might want to seek out legal counsel to in theory help them
get a license if they can afford it.

MS. ROTHMAN: So in addressing the questions,
I want to first pose a different one and then reframe
perhaps the question asked.

So first you asked essentially is the system
working now, and I think it's very important that we not
repeat the perhaps failings of past legislative regimes.
We don't want to just answer does it work now but will
it work in the future? And so when we think about
remixing, I think we really need to think about the
framework of the future and technology that's going to
come online and not just say does the current technology
adequately provide room for these uses or adequately
stop these uses. So I think we need to look further
down the road.

Second, I think in the discussion -- we're
just beginning it here, but in looking at some of the
prior roundtables, and I've already heard it today, there seems to be a polarization between what people think of or sort of two world views.

One, it's our copyrighted material and the right to say no, and I heard it today from Dina, and I heard at other roundtables the right to say no. And then the other which is there's all this material out there and people should be able to remix it and it's our cultural property.

So I want to sort of chart maybe a middle course between those by raising a slightly different question, which is that we need to think about remixes not as an entire whole, but there's different types of remixes. There are remixes that's are fair and that, if litigated, are likely to be found fair. There are ones that, if litigated, would be found not fair and would be infringing and perhaps substitutionary or ones that we might not want distributed on line. And then there may be a third category of gray uses where we can't really decided and should we err on the side of getting rid of them or keeping them up.

And so I think it's really important to understand this array of types of fair uses and their sort of categories when we think about whether they're being impeded or not.
So I'm of the camp that -- maybe it's not a
camp, but that there are some fair uses online and that
it's important to protect a zone for them. We have to
recognize that we have made a shift to a digital age and
that what people are doing online now is very similar to
what we were doing sort of in the brick-and-mortar, you
know, pen-and-paper world. People are making collages.
People are making diaries. They're doing their term
papers online. They're doing new transformative
creations, parodies, critical commentaries, all in the
context of what might be categorized as a remix. I
think it's very important as we move forward that we do
provide space and protect a zone of fair use for those
sorts of uses.

And I am concerned by both the current
technology and as we look down the future I think
increasingly good technology to take down what most
non-sophisticated parties might put up online that
creates copyrighted content. So I think it's very
important in terms of the legislative arena that we do
think about how do we protect in the realm of technology
and the sorts of content ID programs like on YouTube, a
space for fair use.

Now, there is a dispute among the studios
about whether mash-ups, for example, are fair or not,
and I am not sure that it's a good place for congress to
get into the mix of trying to determine whether
individual uses are fair or not, but I think there are
nevertheless the ways the technology can provide room
for fair use.

For example, current technology is largely
programmed software to take down at the instruction of
copyright holders any copyrighted material that's
detected. That's not always true. Some music studios
in the recording industry are advertising against it or
suggesting you can download the songs. There are
different strategies, but in some they're saying just we
picked up our copyrighted work, take to down. But you
could of course build in some breathing room, and I've
spoken to some technologists at NBC that could do
this and. We might disagree on what it is. We might want
to defer into the market about how they would build in
fair use into the technology but perhaps like allowing
five-second clips of various things sort of as a basic
software build in. So that's something to think about.

At the same time, I think it's important that
we do provide space for market solutions. So let's
think more of perhaps either about gray areas or less
about gray areas and more about things that I think are
probably are not fair use. So for example, if someone
wants to mash up a mix of Netflix, hits like "House of Cards" or "Orange is the New Black" because they think that might be cool, I'm not convinced that that's fair use.

On the other hand, it is a sort of driving instinct of making consumers who want to go and that or to collect together all the scenes with their two favorite characters as they fall in love. I'm open to that not being sort of in the fair use protected technology content category.

On the other hand, I think it's important that the market starts getting into that arena and perhaps even facilitates it. So it would be great if ABC said, hey, we have this great editing program. We'll let you use clips up to a certain amount of our material to make these wonderful mash-ups. So I think the market could really come in in those ways to provide solutions, but I nevertheless think that technology -- that congress needs to step in and make sure that technology doesn't shut down very important fair uses in this day and age and continues to protect a fair use zone.

MR. FREUNDLICH: I agree with most of what Dina said. From a litigator standpoint, I think the system now -- you asked if the system now works. The system now is you ask for permission. You negotiate
your licenses; you get paid.

Another part of the current system is there are market-based solutions I think being imposed both in the form of perhaps the creative commons license. If someone wants to allow their to be mashed up for whatever reason, they can set parameters for how they want it to be used, whether they want to get paid, you know, every detail of the kind of license they're looking for, but I don't think that there's a need for any legislation to change what already exists, which is under 106 there's certain rights that you have in your copyrighted material, and then the flip side of that is Section 107, which is how, you know, we impose our first amendment type concepts on the copyright system.

And I think while it is true that the courts have been all over the map on fair use and that it's a case-by-case analysis, I think there's much more danger in trying to create some sort of category of mash-up that you can use statutorily as opposed to voluntarily which I think is something that's already happening.

I've heard that YouTube, for instance, has a situation where you can opt in to get paid if you want to if you're a publisher. Again, it's voluntarily. And as long as it's voluntarily, if somebody wants their things to be used and to get paid for it, I think the
law is there for that. And this whole concept of fair
use is built into the litigation framework that we
operate in every day in this area.

So I don't really see any particular need for
reform in this area while also recognizing that it
exists in the realm of case-by-case analysis.

MR. TURLEY-TREJO: I really agree with the
comments of Jennifer and Teri in particular. I think
just -- and from a licensing standpoint, I mean
licensing music is not easy. Otherwise companies like
the one that I created to be the intermediary between
licensor and licensee wouldn't exist, rights clearance
companies wouldn't exist because the whole premise of
that business is that we know the people. We know the
negotiations. We can get the clearance for you much
easier because it is difficult. It is daunting.

Fair use is working, I think, to some extent,
for a lot of these remixes and mash-ups. I think the
market is struggling to try and find a solution on
YouTube, and YouTube has the power to sort of strongarm
a lot of publishers into agreeing to these license terms
and content ID because it's impossible to track down and
litigate, and so there's -- it's a difficult situation,
but I think, especially with some of the case law with
fair use, it is working, but Jennifer mentioned
something about possibly introducing -- I think she said
a five-second limit or some sort of parameter.

The issue is that fair use is obviously
intentionally ambiguous so that can it can be flexible,
but most people just don't understand that, and most
people -- a lot of maybe young creators who are acting
on culture and remixing and recreating, which is part of
our current culture, don't even know that they're
using -- that they're utilizing fair use through
transformative use, but thankfully there's that part of
the law that helps to protect that.

But, I mean, I'm a musician, and ever since
the history of music being created, it has been building
off the prior composers or the prior generation and
Beethoven and Mozart and Heiden and Wagner and
Mendelson, all of those people quoted each other and
used each other, but there was also a culture that if
they copied somebody, then they were looked down on. They
were looked down on as not creative or as not original.

And it's a different type of transformative
use culture now where we can actually excerpt and
extract audio clips from somebody's work so it's a
direct copy, but it's a different type of transformative
use, and I think it should be protected, and I think
maybe adding some parameters to the law could help,
especially those who are unfamiliar with the law, which
is primarily the people who are doing it. And then
there's people like on the panel who help those creators
to navigate the law.

MS. CHAITOVITZ: Jay.

MR. COOPER: If licensing were easy, we
wouldn't need attorneys, and that's not a good thing.

Copyright is a property right. It's a
property right. It's in the Constitution. I don't want
somebody taking my property at will. The reason -- the
reason for it -- the reason for that is -- first let me
step back.

Remix is a misnomer, okay. The word of art
for remix is what they do in the studio when an artist
goes in and they make a recording and they go in for a
remix session and they say we need the voice louder. We
need the voice softer. We need the base amplified. We
need the horns up or we need the horns down. That's a
remix. That goes on all the time, and we're confusing
terms here because what the people out there are doing
are not remixing. They're really mashing up. That's
what they're doing. They're creating something else.

They're taking my property or my client's
property rights and they're taking it and doing it for
what they want with it, which the client may or may not
approve and may or may not want. It's his property.
It's his right to say no. It's his right to say I like
that or I don't like it.

I've had clients agree and say, "Fine, I
really like that. Go ahead with it." But you know what
we do? We work out a financial arrangement. And so the
client then participates in that new work, if you will,
the mash-up. They participate. They get a royalty and
the royalty is negotiable.

Now, there are some people who say, "I don't like
my things being done like that. I like it the way it
is." The copyright law says you can do arrangements of
it, but you can't change the fundamental character. And
so when you create a work of art, and these are works of
art. These are works of art. The creator does not want
somebody to take their creation, to take their creation
and do something with it at will that may alter that
creation to a point where it's unrecognizable or not
what it was meant to be in the first place.

The French have created great food. They have
created great wines, and they also have a moral right.
And this couldn't happen. This conversation that we're
having here wouldn't happen in many of the countries in
the world because they protect the rights of the
creator. They protect the rights of the artist. It's
fundamental to creation.

The reason why people go in there, and many of them study for years and years to create and learn, and they hone their right and they starve for years until they become successful, and all of a sudden somebody else comes along and says, "Oh, thank you very much for all your hard work. I'm going to take that and use it and not compensate you because I don't have to because I'm told that now that's okay."

I think the system works. I have to say in my personal experience, the vast majority of the time when people come in for licenses, they get their licenses. Not always. Certainly not always. But they get their licenses. A financial arrangement is made. And so I don't see any reason to move this beyond that particular point. I think we're creating a problem where there really is no particular problem.

MS. ROSENBLATT: Hi. I want to very briefly address a couple of things that were said on the line coming to me before getting to the uncertainty question.

The first is to address an example that Jennifer mentioned of making a mash-up of two characters interposed, and I just want to point out that the video "Buffy Versus Edward," which does exactly that to highlight the contrast between various treatments of
characters, specifically identified by the copyright
office in the 1201 exemption proceedings in the 2012 as
an example of a clearly fair use.

The other is the licensing question, and I
think we're looking at two very competing rights. One
is the right to control what happens with your work.
The other is the right of speech. And as Jay pointed
out, many people struggle for years to hone their
crafts. Many of those people who are struggling for
years to hone their crafts are doing so by playing cover
songs, for example, or by making mash-ups through which
they learned editing skills, video skills, that sort of
thing and licensing not only prices.

Many of these struggling artists out of
creation, but also breeds censorship. As I think the
diawntly Steven Tyler doesn't want
people using his music in that particular example, but
that's exactly why we have fair use to allow people to
make commentary without getting his permission.

But now I want to turn to the uncertainty
question which is what you asked. Legal uncertainty
permits overreaching by copyright holders, and
particularly in concert with the Digital Millennium
Copyright Act notice and takedown procedure can be used
to suppress commentary or criticism by playing on the
risk aversion -- the rational risk aversion of intermediaries who don't want their safe harbor taken away, and uncertainty also disproportionally chills speech by the smallest and least privileged speakers.

Fair use regimes -- generally our fair use regime generally favors transformative noncommercial speech. So generally would favor, and we hear this all the time. This isn't just the organization for transformative work saying it. Generally favors the sort of remix embodied in the sort of mash-up embodied in fan works and fan cultures, but when paired with the burden shifting regime of the DMCA ends up being very chilling because it moves the burden of proving noninfringement to the remix artists and away from proving infringement to the copyright owners.

What that means is it harms those who already face financial or social barriers to speech or have difficulty finding or paying for legal services. As an example, we at the OTW get e-mails and calls from men who say, "I've got a take down notice. I'm going to fight it. Help me." We get calls and e-mails from women saying, "I'm afraid to post My Little Pony fiction because I'll get kicked off the Internet." Those are very different reactions to the same law based on the amount of privilege that they have going in.
So I have some concrete suggestions for how to approach this. Remix creators need to know that they have a right to create without permission, and they don't just exist at the sufferance of copyright owners, and the law should expressly permit noncommercial remix through doctrines very much we have now, fair use, safe harbors but -- and these should be flexible -- but not permit the sort of uncertainty we have now.

