1 DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE
2 GREEN PAPER ROUNDTABLE ON COPYRIGHT POLICY,
3 CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY
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10 JULY 29, 2014
11 8:30 A.M. - 3:00 P.M.
12 LOYOLA LAW SCHOOL
13 WALTER J. LACK READING ROOM
14 LOS ANGELES, CALIFORNIA
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19 REPORTER'S TRANSCRIPT OF PROCEEDINGS
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3 INTRODUCTION AND OPENING REMARKS

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5 MS. PERLMUTTER: Well, good morning, everyone,
6 and welcome to the third of our series of roundtables on
7 digital copyright policy issues. We are delighted to be
8 here in Los Angeles at Loyola Law School, and I want to
9 thank all of our friends here for hosting us here today,
10 and welcome to those of you who are joining by webcast.
11 I'm Shira Perlmutter. I'm the chief policy
12 officer at the Patent and Trademark Office, and this
13 roundtable is part of a process that was started by the
14 Department of Commerce's Internet Policy Task Force in
15 last year's Green Paper on copyright policy, creativity
16 and innovation in the digital economy.
17 The Green Paper identified a number of issues
18 on which the task force would undertake further work,
19 and three of those issues are the subject of today's
20 roundtable. The work on the Green Paper has been led
21 for the Internet Policy Task Force by the Patent and
22 Trademark Office and also the National
23 Telecommunications Information Administration, NTIA, and
24 we've also been consulting with the Copyright Office.
25 We began with a full day public meeting in

1 Washington which touched on all of these issues. We've
2 had two sets of written comments from a very wide range
3 of interests and stakeholders on these topics, and we've
4 already held two roundtables, and through the
5 roundtables what we're looking to do is really to
6 broaden and to deepen the discussion on these issues.
7 We have been traveling to four locations
8 around the country. We started in Nashville and
9 Cambridge. We're here today and tomorrow in Berkeley,
10 and the idea is to hear from a variety of stakeholders,
11 and of course based on the locations where the various
12 roundtables are taking place, each one of them has
13 involved or will involve stakeholders from different
14 copyright sectors, different communities and industries.
15 So today we've come to Los Angeles because, of
16 course, its preeminent role as a center for creative
17 production and to hear from all of you here, and we're
18 delighted that we were able to accommodate everyone who
19 asked to participate today.
20 So the goal of these roundtables is to have
21 interactive discussions rather than to hear prepared
22 presentations or statements of policy positions. So I'd
23 like to ask everyone who's participating on the panel to
24 make their comments responsive to the questions that the
25 moderators will ask and also to keep the comments

1 relatively short so that we can have active engagement
2 by all participants, and I think we found in the last
3 two roundtables that was very successful and we were
4 able to have a lot of back-and-forth which really
5 elicited a lot more helpful comments than just hearing
6 one person after another.
7 So we will begin today with the issue of the
8 appropriate calibration of statutory damages, and what
9 we are trying to look at here is a relatively narrow
10 question which is how statutory damages are calculated
11 in two particular contexts, and one is the context of
12 potential secondary liability claims against mass online
13 services, and the other is private individuals engaged
14 in file sharing.
15 So we'd like to ask that you focus on these
16 specific issues rather than the value or application of
17 statutory damages more generally. We'll then have a
18 coffee break and then come back and discuss remixes, the
19 legal framework for the creation and dissemination of
20 remixes.
21 Now, in the Green Paper, the way we've posed
22 the question is to ask whether or not the creation of
23 remixes in the U.S. is being unacceptably impeded by
24 legal uncertainty and, if so, if there's a need for any
25 new approaches.

1 And then after a lunch break our final topic
2 today will be the relevance and scope of the first sale
3 doctrine in the digital environment, and here I just
4 wanted to say we'd like to dig deeper than just a debate
5 over whether the answer is yes or no, that the doctrine
6 should or should not apply to digital transmissions.
7 The Green Paper specifically asked whether
8 there is a way to preserve the doctrine's benefits in
9 the analog world when it comes to the digital world. So
10 what are these benefits? Will the market develop to
11 provide them or has it done so and, if so, how? And if
12 not, what type of solutions would be appropriate?
13 So I think we're ready to begin. If any
14 observers either here or online has comments, there will
15 be time to raise them immediately after each panel
16 session. And for those who are here to do so, please go
17 to the microphones right there in the center. For those
18 who are watching by webcast, you can call (800)369-3319
19 for our phone bridge. I feel like an infomercial. And
20 the access code is 1981439, and these numbers are also
21 on the agenda which is posted on the copyright page of
22 the PTO website. You'll press star 1 for the operator,
23 and then once the operator announces you, you'll be able
24 to state your comment or question to the panel.
25 So I have to say I found it very gratifying