For example, they shouldn't make remix illegal, as 1201 would if not for the Copyright Office exemptions provided in 2010 and 2012, and we should seriously consider the possibility of a specific safe harbor for noncommercial remix as Canada has.

MS. CHAITOVITZ: Thank you. I see some people have their things up a second time.

MS. LaPOLT: I just have a few short comments.

MS. CHAITOVITZ: If everyone just keeps it brief we can go again.

MS. LaPOLT: Thanks, Ann.

So I just have a couple comments to make on the panel from what was stated. So Tara for one says, you know, if you don't have a seasoned music attorney to go clear the rights, then you can't get the rights. Yeah, if you don't have a seasoned real estate broker and resources to buy property, you can't buy property.
That's how that works.

You know, in Canada, I just want to address her statement. In Canada they have rights of paternity in Canada, so rights of paternity where it's even more than a morals clause. So you can -- even if you waive your moral rights in Canada your rights of paternity apply under section, I believe 14.1 of the Canadian Copyright Act, but I could be mistaken on the quote.

The other thing I want to bring up is that fair use is a defense, not a right. Even Weird Al gets permission, okay, and that clearcut, could fall into parody. Even Weird Al, I asked Weird Al. I said, "Weird Al, hey, why do you always get permission?" He goes, "Dina, I have six kids and a wife. Do you really think I want to have $200,000 of my savings account. If I'm going to defend my fair use analysis, I'd rather just get permission and if they say no, they say no. I'll find someone else to give me permission." Weird Al has a number one record in America this week, you know, and everybody gave him permission.

So the other thing I want to address is this gray area. There's no gray area. It's like being a little pregnant. It just doesn't work out, you know what I mean? It's not a gray area. You either get clearance or you don't. You either own the property or
you're stealing the property.

If someone wants to come in and use my bathroom and I say no, you can't give me notice and come up with some kind of guidelines on what constitutes fair use and then come and use my bathroom. It's just this way we have to talk about it.

And it's like when you're representing creative people, this is how they feel. And, you know, we have to respect their wishes, and right now when you're talking about creating best practices for fair use or guidelines or this, that and the other, yeah, the music business is complicated, but so is life. Life is complicated. Figure it out, people. Okay, if you want to get it done, hire someone smart and get it done. If you don't want to get it done, stop whining and complaining that you can't get it done because you can't get it done. All right.

If you want to be a successful musician, you have to create original works of art that people notice that could be exploited and monetized. And trust me, when you become successful and someone starts using your stuff without permission, you're going to be just as upset. Thank you.

MS. CHAITOVITZ: Thank you.

MR. FOX: I think there's a real danger, a
very serious danger in creating exceptions for remixes
and mash-ups, and this relates to a very important
copyright concept that the courts themselves disregard,
and even experienced lawyers.

Copyright analysis is a qualitative analysis,
not a quantitative analysis. And that's particularly
important to keep in mind when you start throwing around
concepts like creating an exception for a remix or a
mash-up.

I tried a case for the Isley Brothers when
they sued Michael Bolton. Michael Bolton didn't create
a remix or a mash-up, but he took their song, Love is a
Wonderful Thing, and he added a bridge and he made what
might be considered to be, or certainly argued through
very good lawyers, was a non-infringing song.

But the point is, and Judge Baird, who I
really commend as being one of the few district court
judges in this circuit who understand this, focused on
the fact that creation, copyright is the combination and
music, all the notes are common, and what you create is
a beautiful thing is the unique combination of some
number of notes.

I try these cases for a living, and I'm always
with the artist or the infringer. The artist will tell
you a beautiful story about how they created it. The
Neville Brothers created their music by pounding on buckets on the street. The infringer will always have a counterfeit story. The artist will always remember the point of creation almost with the exact amount of emotion that a person would consider giving birth to a child. It's very important to them. It's something that came out of them, God given.

And so I think that if we start dancing down the road to, you know, creating exceptions for a remix or a mash-up, because really what you're doing is you're saying is quantitatively different if you really break it down, but if at the heart of it, even if there's a couple beats that are unique, then you are infringing under the copyright law. It's a qualitative analysis, not a quantitative analysis.

I think the most constructive thing Congress can do besides making a complicated body of law more complicated, would be to focus on this concept of a small claims court for copyright claims because the point that you'd have to have $200,000 sitting in a bank account to assert a fair use defense is problematic, and many, many, many of these issues, young artist, people who are creating on YouTube who want to assert a legitimate fair use defense or a young artist who is being infringed have absolutely no recourse. They don't
even qualify for some of these YouTube programs because they haven't created enough content, and court is way too expensive, and they don't want to go hire a lawyer like me and spend $200,000. They want to be able to go into a small forum just the way other people do in small claims matters and be able to work it out.

MS. KAROBONIK: So just a couple of points. I think it's fundamental that we remember intellectual property is distinct from real property. Copyright is not the same thing as real property, and for very good reason because it involves speech, and that's a distinct we've always made.

If you look at certain countries that do have stronger moral rights, often those moral rights will come at the cost of the First Amendment because many of these countries don't have a first amendment.

One of the interesting things that I get to do at New Media Rights is we'll sit down with journalists from other countries. Often these countries don't have a first amendment. Often their country is in the Middle East or their country's in Slovak regions, and they're always understandably confused by fair use since they don't even have a concept of what free speech is and why it might be important. And I think that's something to remember going forward that as this discussion goes on
we need to keep fair use in mind since it really is one
of the few ways that our First Amendment is being
exercised on the Internet.

Jennifer mentioned market solutions, and one
of the things -- this is more something I want to flag
for later, but as speech increasingly moves online, it's
as much as we think of statements on Facebook or YouTube
as public statements made in the public square, they're
really not. They're made on the Web sites of private
companies.

So this should be something we think about as
we're looking at how we regulate speech as to what
degree can these companies make rules and make decisions
on how speech is regulated, and that's something I'll
just -- I just wanted to touch on briefly.

And a few of the other points, I think fair
use, we often run into this problem with fair use. Fair
use isn't everything. It's not -- and there's
definitely cases where I have told people, like no, no.
Your use really isn't fair use but fair use exists for
those cases where licensing might be impossible, where
you're commenting or critiquing something like in the
Acuff-Rose case, for it be told, very few musicians will
license in circumstances where they're being critiqued
or being treated critically.
One of the other things I wanted to -- no. I'll skip that for now. And -- yeah.

MS. ROTHMAN: So I just want to back up a moment and address a few thing that have been said and clarify. So I think that hopefully we all agree, although sometimes it sounds like some of us don't, that fair use exists. It's an important doctrine that protects First Amendment rights. I think also substantive due process rights, and as we switch, as I said, to a digital environment, it's important that we protect that space online.

At the same time, I want to make a very important distinction just so what I said earlier is not taken out of context. So I think that there's a lot of things that are fair use. I don't want to get into a Buffy/Edward -- I'm not really a vampire person. Is that really fair use or not? I'm not sure is the answer, and so -- and that's okay to not be sure.

So what do we do with that as a legislative matter? I know that's sort of mentioned in exemptions that the exemptions exist again as we project ourselves forward in a world in which that's not licensable. But if we shift to a world in which the WB starts creating an online sort of fan site of its own in which you could get that material licensed and mix it up itself, then
all of a sudden there is a market and it becomes a little bit like the phone unlocking in which you can buy an unlocked versus a locked in which the copyright office actually changed its mind about that exemption. So I think that we need to project ourselves forward a little bit more and think in terms of my initial comments are coming from two perspectives. One is what is the appropriate place for legislation? What can congress do? Congress can't sit there and legislate these are all fair uses of remixes or mash-ups and these are all not fair and create some broad exemption. I think that would be a treacherous road. I think it would be very difficult to find any agreement about that.

So that's one perspective, and that's not to say that I don't think fair use should be more expansive than what the market might produce. So I think we need to provide room for market experimentation to help license mash-ups while protecting this fair use zone. So when I talk about a fair use zone, I'm saying some zone of protection from technological impingement. That's not the same as it being completely encompassing of the scope of fair use which would likely be much broader than just an exemption.

What I'm concerned about is as we talk about
whether things that are or are not fair, and some of us would say nothing's fair and some of us would say almost everything is fair. That in some sense this entire law is going to be irrelevant because of the emerging technology online, and what not we're talking about are sophisticated parties who can go and license stuff and work around it and get it put back up when YouTube takes it out.

We're talking about your average person who is trying to express very important things online using copyrighted digital technology, and do we want to permit a world in which the market shuts that down completely? And I think no. I think very strongly no, and so how can the legislation encourage space for that? So that's why I was talking about some sort of build in that doesn't require individualized determination of what's fair or not, but says, hey, look, if you want to try some market solutions for people who aren't going to litigate and using technology to protect against piracy, you also need to think about providing some space for fair use.

Now, I might say it should be at least a minute of copyrighted material that can be used. Others might say 30 seconds. I think that even the studios could agree on five seconds, but wherever that is is not
the point. It's not the amount, it's the notion that there needs to be some online breathing room.

MS. CHAITOVITZ: I can't see the front of the card.

MS. MUDDIMAN: Hi. As a composer and songwriter, it does seem strange to me that people can say that we can have too much power by being a copyright owner. To me it doesn't exist that we can have too much. There is no such thing as a composer or a songwriter having too much power over their own copyright. In the same way that -- and I think you have to compare it to the ownership of a property, a physical property. You have to compare it because in my mind it's so similar.

It's a creation as much in my mind as the bricks and mortar or the wood that is in your home. Someone created that home and you own it, and you have absolute right to determine what happens to your home. If you want someone to rent it, you can negotiate what happens within that rental agreement, but nobody can force you to rent your home.

How can that possibly be a rational way of dealing with intellectual property that you are not a hundred percent in control of what happens to it?

So that's my first point. And coming from
Europe where this conversation, as Jay said, this would
never happen. It frightens me. It shocks me. I'm kind
of nervous that we can even be having this conversation.

And the idea that somehow I, by protecting my
copyright, prevent you from having your freedom of
speech is nuts to me. You could say whatever you like,
just don't use my music to embellish what you want to
say. Don't use anybody's copyright to embellish what
you want to say unless you have their permission.

If you cannot create something without using
someone else's property to create, I question whether or
not you're actually creating, and I say to people who
ask me well, you know, can I own some of your copyright
because I sang your song? I say you can own a hundred
percent of it. Just write it yourself.

If you want someone's property, you have to
negotiate to own some of it to use it. Otherwise create
our own property.

One more thing. Sorry. I pressed the wrong
button.

Five-second rule. I'm not quite sure I
totally understand the five-second rule because in my
book I don't know if you've ever played the game name
that tune. Most people can name it in one or two or
three notes. Five second rule, everyone, even a
I remember someone once telling a story about someone was appalled by how much money Usher wanted from the da-da da-da da-da, it's like it's just three seconds, how can he want so much money? I'm like because it's so recognizably what it is. Everyone can recognize most things. If you cannot recognize it within five seconds, it's obviously not that good perhaps. So I don't really get the five second rule.

Education is the bottom line. You have to educate, and I don't mean just the public. I mean everyone within the industry, and I mean from lawyers through to people who are making videos, filmmakers, even composers and songwriters.

Sadly, the composers and the songwriters and the people who are creating copyright are the ones who need educating the most because their ignorance is what is causing us to be sitting in this room right now.

MS. CHAITOVITZ: Thank you.