1 that we had excellent discussions in the Nashville and
2 Cambridge roundtables with very helpful ideas being put
3 forward and some constructive back and forth, and I
4 think we did make a lot of progress in understanding the
5 full range of perspective on these issues. So we look
6 forward to learning more again from today's
7 conversation.
8 So let me now give the floor first to John
9 Morris, associate administrator and director of Internet
10 policy at NTIA, then to Jacqueline Charlesworth of the
11 Copyright Office's general counsel, and then finally to
12 our former colleague from the PTO, Professor Justin
13 Hughes of Loyola Law School. Thank you.
14 MR. MORRIS: Thanks very much, Shira. I just
15 want to speak just for a second and join Shira in
16 welcoming everyone to the third of the copyright
17 roundtable meetings. I'm the head of the policy office
18 at NTIA, the National Telecommunications and Information
19 Administration, which, like PTO, is housed within the
20 U.S. Department of Commerce.
21 And just as PTO is the lead agency within the
22 executive branch on intellectual property issues, NTIA
23 is the lead agency on Internet and communications policy
24 issues. The two areas really do come together on a lot
25 of the issues that we're going to be talking about

1 today, and the goals that the copyright Green Paper
2 really were pushing was to try to address the legitimate
3 and important considerations and concerns in all the
4 different areas: The goal of ensuring meaningful
5 copyright. A meaningful copyright system that continues
6 to provide necessary incentives for creative expression
7 is a critical goal and one that I think can be done,
8 that we think can be done in tandem with preserving
9 technology innovation.
10 So that's what we've been working on at the
11 Department of Commerce to try to kind of figure out how
12 to thread the needle there, and the roundtables that
13 we've had so far have been extremely helpful in terms of
14 trying to balance something through these different
15 issues. So I look forward to this conversation today,
16 and now let me just briefly turn the floor over to
17 Jacqueline Charlesworth, the general counsel of the U.S.
18 Copyright Office.
19 MS. CHARLESWORTH: Good morning, everyone.
20 And as John mentioned, I'm Jacqueline Charlesworth,
21 general counsel of the U.S. Copyright Office, and I want
22 to thank Shira and her colleagues at USPTO as well as
23 the Department of Commerce for inviting the Copyright
24 Office to attend today's roundtable.
25 As many of you know, a little over a year ago

1 following a speech by the register of copyrights, Maria
2 Pallante at Columbia Law School, house judiciary
3 chairman Bob Goodlatte called for a wide review of our
4 copyright laws to identify areas that may need to be
5 updated for the digital age.
6 The U.S. Copyright Office is working closely
7 with congress to support that review process. Among
8 other things, we are studying the question of orphan
9 works, the making available right and how it's been
10 implemented in the United States as well as taking a
11 close look at our music licensing system, and I see some
12 of my friends from that endeavor out there in the
13 audience.
14 The Green Paper, which was produced by Shira
15 and her staff and released not long after Chairman
16 Goodlatte's announcement, represents a highly impressive
17 effort to identify important issues involving copyright
18 and the Internet and to provide a framework for public
19 discussion of those issues, and I really want to
20 acknowledge Shira and her staff. That was quite an
21 undertaking. I know it was a long process that led to
22 the release of the paper, and I applaud her for that
23 effort.
24 While the Green Paper process is separate from
25 our efforts at the Copyright Office, the two are related

1 in the sense that the public record generated by the
2 Green Paper will undoubtedly inform the congressional
3 review process that's underway.
4 Last week, for example, congress held a
5 hearing on copyright remedies, which included testimony
6 on the role of statutory damages in our system, which of
7 course is one of the topics today, the calibration of
8 those damages.
9 Statutory damages and the first sale doctrine
10 are critical aspects of our copyright system that inform
11 many of the provisions of the Copyright Act and impact
12 the practices of companies large and small as well as
13 those of individuals and, in particular, creators.
14 The question of remixes and how our copyright
15 system should accommodate them is perhaps a more
16 discrete issue in itself but then again ties into larger
17 questions of how music should be licensed as a general
18 matter within our system. And I will say, I will add
19 here that the opinions on how to license music are not
20 what I would call discrete. People feel they can share
21 them, and we've been happy to hear a lot of them at our
22 own roundtable process.
23 It is a fact of copyright law that virtually
24 every policy issue one might consider intersects with a
25 host of others. Perhaps this is what makes the review

1 of our copyright system so challenging but yet so
2 captivating, at least for those of us who are copyright
3 nerds like me. I'm confident that we'll be hearing a
4 variety of opinions today about the issues under
5 consideration, and I welcome that, and I will be
6 listening with great interest.
7 Thank you again, Shira, for having me.
8 MR. HUGHES: Good morning, everyone. I'm
9 Justin Hughes, and I'm on the faculty here at Loyola Law
10 School. Some of you know me from former lives. On
11 behalf of Loyola Law School and Loyola Marymount
12 University, we want to welcome you this morning.
13 It's a great pleasure for our law school to
14 provide the venue for this Green Paper roundtable
15 organized by the United States Patent and Trademark
16 Office and the National Telecommunications and
17 Information Agency. We want to welcome our colleagues
18 and friends from those agencies as well as our
19 colleagues and friends from the Copyright Office, and so
20 many of the companies, organizations, groups that will
21 be critical in providing input for what will undoubtedly
22 be an important administration white paper and also the
23 input for overall what is going to be a very important
24 comprehensive copyright reform effort in Washington and
25 around the country, however long that takes.