MR. TURLEY-TREJO: Amen to education. I think that's critical, and I'm in the educational field. And I'll tell you, when people come into my office and ask me -- students, film students, music students, can I do this? Can I create this mash-up, this parody, which I
have to educate a lot on what a true parody really is. That is definitely needed. And I think that's maybe one thing everyone can agree with, the education would help in a lot of ways.

But I really, for the record, would like to say that what Teri said about intellectual property not being the same as property is very real. I mean, intellectual property expires. It's temporary.

MS. MUDDIMAN: It shouldn't.

MR. TURLEY-TREJO: That's an opinion, yeah. But, I mean, as far as the U.S. Constitution is concerned, it's to secure for the limited times.

MS. MUDDIMAN: I don't understand that. I don't understand why that would be.

MR. TURLEY-TREJO: And that's probably a different argument for another day, but the fact is that's what we're working with. And I think -- and I agree with that. I mean, even being a young and not platinum selling musician, I'm fine with that. I think copyright lasts too long with the states and family members that didn't even create it who are benefiting, which is good.

MS. MUDDIMAN: But do you want to get your --

MR. TURLEY-TREJO: It's true. I don't mean to create pandemonium. All I'm saying is I think
intellectual property is different from real estate or from property because it is limited and that's what the constitution says, so maybe we'll just end it there.

And I think as far as the five-second rule or the 30-second rule, that would encourage -- because if you're using a small amount, you're not supplanting that work. You're utilizing it in a way, and it depends on the user obviously, but if you have a creative person who a lot of these mash-ups -- because we're dealing with culture here. Culture has an intangible real estate which is why it's difficult to compare, but that culture is part of our identity. So that's why speech comes into play, and to be able to use that to create something new and different and ultimately unique in the sense of the creation, even though it's a derivative work, which sound recordings are a derivative work of an underlying composition. I think that is really -- I think that's important to the culture and the advancement and progression of the useful arts and sciences.

And so I think because of that, remixes or however you define it, mash-ups, should be allowed and under fair use they are, but I agree with Jennifer that if we do introduce some legislation, that it definitely should have some breathing room for fair use, and the
problem is that the conversation is always so skewed towards this property which I understand the emotional investment involved in that creative property, but if legislation is enacted with that only in mind, then you're not going to have the breathing room that is necessary to help progress and advance the use of arts.

MS. CHAITOVITZ: Thank you.

MR. COOPER: Well, fair use is in the Copyright Act. It defines fair use in the Copyright Act. There have been innumerable court decisions over the years concerning fair use and what is allowable and what is not allowable, how it's defined, what is not. Criticism, commentary, teaching, et cetera, how much can be used, what can be taken. I don't understand why we're having a conversation all of a sudden to give people the right or the free right to create the derivative works without compensating the person who created the original work. I'm really baffled by that.

I'm a little baffled by your comment, Betsy, about the safe harbor. Safe harbor is a disaster -- a disaster for entertainers. What I spend a lot of time on, and I'm not the only one, is sending notices about infringement. And then, of course, the company responds back, "Yes, we'll take it down," and the next day it's back up. There is a term of art, "whack-a-mole," and
that's what we're doing on a constant, constant basis.

I know it's not the proper conversation here of safe harbor, but that's another day to talk about safe harbor. It ain't working, safe harbor. Not at all, and it is a disaster in a lot of ways.

But I don't think that we have -- we should be sitting here with the creators saying basically, "Oh, it's okay take my work." Create a derivative work. You're opening up all kinds of possibilities. Film, television, et cetera, et cetera, people go out and create it. This is not free speech. Free speech is you have the right to say my work sucks. Okay. You can say anything you want. You can say this really is terrible. It's awful. Say anything you want about my work. Do a parody in certain limited instances as parody is defined in the present time.

This is not what we're talking about. We're not talking about free speech. We're talking about taking my work and my property and you creating something different and new using my property or additional, creating my property, and not paying any proper compensation to me for creating that property, which my artists have spent years, money, sweat, blood, tears, and a divorce in order to create this.

So I don't think -- I don't know why we're
having this conversation. It's not a free speech issue at all. It's a question of doing a derivative work. Derivative work traditionally has been you go to the original -- you go to the person whose work you want to incorporate in this new work and you get a license.

No, you can't get licenses for everything, but that's okay. You have multimillions or maybe billions of songs to choose from if you want to take a song. So you don't get this song. There are another billion songs you can go get to create whatever you want to create. Why is my property so important to you that you only can do your creation with my property? I don't think it's right. I don't think we should be having this conversation at all, and I think it's sending the wrong message, period.

MS. ROSENBLATT: Thanks. And, Jay, by the way, I think we can agree that the safe harbor is a disaster but for totally different reasons. It's not good at preventing piracy in the whack-a-mole sense, and it over deters various kinds of free expression. So it is both over inclusive and under inclusive I think in many ways.

But that -- I just wanted to address a couple things that have come up. One is just to the -- to sort of refer you to our Green Paper submission because
there's about 60 pages that I wouldn't want to repeat,
but just to point out that fans often have similar
emotional attachments and amounts of dedication to the
fan works they create, which often also take years,
dollars, sweat and tears to make, and also often include
immense amounts of creative input and technical skill.
So we have many pages on that in the Green Paper
submission. I won't dwell on it here.

I'd also just want to go back to the licensing
solution point and point out that I'm not sure to what
extent we're actually putting forward -- anyone is
actually putting forward the idea of licensing solutions
as alternatives to fair use, but I wanted to just
mention a couple reasons why they may augment fair use
but aren't adequate replacements for fair use not only
because they invite censorship and have heavy cost
concerns, as I mentioned before, but also as the
Copyright Office has pointed out, there are
technological barriers.

If, for example, Warner Brothers made clips
available of its work for use in remix, there's a high
chance, as we have now, that those might not be
available in the particular formats or qualities
necessary to make the remix works that fair use permits.
So just want to sort of reiterate what the Copyright
Office has said on that point.

And finally just say that I think maybe many
of us can agree that fair use does a good job of making
room for commentary, criticism, transformative work, and
particularly for noncommercial transformative work, and
that when we can agree looking down on the fair use
factors that some things should be fair use. I know not
everyone in this lineup will ever agree on particular
kinds of use. When you look at the fair use factors,
there are many uses that you actually can find.

You know, you can walk down them and they fit
the fair use rubric. They only use part of the
original. They transform meaning. They're
noncommercial, they're non-substitutive, and our
suggestion is for those sorts of works, there is
something we can do that not only does what the current
fair use rules do now, but also makes the world more
certain for people who want to do what is currently fair
use now by, for example, making a clear carve-out for
those sorts of works.

MS. PERLMUTTER: Before we move on, just to
say, we're aware, of course, that a lot of the issues
that have been raised in the Green Paper tend to
interact with each other and it's difficult sometimes to
discuss things completely separately, but just to make
the point that for those on the panel or in the audience
who are concerned about the aspects of this issue as it
relates to the operation of the notice and the takedown
system under the DMCA, we do have a separate process
going on simultaneously with this one which is a
multistakeholder forum discussing ways in which the
operation notice and takedown system can be improved
which is likely to address a lot of issues that have
been raised here.

For those of you who are interested, it's open
to the public. The next meeting is going to be in
Washington on September 10, and you can join by webcast
or in person, and there's information about that also on
our website. So that's the brief advertisement before
we move on.

MS. CHAITOVITZ: What I'd like to do is move
on to the next question, but you all at the end, if we
want to come back, if you have things to say, we will do
that.

So our discussions in Nashville and Cambridge
yielded some suggested approaches, so I'd like to hear
your all take on them. A number of participants
suggested two things: A combination of fair use
guidelines and, at least in music, licensing
collectives.
So I want to break these down into separate conversations so we don't get tangled up. First I want to talk about voluntary guidelines like the ones that have been issues by AU and best practices. There were suggestions. Another suggestion was a Copyright Office brochure as better -- as a better way to enable reliance on fair use.

So I was wondering if you all think these guidelines help. Would other types of guidelines or copyright office brochures be of use?

Okay. I think Dina was -- you were really first. You're fast.

MS. LaPOLT: All right. Okay. Best practices are really dangerous. Really dangerous. They're not the law. Okay. Best practices -- any governmental body that issues best practices for coming within the confines of fair use is a gross misrepresentation to the American public.

You think people aren't educated now on the Copyright Act and then you get some 20-year-old kid who gets some best practices and thinks like, yeah, I can do it. It's fair use. That's not the law. So then you have these young kids thinking that they can just, you know, remix and mash-up and bastardize people's property because they fall into these fair use -- I mean, these
best practices guidelines, and I just think it's not the way to go.

The documents are not created by courts or the legislature, so someone can still land in deep trouble if they go ahead and claim that they used their best practices and started mashing up or sampling remixes of someone's property. They get in a lawsuit and then it becomes liability. Well, were these best practices misleading to the point that it creates liability to whatever body has put them out? It's just a nightmare.

I agree with Jay. For us to be sitting here and discussing this, that's a gross misrepresentation. Okay.

I mean, Helene, I'm very sorry that you have to be over here in this country and have to go through this. You know, I'm so tired of America being the biggest country in the world that sets the cultural precedent for how the rest of the world consumes music. We have the biggest artists, the biggest songwriters in the world, yet we treat our creative people the worst. We treat them like dirt. Okay.

Now we're talking about taking away their rights and creating a best practices to where stealing their music and trampling on their rights can come into some kind of best practices.
Okay. What was your second question, Ann?

MS. CHAITOVITZ: The second one comes later.

MS. LaPOLT: Oh, okay. Thank you.

MS. CHAITOVITZ: I think Gerard was next.

MR. FOX: Yeah, I would strongly encourage those who are thinking about adding fair use guidelines not to do it. What you end up doing when you add guidelines is you broaden exceptions essentially, which creates a situation where you begin to swallow the set of rights you intend to protect. So I think that any time you sit down and try to take away something that's already too complicated and too broad and flesh it out more, you make it more detailed and more broad and there will be other problems.

Collectives are fine for a label that has a huge catalog, and this does not get to the heart of the problem. And while it might sound like I'm off topic here, this all finds its way to the idea of a copyright small claims court.

We're all dancing around this, but there's a core problem here. Educated users and consumers of music usually get it right. Not all the time. But you do have a younger generation. Now, these younger generation of folks are executives at places like Vice Media, and they are brought up in a world where they
really believe they can -- you know, they're very quick. They're very quick. They do Comic Cons. They know how to create, and they don't see a problem, with no disrespect to the artist, with what they're doing, until they're caught. And I think that the system that they're thrown into right now is Draconian, and it's ignorant and it's not effective.

You shouldn't have to be dragged into federal district court if you have a small profit on an infringing work. There should be a way that you should be able -- and by the way, if you're the artist and you want to enforce your rights, you shouldn't have to pay a $50,000 retainer to go get a lawyer to handle it. These situations, which we're going to be keep circling around, no matter how much you try to define fair use, are going to keep happening.

The younger generation is quick. There's an infinite number of new channels and types of creation, and there are going to be artist that are going to be nailing these young people and bringing them somewhere. Where is that place? Because if you don't get a license, you're going to be arguing about more than fair use. You're going to be arguing about things like allocation. Okay. I used part of your song but, hey, my stuff is really good too and I mixed it together, and
what's really selling this is the way that I put this
like film behind it of someone skateboarding because you
allocate damages in a copyright suit.

Now, that's highly expensive in a federal
district court action in the type that I'm involved in,
but I think 20 or 30 years from now defendants will
Skype into some type of copyright small claims court,
put together their defense very quickly and have an
outcome. And, by the way, get educated through the
process so that they do the simple thing, which is go
get a license.

MS. CHAITOVITZ: Thank you. Now I'll just go
down to Teri.

MS. KAROBONIK: So, first of all, I want to
say I actually do like the American University
guidelines. I find them a very helpful starting place
to work when I'm working with documentary filmmakers to
at least get them up to speed, but I'm not fond of the
idea of one set of fair use guidelines.

The idea is a little bit ridiculous when you
think about how many different types of copyrighted
works, fair use touches and fair use is so fact
dependent. So creating one set of guidelines that would
fit all of those factual scenarios is probably not
something that's doable, and then breaking it down to
each type of possible reuse may be doable, but I have a hard time seeing a process, especially a multistakeholder process that would result in guidelines for all of these areas and it actually getting done. It seems rather unworkable.

I think the better approach here is really to have groups that have boots on the ground that are -- that really do focus on educating users. Since I will say there's some very talented copyright attorneys that I've run into, very experienced, but sit them down with the average user and some of them -- I think it's that trick of experience. As we get more experienced as attorneys as this copyright becomes second nature to us, we forget the little details. We forget how confusing some of this stuff was.

And I see this all the time with my students since part of what I do is I teach the New Media Rights clinic, and I think we really need people that are developing these guidelines to have those boots on the ground and also to be the type of attorneys that can explain something to the average person since that's a very, very unique skill as an attorney.

I'd love to see it, and it's something I'd really like my students leave with, but I'd really love to see that to be more widespread, but that's another
discussion for another day.

MS. CHAITOVITZ: Thank you. Jennifer.

MS. ROTHMAN: So I've previously written about some of my concerns about best practice statements, and I won't enumerate them all here. Some of them have been raised, but I think it's most important to think about the way in which they developed and the fact that they are not particularly representative of the stakeholders, and even though they may represent particular needs of the documentary community, although there's some dispute about that, as a former documentarian, and I think it throws some really good uses under the bus. But the online code I think is one of the stronger ones, and it's certainly written by people who I have a tremendous amount of respect for, but it still didn't include many of the stakeholders, or pretty much all the stakeholders whose works were being used, and I think they that overall discount the role, sometimes not even mentioning it, of market harm and really focus on -- only on transformativeness. But, again, I don't think it's worth getting into the nuances of. Except to say, we should allow guidelines and different communities to develop them, and people can look at them as reference points or not.
I certainly don't think the ones from American University should be adopted, and so I think the more interesting question is should the Copyright Office or the USPTO develop some alternative guideline that might be useful for remixes or mash-ups or more broadly about fair use. Some of that could be useful in terms of just educating people about fair use and the factors and what they mean, but we still have the problem that no one can really agree. I think we can probably have almost fisticuffs on this panel about various things and whether they're fair uses or not, some of them saying that nothing is ever fair.

But there could be some sort of update of examples of recent case laws so people know sort of when they're in a more fair space or less fair space and/or things that are routinely accepted, perhaps, you know, uses in biographies or something like that, but even has some gray zones, so it is sort of a treacherous ground. But it may be that providing some sort of fair use guidelines combined with some sort of good faith defense in an effort to comply with those fair use guidelines that could at least protect people who are really trying to figure out a very difficult set of laws or maybe even some pre-use opinion letters which is something that I'd really like to advocate as an area for clinics, for
legal clinics, but maybe it can come from the Copyright Office as well where someone who is not sure whether something is fair could at least get an opinion letter that says you made a good faith effort. There's some reasons why we think it's fair, and maybe it wouldn't ultimately be adjudicated that way, but it might perhaps pointing to our earlier discussion of statutory damages or something else along long those lines. So those are my thoughts about guidelines, but generally they make me uncomfortable.

MR. FREUNDLICH: That last suggestion has a lot of merit to it, but I don't know how that could possibly work in the sense of volume of requests that would come in. I know in the tax area that works really well, and there's big transactions and people get revenue release before they jump.

I have complete fear of any guidelines that come with the Copyright Office in prompture because I think the courts are working fine within the guidelines of Section 107, which is purpose and character, nature of the use, amount of substantiality, effect on use in the potential market. All concepts that have come from various ones of us at different times during this colloquium.

I think the law as written is fine. I think
the courts would be confused by any other statement of
guideline by the Copyright Office. Is that another way
of saying that there's a safe harbor if you follow the
guidelines? And then, of course, there's a problem of
trying to agree on what the guidelines are.

I think instead of adding clarity to the
situation it would actually add another large layer of
complexity and disclarity, if that's a word.

MS. CHAITOVITZ: Thank you.

Helene, I think yours --

MS. MUDDIMAN: I totally agree. I think
giving people more room to maneuver and be "creative,"
in quotes, is to me, again, kind of laughable that
somehow taking someone's property and adapting it to
their thinking in a creative way. I mean, that's your
opinion, and you should not have the right to tell the
person whose property it is that you are adapting their
property in a creative way.

If they think it's not creative, they
absolutely should have the right to say you cannot use
my copyright to be "creative," quote/unquote. I mean,
by all means ask them if they would like their property
to be used in that way, but if they say no, no means no.
And they have absolute right, and you should not in any
way stop people who own copyright from having that
permission to say no is my view.

And then I'd just like to say, if you want to create a guideline, the guideline should be get permission, and if you don't have permission, don't use it.

MS. CHAITOVITZ: Ty.

MR. TURLEY-TREJO: I think coming from the Copyright Office, some sort of -- I mean it sounds like with this Buffy versus Edward video and some organizations claiming that this is a great example of fair use. Like those types of things are helpful, and I think it's helpful to the laymen, and that's what's important. That's what I think could be beneficial coming from an official standpoint is saying -- explaining (inaudible) in a simple way that the verdict, so you're not creating law, and you're obviously disclaiming that this is going to be legal advice. It's just they're guidelines. They wouldn't hold up in court or anything like, that they would just be used as some sort of educational reference, and I think that would be helpful.

And I think, to clarify, it should all start with an initial respect out of creators because, without creators, there's absolutely nothing to infringe. So I think if that balanced viewpoint is presented in the
guidelines perspective or maybe not as formal as the
guidelines but some sort of informational brochure would
be really helpful and to educate, to go back and to
educate young people and say, listen, first and foremost
you need to have respect for the art that you are trying
to use, and then you need to understand these guidelines
and the defense of the fair use and what it is intended
for and, you know, the careful lineup when you're
exploiting somebody else's work for your own benefit as
opposed to using it for creative purpose.

MS. CHAITOVITZ: Jay and Betsy.

MR. COOPER: Good point, Ty. I'd like to make
a general comment. As the music business started its
decline in the year 2000, to the point now where for a
high percentage of creators, it's a disaster out there.
A serious financial disaster, and it's taking -- it's
disastrous and it's depressing for new people coming
into this business, which is bad for everything. Which
is for everybody.

Music is more ubiquitous than it's ever been
in history. And what has happened is music is now
becoming a commodity to sell everything else. To sell
Internet services, to sell subscriptions, to sell
products, to sell everything else of that nature. But
the money has declined substantially. Really
substantially. And that's bad for the creative health of our country. Really seriously bad.

And what I'd like to see the Copyright Office, the Commerce department is to give emphasis to how do we protect the creator? We need to protect the creator because there ain't anybody protecting the creators at this particular point in a general way.

They don't have the money. They don't have the resources or anything of that nature, and a lot of big corporations are doing very good for themselves, but music is being used to benefit them and the creators are not receiving the same benefits, and that's where I think the emphasis should be and that's where I think the study should be within the government at this particular point.

We have a valuable resource in this country that's not being fully protected, and I'd like to see that emphasis being made.

MS. ROSENBLATT: Very quickly. Earlier on the panel I heard a number of people saying they were in favor of education, and I think there's an interesting potential for overlap between whatever guideline ideas and education ideas may be coming out of this process. I think there's a lot of benefit to official resources that help the lay person understand the law. One of
the -- one of the great things that's happened in recent years is we've had many sources coming up with their own resources. One of the terrible things that's happened in recent years is we've had lots of entities coming up with their own resources. Many of which disagree with each other.

So having a unitary source of information seems good. The down side is, as some have said, it's unworkably complicated to address every possible input and remix situation. The other, and I think this is a major trouble, is it could become quasi law. And I think creating an official source that's quasi law that's creates some sort of baseline where you can violate it and that would be per se infringement, et cetera, would be a real detriment. So if there's a balance to be made, I think it would be addressing those things.

MS. CHAITOVITZ: Thank you. Now, we're going to move to the second part of the kind of solutions that were, or approaches that were presented as solutions in Nashville and Cambridge. And so far it's focused on music. It should be pretty quick answers because we're running out of time. But some participants favored a voluntary licensing scheme or society as a way to eliminate the transaction costs of individual
negotiations in getting licenses.

They talked of things like HFA or PROs that would, you know, give -- as a hub to give licenses for remix works. So I'm wondering, especially since before, we heard a lot against compulsory licenses, a lot of the artists' reps spoke against compulsory licenses, but what would you think of a transaction facilitating institution similar to HFA or the PROs?

MR. FREUNDLICH: I think it's all well and good if it's voluntary. I mean, if people want to be involved in such a system and it creates a pool of money and allocates it, that's fine. But if what you're talking about is compelling everybody to allow their stuff to be licensed, then that doesn't work.

MS. CHAITOVITZ: No. Like the HFA or PRO, it would be an opt in.

MR. FREUNDLICH: Yeah. I don't see why not if people want to use it.

MS. CHAITOVITZ: Betsy?

MS. ROSENBLATT: I've already said why I think licensing is an alternative to fair use. If -- the real question to me would be if such a thing existed, how would it interact with fair use facilitating licensing. Sounds appealing on one hand. On the other, does that mean that if someone -- you know, we have --
people making fan works are not sophisticated people necessarily. Some are very sophisticated. Some are not. Some are kids. Some are -- don't have the privilege and resources to be able to even figure out whether someone belongs to this licensing organization or not.

And so if it wouldn't impact the fair use analysis, that's one thing. But if it would, I think it creates real difficulties for people who want to make what would be fair uses now.

MS. CHAITOVITZ: Okay. Jay and then Jennifer.

MR. COOPER: I think there's possibilities in that. The problem is that there is no universal database. None whatsoever. And there's been a number of attempts at it. None has been completed to this day. And the problem for anybody, even for the most sophisticated is to find out who owns the rights and who has all the rights, and so many rights are split up. And I'm always fascinated when I go to the ASCAP or BMI awards and they announce a song and ten songwriters get up and 25 publishers. It's wonderful.

So there is no one source and that's the problem for everybody. Not just for the person who wants to do the derivative work, but is responsible for everybody who wants to even license something.
So at some point we need a universal database.

But the idea of central source is a very good idea, but I think it's a long way in coming and it won't happen until we get a universal database.

MS. CHAITOVITZ: Jennifer?

MS. ROTHMAN: I think there's nothing wrong with doing collective licensing in conjunction with creative commons. It's just not going to be sufficient both because there's not going to be a universal database of every work that anyone might want or licenses at a reasonable fee and then also presupposes that fair use is solely about market failure. And so I think we need to understand that, that there's some other aspects of uses that we'd want to protect regardless of whether licensing -- collective licensing is a great idea that people know that at least these are approved uses, but I've been wanting to give three examples just very shortly that I think relate to some of the discussions about fair use and I think relate to this licensing because I wouldn't ever think that they should really be licensed uses. There's the Stephanie Lanz case, which most people know about where someone is filming their kid dancing to Prince's Let's Go Crazy. Prince is on and posts it on YouTube. She's just filming her reality. Someone using Fox News clips to perhaps point out errors
of fact and intermixing that.
If your child is competing in the Olympics, for example, and you want to show them touching the wall for their gold metal, NBC's technology will take it down. These are things I don't think you need to get licenses or go through collective licensing, and I think even some of the more robust artists rights folks might think are fair and worth providing room for.

**MS. CHAITOVITZ:** Thank you.

**MR. FOX:** Just to make one point.

**MS. CHAITOVITZ:** Oh, okay. We'll go to Helene. But just so you understand, we're not suggesting this as an alternative to fair use. We're suggesting this because when people want -- when something is not fair use and a license is needed, people have talked about the issues with transaction costs and so we are wondering if this would be a way to help alleviate that burden.

**MS. MUDDIMAN:** I absolutely think the only way we can move forward is to have some form of PRO kind of Harry Fox agency type organization and I think it's going to be very, very difficult, but then so was building a Harry Fox Agency on a PRO. And in fact, every single country in the world who has a PRO, it was not easy to do. And especially when they first created them they didn't have the sophisticated technology that
we do have today. So I think in many ways the idea of creating this global database is to me the only way forward and not at all daunting because I think what we have nowadays in our technology is much easier than back in the day when they created them without any technology.

So I think it's inevitable. We have to do it and we have to do it quickly.

MS. CHAITOVITZ: Okay. Quickly because we're out of time so then I'll have to go to the floor. And if people have comments, if you could go to the mic while they're talking to you.

MR. FOX: Yes, just very quickly. I'm all for creative comment system and how it simplifies and reduce costs.

Just a footnote that, you know, it becomes problematic -- most of what we're talking about now is, you know, people create stuff on YouTube and then they monetize it. And somebody will go out and they'll get a sync license, and get a mechanical license and they may think that they've got all the licenses they need, and they think they might have the master use license but they don't because it's reverted to the artist. And so these aren't pure solutions because even within this system which I've dealt with, because it's such a
complicated network of licenses, the user can still get sued if they didn't pick up something like a master use license.

MS. CHAITOVITZ: Thank you. We have a long line. And we're going to need to alternate between people here and people online if there are any.

MS. AISTARS: Thanks. I'm Sandra Aistars with the Copyright Alliance. A couple comments. And I'll start by saying the fair use is a doctrine that's incredibly important to artists and creators and the artists are the main people who rely on it. So anything that I'm saying here is intended to distinguish cases where fair use applies from cases where we're talking about a derivative work where you should be asking for permission from the creator.

So comments were made by a number of speakers about social barriers that exist to speech when you have to go and seek permission. And I would suggest that copyright law exists to promote both the creation and the dissemination of work to our community, our society and the way that that is accomplished in part is by allowing creators to feel comfortable and secure in releasing their work out into the community.

One thing that we hear very frequently from our grassroots artists is that when their work is used
without their permission for derivative works that alter
the meaning of the work, that makes it very unlikely
that they will feel comfortable releasing their work
into the wild, shall we say.

There were suggestions made that we should
have a compulsory license for noncommercial users, and
there are various recent examples where noncommercial
speech could be very damaging in a way that prevents
artists from releasing their works, and I'm talking
about instances where we're talking about hate speech.

There was a case that was just recently
settled where a photograph taken, where an engagement
photograph of a gay couple was taken and used by an
antigay marriage group in a very hateful manner. The
photographer was able to bring a claim and it settled
because the court found that it was beyond fair use and
that would not have happened had we such a provision as
is being suggested here.

Similarly, just a week or two ago, the
Westboro Baptist Church, a nonprofit, noncommercial
speaker rewrote the lyrics of "Hey Jude" as a
anti-Semitic creed, "Hey Jews." And is now performing
that on YouTube, and, you know, publicizing it.

So again, something that if you're Paul
McCartney, I'm sure he's not very pleased with that use,
and I'm sure that he would be objecting quite
strenuously to a noncommercial compulsory license that
would allow this.

    How is the marketplace working? I think, you
know, one positive comment to make is I think with
respect to some enforcement mechanisms that exist, and
notably I think Google and YouTube are quite good at
this. There are actually already attempts to account
maybe imperfectly, but account for fair use in the ways
that works are identified online. So for instance, with
motion pictures, you've got the ability to set the
controls so that you are looking for works and ensuring
that you've got like audio and video running
concurrently and for a specific period of time so that
you're only picking up things that are more likely, you
know, than not to be the true, you know, work that
you're looking for. Granted it's not perfect, but I
think there's good will and good attempts at, you know,
trying to account for these sorts of situations that
Professor Rothman was importantly raising.

    There's also various services in the
marketplace that allow you to not only use clips from
commercial, you know, studio clips and others for
remixing and for fan fiction uses, but also allow those
to be monetized by the remixer and the fan fiction
author. Amazon Kindle Worlds in an example of. That
doesn't supplant fair use, but I think that shows that
there are attempts by copyright owners to try and
accommodate the sorts of things that people are talking
about wanting to do.

And one other note, there was a good point
made about this five second rule and should we allow
sampling of five seconds or less as part of a remix
consideration. Yeah. A five second sample may actually
be the heart of the work, the hook when you're talking
about a musical work.

Another point, you know, you hear often these
days about orchestras being replaced, you know, when an
opera is performed by a digital, you know, facsimile of
an orchestra and those I am, you know, presuming are in
part at least created by the use of sampling technology.
Certainly a sampling if it is sampling that doesn't harm
the composition, may nevertheless harm the musician, the
performer. So if we're going to be allowing, you know,
creating these sorts of technologies and creating these
sorts of works, there should be done in an authorized
way so that the original musicians who are ultimately
potentially getting replaced, have at least some say in
whether their works are used that way or not to create
the technology. So thank you.
MS. CHAITOVITZ: Thank you. We should --

okay. Jacqueline.

MS. CHARLSWORTH: Jacqueline Charlesworth. The
line is long, so I will be very brief. A couple remarks
were made about a Buffy the Vampire video. I just want
to clarify that that was in the context of the Section
1201 rule making where the Copyright Office looked at a
specific video, that one, and said that's likely fair
use and therefore there was basis to grant an exemption.
I just didn't want people to have the impression that we
had spoken broadly on remixes.

The second point is just that we are in the
process of developing a fair use index, which is going
to be designed for laypeople which will simply index
cases and give sort of the very, sort of crystalize the
outcome of the case so people will be able to look at
that and hopefully achieve some guidance and it is being
written for laypeople. So be on the lookout.

MS. CHAITOVITZ: Thank you.

MR. THOMAS: Good afternoon. My name is
Nissan Thomas from the Law Offices of Nissan Thomas, and
I'd like to make several comments, and I'll be as brief
as possible. I think that when you're talking about
original works, I think everybody's inspired by somebody
else, and so originality is what it is, but I think we
are all inspired by somebody else's work. And in relation to, I think about hip-hop music and how they use samples without authorization and we have a whole new genre of music that came out of using other people's work, so I say that to say this, that I believe that the copyright law and the office and the government's role is to take, you know, the issues and arguments on either side of the debate and try to figure out a solution.

We're here today because of YouTube and people are taking people's work and not being compensated for it. That's why we're here today. And so I would advocate for a synchronization right, a compulsory synchronization right limited for digital distribution on certain types of platforms in the case of YouTube and creating mash-up remixes of music on the case of Sound Cloud and then creating an organization to collect the sums and the monies and also to help educate licensees on what is the proper use. Thank you.

MR. COOPER: You're correct about the hip-hop, beginning to use other people's work. However, what happened was after a few lawsuits they started getting licenses.

MR. THOMAS: No, I agree. But what I'm trying to say is the activity occurred prior to the law or people catching up. So what I'm trying to say is that
the reality exists. People are going to use other
people's work regardless if they're going to go get
authorization or not because of the fact that the
technology exists.

MR. COOPER: Technology exists and the law
exists. The law didn't have to catch up. But they had
to catch up with what the law was and they finally did,
and so it because constantly they come in to everybody,
to the labels and all that for the licenses, so they
learn that you have to get a license.

We're not saying anything different. With
mash-ups you get licenses.

MR. THOMAS: What I'm saying is we've already
addressed the difficulties and you've even mentioned
there's not a global database so how do you find the
rights? You've got, you know, 20 writers and 15
publishers.

MS. LaPOLT: You hire a skilled music
attorney.

MS. PERLMUTTER: We're going to have to cut
this off.

MR. THOMAS: There's a medium ground. I get
those arguments, but there's arguments on both sides and
this task of this panel is to find the middle ground.
And if we want to find and help musicians who want to
create more work, we're trying to figure out solutions
to create more money in their pocket because obviously
at the end of the day people are taking this work and
that's the reality.

MS. PERLMUTTER: Thank you. Can I just ask
everyone since we're now five minutes into the lunch
hour if you can keep your comments very short.

MR. DREITH: Dennis Dreith, AFSA. I will be
very brief. I was just going to say random thoughts.
The idea that I've heard about protecting the creativity
of those who are taking the creative works of other
people was just an anathema to me. I think the idea
that we have, they may be doing it in a creative fashion
but these are derivative works. You're taking someone
else's creativity activity and somebody else's
creativity and putting them together.

If I want to make a new aspirin, I want to
make a Bayer aspirin, I want to make a new and improved
Bayer aspirin, I'm not making, I'm not creating
something brand new. It's a derivative work and that
should be licensed. So I think there's just no doubt
under any circumstance for that.

And the notion that we should create a time
limit for fair use. I've spent a great deal of working
with documentary film makers as a composer working in
this industry. I will say that fair use is the most 
confused and misunderstood and oftentimes misclaimed 
doctrine I’ve ever seen -- most of the time when 
people think it's fair use, it's not. It gets them into more 
trouble than I've ever seen expanding fair use and 
certainly expanding over a time line would be 
ridiculous. I mean, is there anybody who couldn't 
identify the Jaws theme in two notes? So I think I'll 
leave it with that.

MR. STOLTZ: Mitch Stoltz with the Electronic 
Frontier Foundation. I was moved by the passion of a 
lot of the advocates on this panel on all sides of this 
issue, and I'm moved by our art and creative works of 
all kind.

I want to -- I'd ask everyone here and 
everyone watching online that if you too are moved by 
creative work and the passion of the people who create 
it, is to take another look at the Green Paper comments 
submitted by the Organization for Transformative Works. 
This was pages and pages of incredibly moving 
personal stories about people, and these are for the 
most part marginalized people. These are women. These 
are people of color. These are new Americans. These 
are LGBT using fan work, using video and writing and 
music and other media and using mainstream creative work
to talk back to popular culture, to participate in
popular culture, to enrich it and maybe to change it.
And I was moved to tears by some of these stories.

These are folks who most of them will never be
able to afford the hourly rates of Dina or Jay or even
lesser attorneys. Some of them will. Some of them will
probably become mainstream artists, and in so doing,
change our culture for the better. Most won’t. They certainly
don't right now, I encourage everyone, I would
encourage the task force and the Copyright Office to
take another look at those comments. And once you have,
I think there's no way that anyone would be able to come
back to the task force and say that these people are not
creative, that they are not creators. That they don't
contribute to our shared culture, that they don't
deserve the same protection and the same freedom that
our laws give to the mainstream artists. Thank you.

MS. PERLMUTTER: And the last word. Professor
Cruise.

MR. CRUZ: Thank you. I will keep it brief.
My name is Kenneth Cruz. I'm a copyright attorney here
in town, and I've come from a long career in academia
where working with publishers, working with academics,
working with universities, museums and libraries and
working with people who have often equally passionate
but very different issues from the ones that we've heard here today, but where I'm constantly reminding them that we are on all sides of these issues simultaneously. We are all owners and we are all users.

And, in fact, I would say in my experience perhaps the most confusingly befuddling aspect of copyright law is not at all fair use. It's ownership. It's the fact that stuff is protected and it's protected automatically and it's protected for decades and decades and that these rights extend around the world. This is probably the biggest shock to anybody who is new to the system of copyright is to discover how ubiquitous it really is.

So a couple of closing points that touch on exactly the substance of our issues today. One is you can't talk about guidelines and thoughts about guidelines without learning from the past, and that past guidelines begins in 1976 with so-called classroom guidelines about photocopying. 1981, about copying recording off the air, and CONFU. If that has -- creates blank looks, that means we're not learning from the past.

The CONFU, the conference on fair use generated a set of guidelines that purported to define fair use. About the kindest thing that I can say about
all of those efforts to create guidelines is they have utterly failed to meet their goals. So we need to learn from the past.

My strongest interest is in creating good law. Good law that makes responsible social and private choices, and good law that's functional and makes sense in the environment and the diverse environments within which we are all working. And a good example of that is one that bridges this panel with the panel that came right before you.

Let me turn the attention back to statutory damages. A couple of aspects of statutory damages statute are wonderful role models for us as we think about new law. In other words, you get statutory damages by timely registration, and I know that there's some critique of that. But it's actually a fantastic way of demonstrating that you are serious about copyright. That you're not going to come to me 60, 70 years from now and tell me you're serious now where you weren't before. So that it's a way of demonstrating you're serious. If you're not serious enough to pay the modest registration fee, we have to wonder why you're doing what you're doing.

And also, registration creates a record. It let's the world know that you're serious and it let's
the world know how to find you.

Another aspect of the statutory damage statute is the provision for the remission of statutory damages upon, for certain institutions who are engaged in certain types of activities. It doesn't matter the details for the moment because the key point is that the statute allows for the remittance of statutory damages. If you do your homework. If you're engaging in fair use, not because you stumbled into it. Not because you're pulling it out of the back pocket when you need it. It's because you did your homework. You thought about what you were doing it. You made a detailed analysis of fair use and you acted in good faith and then you get the benefit of the remittance of statutory damages.

Notice what the statute does? It educates and encourages the public going in as owners and it educates and encourages the public as users. This is a good role model for us to think about. Thank you all very much.

MS. PERLMUTTER: Thank you. So what we're going to suggest since we are running late and I don't want people to have to be too rushed, is that we will resume at 1:45 instead of 1:30, but we will still conclude at 3:00 o'clock. We're not going to need the full time for the closing remarks.
So please be back and we'll start promptly at 1:45.

(Recess taken.)

MR. GOLANT: Hello, everyone. We are going to start our panel on first sale right now. So we're going to follow the same instructions as before. If you have any questions, put up your placard and we'll go through the series of who's who after I read a brief introduction about the topic, and then we'll have some questions, and then we'll have a lively engagement on this issue about first sale.

So what are we talking about right now? The first sale doctrine as codified in the Copyright Act, allows the owner of a physical copy of a work to resell or otherwise dispose of that copy without the copyright owner's consent by limiting the scope of the distribution right, but the copyright owner's remaining exclusive right, 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 concluded so in 2001 that the doctrine should not be extended. So with that brief introduction, let me go down the aisle starting with Steve here and ending all the way to the right.
MR. TEPP: Thank you, Ben. My name is Steve Tepp. I am the president and CEO of Sentinel Worldwide. I'm here representing the Global Intellectual Property Center, U.S. Chamber of Commerce.

MR. DENNIS: My name is Don Dennis here with the law firm of Don Dennis where we focus on Internet and intellectual property law issues.

MR. THOMAS: My name is Nissan Thomas from the Law Office of Nissan Thomas. I am a transactional entertainment attorney, among other things, and a proud alumnus of Loyola Law School.

MR. KARI: I'm Doug Kari, executive vice president, one of the principles of Arbitech. We are a computer products distributor. I authored an amicus brief on behalf of 380 technology companies in favor of the petition in the Kirtsaeng case, and it was cited in the court's decision. So this is an area close to my heart.

MR. VILLASENOR: I'm John Villasenor. I'm with UCLA and the Brookings Institution. At UCLA I teach in the schools of engineering, public affairs, and management, and I was one of the witnesses who testified at the recent digital first sale hearing at the house judiciary committee held a few weeks ago.

MR. BRANCH: Hi. I'm K. Christopher Branch,
also an alumnus of Loyola Law School. Also adjunct
professor of lime law here at Loyola Law School. I'm an
intellectual property attorney, a startup internet
attorney as well as an alcohol attorney practicing
throughout California.

MS. BRIDGE: Hi. I'm Catherine Bridge,
assistant general counsel at the Walt Disney Company,
and my practice focuses primarily on copyright,
trademark and right of publicity issues.

MR. TRONCOSO: My name is Christian Troncoso.
I'm with the Entertainment Software Association. We
represent most of the largest game publish -- video game
publishers in the U.S. as well as the three major
console makers: Nintendo, Sony and Microsoft.

MR. GOLANT: Thanks, everyone. And for those that have been
following
our roundtables in Nashville and also at Cambridge in
June. Some of these questions may be familiar to you.
We'll start off with this one:

So from a practical perspective, is there a
need for a secondary market for online music, video,
and video games analogous to the secondary market for
physical media? Why or why not?

Who would like to take first crack at that
type of question? Put up your sign and we'll follow up
from there.
Catherine?

MS. BRIDGE: Okay. I would say no, and I'm speaking primarily for movies and the types of television shows that our company creates. You know, at this point the law and technology converge to enable a very robust licensing model, and that gives us the ability to give consumers access to very high quality content when they want it, how they want it, where they want it, and to multiple authorized users.

The market is meeting consumer demand through streaming electronic download and services with similar names. This is a much more dynamic and flexible landscape for the consumer with a great deal of choice, different price points, and, you know, from free online viewing or free mobile viewing to downloads of movies for prices that are similar to DVDs and, you know, none of this involves the transfer of a physical object.

And the first sale is a limitation on the distribution right that is really there to facilitate the alienation of physical property, and that's not what we're talking about here. We're talking about digital distribution, digital access.

Consumers that prefer that model and prefer to purchase the physical good on which the content is distributed. You can still buy books and DVDs, and
first sale is applicable to that disposing of that physical good, but we're finding that consumers are moving to access-based models which are based in licensing readily and that we're meeting demand and it's giving them great advantage.

I'll just offer a personal anecdote which is last weekend I drove down to San Diego with my daughter. What should have been a two-hour drive was a four-hour drive, and, you know, I was very happy to have the iPad that was loaded with a lot of content and probably a lot more content than, you know, had I had the presence of mind to bring a DVD player and some DVDs or something or something else. So for me that -- it's just a personal anecdote, but there's reasons why, and that's just one, why these electronic services are terrific and meeting what consumers want.

Um, so, you know, we're also not seeing a ground swell from consumers for a resale market for digital goods. I mean for digital distributed content, and that's because it's flexible and it's dynamic, and if we saw that, the market would respond, but we don't see a need for the government to step in with, you know, first sale based on, you know, notions of alienation of physical property for a marketplace that we think is working very well.
MR. GOLANT: Thanks. Appreciate your comments. I think, Nissan, you were second and, Kristin, you were third.

MR. THOMAS: I would like to take the opposite position and advocate for a first sale doctrine in the digital context. I know it's a very difficult position given that digital media is somewhat intangible. You can't really touch it. You don't own it. I mean you can't give it away and things of that nature, but I think the challenge is first if we want to define the first sale right, we need to define what ownership is in the digital context.

I think you go to different types of platforms and download different types of media, whether that be a book or music, and the ownership of that is different, you know. Music you might be able to house it and store it on your hard drive, but a book from Amazon, maybe you only have access to it to a certain extent.

So if there may be some uniform language around what ownership is in a digital context, then we could probably move into a place that we can start to see resale of digital works.

MR. GOLANT: Thank you. Christian.

MR. TRONCOSO: Thanks. I mean I think for this whole issue there's really sort of two related
questions. The first is whether the public is experiencing any problems because the first sale doctrine is not currently applicable to works that are distributed online, and then the second is whether fixing that problem is actually going to advance the public interest, and I think it's on the second question that really, you know, what I'm here to discuss because a lot of the business models Catherine was discussing and the business models that are prevailing in the video game industry are based on licensing and that's because they involve sort of an ongoing service that game publishers are providing consumers where they're able to provide an interactive experience rather than 15 years ago when the video game industry was pretty much just games sold on disc where you take it home and you play that game and it's sort of just a stand-alone product. Now that games are so dynamic and being updated all the time and players are playing against each other one a game publisher's servers, there really is a necessity to use licensing as the distribution model, and so any fix that would undermine the ability of content producers to rely on licensing that is enforceable would really undermine their ability to offer those types of business models, whether it's the subscription services that are big in the video game industry.
and also in the music and film industries or sort of the
ewner distribution models for the video game industry
which are oftentimes games distributed for free but then
monetized through in-game transactions or the like.
So any sort of tinkering with that sort of
freedom of contract for game publishers to offer their
works to the public is going to sort of turn the hand of
time back and make it very difficult for them to offer
the types of games that consumers are gravitating
towards now.

MR. GOLANT: Understood. Christopher.

MR. BRANCH: Yeah. It's just a point though.
We're really talking about thievery and stealing things,
and I think it's a 64,000-pound gorilla in the room to
allow individuals and companies to sit there and take
property that belongs to somebody else, make a gazillion
copies of it, and send it out and then say, "Oh, but I'm
the secondary user so I'm allowed to do that" is just
plain out old-fashioned thievery, and whether it's some
file thing or something else. And sure, there's all
this technology (inaudible) simply take it out of your
machine and put it on somebody else's. Yeah, but you've
got 6,000 backup copies and you've got the clouds and
you've got all this stuff unless somebody is swearing
under penalty of perjury, and we know what that does.
There's no ability to really have the initial creative artist control what he or she has done with it. Whether it's a company, whether it's an individual, and until such time as technology catches up with that, there's nothing we can do to control that flow of creative genius that started the whole process.

MR. GOLANT: Thanks. Steve, you have a follow-up.

MR. TEPP: Just a couple of quick thoughts. You asked -- you posed the question should we have a secondary market. First of all, we do, of course. We have a secondary market for the traditional application of the existing first sale doctrine.

To the extent what you're asking should we have a forward and delete model in furtherance of what's arguably a secondary market, I would argue that's not a secondary market at all because, as you know, the quality of the digital file does not degrade and is instantly transferable over unlimited distances, so it's going to substitute one for one for sales in the primary market. So it's really just another version of the primary market except it's not authorized by the copyright owner.

MR. GOLANT: Understood. And this is in follow-up. Since we had some comments about consumers,
I'm going to ask questions about that right now, and the first one is when consumers pay for access to content online, how do they know that they may not be able to freely resale or give away the music, e-books and games that they purchase?

John?

MR. VILLASENOR: So I guess I'll answer that by giving some context. I think the question of first sale is, with all due respect to all of us, becoming less important. As a gentleman on the end noted, fewer and fewer pieces of content are distributed pursuant to sales, and so I guess regardless of what we might think about secondary markets, I happen to think they're good. Introducing a first sale -- digital first sale doctrine wouldn't address any concerns that may or may not exist today because this content isn't being sold. That does move the license issue is that I think that content owners -- probably many people agree -- have not gone to distributors -- people facing consumers have not done a particularly good job or as good a job as they could in making clear to consumers what rights they have or do not have in the content.

If there's a button that says "buy" and a consumer presses the button and finds that he or she in fact owns nothing, I think there's a pretty reasonable
argument that there's at least not a particularly forthright disclosure regarding the consumer's rights.

So I think if consumers were in possession of clear information about what their rights are or are not, then the market would lead to pressures that would lead content owners and distributors to provide more flexible offerings of content that would perhaps include the opportunity to have downstream secondary distributions which, remember, are perfectly lawful if they are done with the authority of the content owner even in a licensing model.

MR. GOLANT: Thanks. I think we have -- let's see -- Nissan first and then Don.

MR. THOMAS: Yes. So obviously piggybacking with what John said, it's a consumer protection issue, and whether consumers are adequately disclosed and know their rights when they buy something because obviously purchasing and buying connotes ownership and certain rights with that.

So -- and, again, it goes back to having to define what ownership is in the digital content -- context and having these digital platforms abide by that and so that there's one kind of set uniform rule in regards to digital what is actually ownership, and I don't think we can have a secondary market or resale
doctrine without knowing what ownership is in a digital context because obviously it's different than in the physical.

MR. GOLANT: Thanks. Don, go ahead.

MR. DENNIS: Yeah. I agree pretty much with what everyone has stated, and also I think it would be something akin to creating a very reasonable shrink wrap license that you already have where you kind of spell out the terms of what a consumer exactly is entitled to and then also probably adding onto that what devices that they're going to be accessing the content from.

For example, devices that are only owned by that consumer if you're trying to limit them transferring it to other individuals that would be typically precluded.

MR. GOLANT: I think, Christopher, you put your card up?

MR. BRANCH: Well, let's broaden this a little bit though. I mean we talked about the last panel and the best practices. We talked about all these various things to educate the consumer. We give them license agreements. How many of you have ever read any license agreement for any item you've ever bought? Only one person in the entire room. We have a room full of lawyers. We have a law school. We have lawyers all over the place.
I'm not sure, number one, the public cares.

Number two, I think that if they need to learn what they're entitled to when they get certain things, that they need to consult counsel or figure it out or read the documentation that they have, but I think to come up with more guidelines and more issues to educate this one narrow set of consumers, you know, puts to light, well, okay, so you can't reproduce something. You just paid $3 million for a painting, but you can't reproduce it and put it on a wine label because that wasn't included with your purchase of the painting because you didn't have reproductive rights.

Well, then, we need to come up with a pamphlet for that. Then we need to come up with a pamphlet for everything that we do here and basically re-explain the law of this entire law library behind us and the whole Lexis-Nexis and West Law, and I think to start going down that road to educate consumers is just asking for too big a project.

MR. VILLASENOR: If I can respond, we can disagree or agree about how much we should educate consumers, but we shouldn't deceive consumers, and I would argue that the big fat "buy" button deceives consumers. And so I think it would be disingenuous -- and, again, just for the record here, I do not think we
should modify copyright law to have a digital first sale doctrine.

It would create all sorts of problems now in the contract world, but I don't think it's reasonable advice to say that consumers should, quote, "consult with counsel." Consumer -- my 13-year-old daughter is a consumer of digital media. Should I ask her to consult with counsel when she buys something? I think consumers have a right to reasonable clarity regarding their rights with respect to content, and I actually -- maybe I'm over naive. I think it's a win-win. I think if consumers had better clarity regarding their rights, I think you'd see the market act with more clarity in terms of the offerings and you'd find an even greater variety of offerings than we have today.

MR. GOLANT: Thanks for your comment.

Catherine, I think you had your card.

MS. BRIDGE: Yeah. I think we can all agree that consumer expectations and speaking to consumers and distributors speaking to consumers in ways that are clear and transparent is in everybody's interest. So I think there's no debate about that.

I do think -- I would just respond to the point about the buy button which is only that I think, you know, it is something that in this access -- you
know, access environment where people are getting their content and consuming it online and mobile through digital environments, I think it speaks not necessarily to an ownership model.

I mean -- you know, I haven't done a survey I can't speak scientifically about this, but I think more and more people would understand that you can buy a license to have content, you know, pursuant to the terms of the license, you know, and they get the license and are presented with it, and we all know there's issues around, you know, how much we all agree in terms of use, but I would just say that I don't think use of the buy button is a deception, and I think it's kind of an iterative process in that people are consuming content are understanding that it's not a physical ownership model.

MS. PERLMUTTER: There was some discussion at one of our prior panels about the possibility of having the button say not just "buy" or "buy access" or "buy license."

Would that deal, John, with some of your concerns?

MR. VILLASENOR: I think it would be very helpful because at least it raises the question because in the wider world, if we buy a candy bar, we own the
candy bar; right?

Whereas if we buy music, we don't own the music. I think the group here is extremely savvy about these issues, but I think in my anecdotal experience just talking to people who aren't spending their hours looking at this, that people don't understand when they press "buy."

You go to Amazon and you buy a shirt, you own the shirt. You buy music, you don't own the music. That's a nonobvious concept. It's complicated. It's a confusing concept. We don't need to confuse. Why confuse when we can be more clear?

MR. GOLANT: Christopher.

MR. BRANCH: Yeah. I wanted to respond to John, not necessarily to oppose his 13-year-old daughter who hits the "buy" button doesn't want to consult counsel, but what we're talking about is not -- we're talking about buying with the expectation of potentially reselling. It's not buying it so you can listen to it. You're buying it, and now you want to go reproduce it and resell it to some other 13-year-old girl or to somebody else.

Now you're talking about making money and profit or sharing certain things with other people, and just like you buy and sell CDs on eBay or cars on eBay
and now you're talking about buying and selling, and
it's at that point where I'm not sure that the consumers
have the expectation that when they hit the buy button
for some music that they're thinking about how they're
going to resell it.

If you go buy a CD at Amoeba for $2, you may
take it back to Amoeba and try to resell it to them for
$.50, and that may or may not -- but at least you have
an exchange, and that's where the first use doctrine
really comes in or the first sale doctrine comes in is
you're ridding yourself of that CD.

Now, whether you put that on your iTunes or
something else is not what we're dealing with here.
We're looking at consumer expectation when they buy, and
by pressing the buy button in electronic format, I'm not
sure any consumer is expecting to resell that in the
next hour.

MR. GOLANT: Excellent. Thanks.

If there's no other comments, I think I'll go
to the next question. This is a thread I picked up from the
previous comments, and the question goes like this:

Would a voluntary best practices regime
establishing standard definitions, terms and conditions
for online rentals and purchases be useful. That's the first part. And

how
could such a regime be constructed that takes into account the needs of both the creators and the consumers?

Who would like to go first in answering that?

Doug.

MR. KARI: Before we get too far in discussing physical versus digital, I think it's important and the reason that I'm here is to point out that you could do mischief if you begin to think of these concepts as strictly separable because sometimes they are not.

For example, there is embedded digital content in myriad physical objects, digital content that is essential for the operation of those objects, whether they be the automobiles that Christopher mentioned, whether they be refrigerators, things like hairdryers. Myriad of objects. Anything with a digital display, for example: A clock radio, a DVD player.

This was why in the Kirtsaeng case we pointed out in our brief that it was very important that the rule be established that allows for transferability, alienation of these items because, as digital content begins to permeate the physical world, it's important to have a rule that doesn't allow mischief to be done by the manufacturers who want to piggyback on the rights, the intellectual property rights within a physical
object in order to restrain the secondary trade in the
object.

So in this discussion, I don't have a problem
when folks are talking about pure digital content or
purely a physical object that has no intellectual
property rights in it, but beware when you begin to mix
the two and some of the statements -- the broad
statements that are being made can do mischief in the
physical world if they're carried to their logical
extreme, and I would just caution everyone to think
about that, and I would ask the PTO as well to consider
that. It is not necessarily black and white that
dividing line between physical and digital.

MR. GOLANT: Well, thanks. Yes, Christopher.

MR. BRANCH: I think Doug makes a good point,
and we're sitting here in 2014, and we don't even know
what the next four to five years are going to be. I'm
involved in so many cutting-edge projects around the
world that I can't tell you about, but there are so many
things going on that we sit here that we don't even know
about, and so to change the rules for what we see on the
radar in the next year is almost not going to apply
three or four years from now.

So you have to be very careful about changes
we make to doctrines like this because we have no idea
what's on the horizon. Things are changing exponentially as we sit here, and what used to take 20, 30, 40 years to change is now taking 20, 30 and 40 seconds, so we have to be very careful about changes and make sure that whatever changes or additions we make are going to cover things like the merging of tangible property and intellectual property and digital property and how it all fits together.

That's, I think, a huge concern about changing the rules at this point for what we know and understand today as far as consumer behavior, as far as the internet. I mean Napster was a big thing ten years ago, and now I don't think any teenager has ever heard of it. So there's something new, so you always have to be careful about changing for today's standards.


MR. TRONCOSO: I was just going to return to your initial question, but if others had comments on the sort of physical goods with code that is essential to its operation, I'll sort of wait.

MR. GOLANT: Anybody? Go ahead.

MR. TRONCOSO: So the idea of best practices I think sounds very appealing. I think much like the discussion in the prior panel on fair use best practices, creating a set of best practices for selling
goods on the Internet is going to be very difficult 
because there's just so many different types of business 
models, even within my industry. So creating a best 
practices document that would be relevant to even a 
small segment of my members would be very difficult and 
very difficult to achieve consensus on. 

And the other point I wanted to raise on this 
contract issue is that we need to not forget that there 
are already a lot of remedies in contract law that 
address a lot of the concerns that have been brought up 
on this panel. So if contracts are unconscionable, 
obviously they're not going to be enforceable, and 
there's also the FTC who has the power to intervene if a 
contract is unfair or deceptive. 

So to the extent -- I think John Villasenor's 
point is very well taken. If the contracts online are 
deceptive, that's bad for everyone. That's bad for 
every industry, and I think there would be a lot of 
consensus around sort of dealing with this issue that 
way, either through contract law or in instances where 
there truly is a deceptive practice going on for the 
FTC. 

MR. GOLANT: Excellent. Thanks for that. 

Let's move on to a question about copyright owners and 
their interests. So here it is:
How will existing business models be affected if the first sale doctrine is extended to digital media on the online marketplace, and how will such an expanded first sale document affect the income of small and medium-sized copyright holders?

John?

MR. VILLASENOR: The caveat here is that most content is, as well all know, not distributed pursuant to the sale. But -- so the license content wouldn't be, in my view, particularly effective. But for the substantive content that is actually digitally sold, electronically sold, I think a first sale doctrine would be a huge problem because what you can do, for example, is then have these -- you could make loans that don't last two weeks but that last 20 milliseconds, and you could basically have people loan to pools in the clouds so that an artist would never sell any more copies of the work than there were people who happen to be listening to it at any one time which would decimate the market for artists, and the ability to do these millisecond or microsecond type loans is absolutely no analog in the physical world.

So I think it would be a huge problem, but the very existence of that problem would be all the more reason why distributors would move away from sales.
models to contract models so they would simply become --

finish the transition.

MR. GOLANT: Okay. Steve and then

Christopher.

MR. TEPP: So harkening back to the copyright
office report in 2001 that you mentioned in the
introduction, there were three elements of the office's
conclusion as to why the first sale doctrine should not
be extended to authorize the forward and delete model,
the third of which is the most relevant here, and that
is the practical effect.

The first sale doctrine, when it was created
by the courts back in the beginning of the 20th Century
and codified in the 1909 Act and not too long after, was
necessarily limited in its effect on the market for
copyrighted works by the practical logistical realities
of the time. If you have a hard copy of the work and
you wanted to transfer that, first you had to find
someone who wanted it, and then you had to physically
deliver it to them.

Both of those transaction costs are reduced
virtually to zero in the modern age because of the
combination of digital technology and the interconnected
network age that we live in. So the result is that a
forward and delete model would have a much more dramatic
and harmful effect for the market for copyright owners arguably to the point where it would threaten their ability to make a living at it.

Add to that the recent decisions we've seen regarding mass digitization, and there's been an affirmance by the circuit court of one of the lower court decisions not too long ago. If those are all lawfully made copies, which of course is the statutory test now. It's not about first sale anymore even though we continue to use that name.

If those are 10, 20 million lawfully made copies, and then the Section 109 is changed to authorize forward and delete, every one of those can then be forwarded and it's hard to see what, if anything, remains of copyright for works that are subject to that use.

MR. GOLANT: Okay. Thanks for your comment.

Christopher, you're next.

MR. BRANCH: I'm going to hold off.

MR. GOLANT: Okay. Nissan.

MR. THOMAS: So, again, I would argue that if we're going to talk about first sale right doctrine in the digital context that we define what ownership is, and in that context ownership probably should be unlimited access 24/7 for that individual that made a
purchase, and in that sense that the actual file does not reside in the hard drive of whatever device that the download occurred that is actually still housed on a remote server through the platform, then there might be plausible opportunities to allow the original rights owner the platform and the purchaser to participate in the income stream of the resale of that work which would virtually mean that once they sold it, they will lose access to it, and so I mean I think for us I think the challenge is to try to find new ways of compensating copyright owners, and that's what this panel and the government's role is to do.

MR. GOLANT: Thanks.

MR. BRANCH: So I think that this is wonderful for the large companies who can afford to put out licenses and for those kinds of entities that can sign up, but for the garage bands, the small musicians who compose one or two or three CDs and then make those available digitally to the world and charge $.99 a song, I think it's that core little group of people are the ones who would basically stop doing what they're doing to get compensated to buy their guitars, to rent their studio space.

It's the real small individuals who really suffer, I think, in this. And sure we could go to this
entire licensing thing and every song that you get is licensed and all of these wonderful creative things, but it really puts those really small entities who are just looking for enough money to pay for their next guitar or their guitar string or what have you out of their ability to do that and go back to their day jobs and just do whatever they can for fun.

MR. GOLANT: Thanks. Anybody else want to respond to any of the questions, comments so far?

MS. BRIDGE: I would just say that the question was focused on smaller, medium-size companies, but I would say I would think even with content that comes from a large company such as ours, really consumers -- the marketplace is responding now to consumers with different price points, different types of platforms, and if there were a digital resale overlay, that would require us to change the economics of the first transaction.

It would have to be -- I mean it would have to be significantly higher to pay for the investment that goes into making the movies that we're making, the television shows that we're making, and that would be a radical alteration of the marketplace, and I think ultimately consumers would be harmed by that.

MR. GOLANT: Good point. I have another
question for the crowd, and it goes like this:

How do existing or planned online business models provide consumers with the benefits associated with the first sale doctrine such as the ability to lend a book to a friend or buy a cheaper secondhand copy of the textbook?

MR. KARI: There's a thriving online market in copyright protected items of all kinds, and the existence of that online market has really extended worldwide so that it's important that whatever rules are adopted by the Patent and Trademark Office and by congress keep in mind the ability of U.S. consumers and businesses to participate in this thriving electronic marketplace where transactions occur from all over the world, and with modern logistics and shipping things can move readily, and that's getting better and better, and that's good.

In general it's economically healthy, environmentally healthy to have objects freely tradeable and to maximize their lifespan and to maximize their value. This is good. You don't want things ending up, for example, in the garbage dump because people are afraid of reselling them and they're afraid that they're going to be infringing on someone's rights.

Anytime you possessory rights from the rights
of alienation -- and I'm talking in the physical -- in
the physical world, you create mischief. It's
counterintuitive. Most people believe that the physical
right of ownership, that possessory right of ownership
also includes the right of alienation. You try to
separate the two, it creates great headaches, and it
creates burdens to free alienability, free trade, and to
maximize the use of things in the physical world. The
online world has been terrific in allowing things to
move around the world to be put to maximal use and for
their value to be maximally realized for the benefit of
all of man kind.

MR. GOLANT: Thanks. Anyone want to respond
to that?

MR. DENNIS: Not necessarily respond but what
I was thinking in regards to your question in terms of
small businesses and up and coming companies in the
future of how they would continue to thrive and stay
alive in this new environment would be something they
might consider a subscription-based service where, if
they couldn't get the entire upfront cost in a large
amount, they might break it up over a period of time.

In addition, that would allow them a little
bit more flexibility to remain in business while
actively trying to create new content that will gather
more consumers to keep the drive. Otherwise, it
wouldn't be worth it to go through all the changes and
difficulties they have to come up with new and creative
and appealing content if they knew it would only be one
sale.

MR. GOLANT: Thanks for your comment.

Anybody else want to respond to the question
so far?

All right. Here's another one for you, and
this is a factual question. If you know it, please
speak up.

Are there any types of works in digital
markets that are always licensed and never sold?

Christopher.

MR. BRANCH: Every piece of software I've ever
seen has a license attached to it, and I've actually
boughten older pieces of software on eBay that came with
a license or you just buy the license number from
somebody else, and so because there's a tangible item
with a license, then it seems like it's subject to the
first sale doctrine, and the same way with that's all
part of the contract. That's all part of contract law.

And so -- (inaudible).

But you bought the license, and then somebody
else -- you bought the rights to that license from
somebody else.

MR. VILLASENOR: We're seeing in the ninth circuit (inaudible) which would argue against --

MR. BRANCH: It was Lotus 123.

MR. VILLASENOR: If I could respond to your earlier question. I think I should also say to the extent it's not obvious, all of my opinions are my own and I'm not claiming to represent UCLA.

There have been content (inaudible) provided the ability to loan digital content or to share on multiple devices and I applaud those efforts, that’s really good. The concern though is that it still leaves in the control of the content holder or the distributor a far greater level of control than has historically been possible, and ideally -- and I'm not saying that the solution is to then strip the content holder's right or copyright holder's right away because that leads to all of these bad consequences we talked about.

It would be nice if it was possible for content distributors or copyright holders to enable these kinds of sharing while also having some layer of anonymity; right? In other words, through technology. So I could loan a piece of digital content with the consent of the copyrighters for two weeks, for example, and the copyright owner could verify that I had loaned it but
wouldn't need to know exactly who I loaned it to, just
that I had loaned it, and it was one of a copy, and I
didn't have access to it while this other person did and then I got it
back after two weeks or something like that. But I
think there are anonymization protocols, which I'm optimistic might help
in those respects. So
I think there's an opportunity for progress there.

MR. GOLANT: Thanks for your comments.

Christopher, do you have a follow-up?

Anybody?

MR. KARI: I just wanted to add one comment.
Just again to make the distinction it is true that
software applications, operating systems and such are
generally handled by way of license agreements, but
there is software in a myriad of forms that is typically
handled by way of sale because it's just -- it's
embedded. It's there.

For example, in a computer typically the
operating system is handled by a license agreement. The
BIOS is not. People expect that there's going to be a
BIOS that enables them to load that operating system and
start the machine in the first place, and the same would
apply to embedded software in a myriad of other context,
and again this is where my concern comes that mischief
can be done when we talk broadly.

I know what Christopher meant, but if you take
the words literally and say that all software is handled through licensing agreements, that's simply not true.

There's software on devices that every one of us use today that we did not sign a license for, and if you drove here by automobile, you were utilizing software, and you never signed a license agreement for that software, and you expect that you own that software and when you resale that car that you have the right to do so, and Toyota or Ford or whomever else manufactured your automobile doesn't have the right to come in and say, "You need to a new license agreement from me in order to carry out that sale."

And if that sounds intuitively correct to you, that would be intuitively correct and I think legally correct in a variety of other context and devices that we all touch all the time. So, again, we have to make those distinctions. I think they're intuitive, but it's important to keep them in mind.

MR. VILLASENOR: If you didn't sign a license agreement, then under contract law you're not bound by the contract; right? So it may not be as much of a problem as you're suggesting because, when I buy a car, I don't seen a license agreement saying I can't resell I'm not in any way mitigating the issue, but there's a difference between a unilateral license which someone might claim your
party to and a contractually binding license which you have explicitly agreed to. I think that distinction is important to keep in mind.

MR. KARI: But there are manufacturers who will take that position and try to hide the ball on the embedded software and then utilize it later as a tool to attempt to restrain secondary market trade, and there are many examples of that that those of us in the trade world have seen, and again the concern is that we not develop a standard of practice that enables -- that enables people to use the excuse of embedded software as a way of beginning to restrain secondary market trading in everyday physical objects.

MR. GOLANT: Any other responses from the panel?

Well, then, let's move on to any questions from the audience or online.

Hollis, anyone online asking anything?

MS. ROBINSON: No, not yet.

MS. PERLMUTTER: We have a shy audience.

MS. ROBINSON: Yes, we do.

MR. GOLANT: Anybody want to stand up to the microphone? Oh, we have some people here.

MS. MUDDIMAN: Hello. Helen Muddiman, composer/song writer. Just want to ask the question. What is the right of the resale?
Are we talking about entertainment is the problem or is it -- because you are talking about cars and those kinds of licenses and entertainment that Disney is talking about. They are so different, and I just -- how are you -- how are you going to try and marry them together when the things are inherently so different?

MR. GOLANT: Do you want to respond to her comment?

MR. KARI: Carefully, thoughtfully.

UNIDENTIFIED SPEAKER: I was just going to respond to your last question as examples of maybe not content but business models that are entirely licensed based. Stock imagery is a very good example. And if you look at the services, whether it's somebody who is huge like Getty Images or the hundreds of small picture licensing services that exist across the country that may be owned by individual photographers or small groups of photographers, those typically exist entirely conducting licensed transactions online.

They are licenses. They are a one-time transaction with the photographer or the stock imagery company, and so if you are considering some of the precedence, for instance, in the EU which would try and define a license agreement that has, you know, a
one-time transaction, no follow-up, those sorts of characteristics as a sale rather than a license, that would be very problematic and would undo entire, you know, long-standing, you know, categories of businesses. Nobody who enters into a stock image license agreement expects that they can then resell that image in competition with the photographer to another magazine or newspaper or, you know, Web site once they're done using the image on their own Web site.

MR. GOLANT: Thanks for that.

Anyone else?

Great. So we conclude our session on the first sale, and I thank you all on the panel and in the audience for coming here today and listening, and we have some closing remarks from Shira.

MS. PERLMUTTER: This will be brief, so we'll make up for some of our lost time.

Again, I wanted also to say thank you to everyone who came here and participated in these discussions. I thought they were probably more fireworks at this one than either of the other two roundtables which hopefully will illuminate the issues, so we really appreciate it. And I also wanted to particularly extend a special thank you to our own terrific team from the Patent & Trademark Office, Hollis
Robinson, Linda Taylor and Angel Jenkins, for handling all of the logistics to make this possible because it is more complicated than you would think, and it's only because of their good work that it looks so easy and smooth, and also to give a very warm thanks to Loyola Law School for their generous hospitality, for their beautiful facilities and for their hopefully flattering photography.

And just a final housekeeping note. A transcript of the hearing and also a recording of the webcast will be posted on both the PTO and NTIA Web sites in August if you'd like to look back at them, and we will be having our fourth and final roundtable tomorrow at Berkeley Law School, and if you're so keen to continue this conversation that you want to tune in, it will also be watchable by Web site, by Web cast, and you're also welcome to weigh in remotely if you'd like to.

MR. MORRIS: Or you can join us on the flight tonight.

MS. PERLMUTTER: Exactly. And if you want to keep track of all of our various Green Paper related events and activities, you can sign up for copyright alerts which we send out to you if you go to the PTO Web site to the copyright page, and hopefully our plan is to
aim toward a paper that would reach some conclusions and
make some recommendations on these policy issues that
we've been discussing today hopefully by the end of the
year or at least early next year. So thank you again
very much.

(Whereupon, the proceedings concluded at
2:43 P.M.)
CERTIFICATE OF REPORTER

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

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