1 I want to join in congratulating Shira and Ann
2 Chaitovitz and Ben Golant and all of the people at the
3 United States Patent and Trademark Office and NTIA on
4 the work they have done to date and wish them well for
5 all the work they have to do in the future.
6 And with that, Loyola Law School is very, very
7 happy to welcome you and wish you the best wishes for
8 today.
9 MS. PERLMUTTER: Thank you. And I'll turn the
10 program over now to Ann Chaitovitz from the Patent and
11 Trademark Office.
12 MS. CHAITOVITZ: Hi, everybody. Our first
13 topic is going to be statutory damages, and I'll read a
14 brief introduction, and then I'll ask everybody if they
15 could go down and introduce themselves.
16 And throughout the discussion, when you want
17 to speak, if you could do this with your name tag, and
18 I'll try as best I can to see the order that they go up
19 in and respond to you in that order, but forgive me if I
20 miss.
21 So statutory damages are available under the
22 Copyright Act as an alternative remedy, monetary remedy,
23 to actual damages and profits. Statutory damages
24 normally range from a minimum of $750 to a maximum of
25 $30,000 per work infringed with the potential to be

1 raised to a maximum of $150,000 upon a finding of willful
2 infringement or lowered to a minimum of $200 upon a
3 finding of innocent infringement.
4 So today we're going to address two specific
5 contexts, as Shira mentioned, from the Green Paper. The
6 first is secondary liability for large-scale
7 infringement, and I'll be asking those questions, and
8 then we're going to talk about statutory damages for
9 individual file sharers, and Ben will be asking those
10 questions.
11 With respect to statutory damages for
12 secondary liability, there are competing arguments about
13 the potential negative impact on investment and the need
14 for proportionate level of deterrence, and there have
15 been calls for further calibration of the levels of
16 statutory damages for individual file sharers in the
17 wake of some large jury awards in the two file sharing
18 cases that have gone to trial.
19 So if you could just go down the row and
20 introduce yourself briefly, then we will begin.
21 MR. DREITH: I'm Dennis Dreith. I'm the
22 executive director for the AFM and SAG-AFTRA
23 intellectual property rights distribution fund. We
24 process residuals and royalties for nonfeatured
25 performers.

1 MS. MOORE: I'm Deborah Moore. I'm a film
2 producer at the independent level at this point. I've
3 worked both at the network level, the studio level and
4 for the last ten years as an independent.
5 MS. STILWELL: Rachel Stilwell. I have my own
6 law practice here in Los Angeles. I represent recording
7 artists, songwriters, filmmakers and animators.
8 MR. BORKOWSKI: George Borkowski. I'm senior
9 vice president of litigation and legal affairs at the
10 Recording Industry Association of America. Before that
11 I was a copyright litigator in private practice here in
12 Los Angeles. I represented the record industry in the
13 Napster, Aimster and Grokster cases among others.
14 MR. STOLTZ: I'm Mitch Stoltz. I'm a staff
15 attorney at the Electronic Frontier Foundation. It's a
16 nonprofit civil liberties organization. I specialize in
17 copyright. Before that I was in private practice at a
18 business litigation firm, and before that I was a
19 software engineer.
20 MR. PIETZ: Hello, everyone. I'm Morgan
21 Pietz. I'm a litigator here in Los Angeles. I've
22 represented approximately -- probably getting close to
23 200 individual John Doe defendants who have been sued by
24 various copyright owners, particularly porn companies.
25 MS. KAROBONIK: Hi. My name is Teri

1 Karobonik, and I'm a staff attorney at a nonprofit
2 called New Media Rights. We primarily provide free and
3 low cost services to artists, creators and
4 entrepreneurs, and we also do policy work and
5 educational work based on what we learn on the ground.
6 MS. HODGSON: Good morning. Good morning,
7 everybody. My name is Cheryl Hodgson. I'm an attorney
8 in private practice in Santa Monica, and I specialize in
9 trademark copyright matters, and I do a fair amount of
10 litigation in copyrights, and my background primarily
11 has been representing publishers, composers, songwriters
12 in various aspects of the music industry.
13 MR. BURROUGHS: Good morning. My name is
14 Scott Burroughs. I'm a partner in Donliger/Burroughs on
15 the Westside of Los Angeles. We primarily represent
16 content creators in copyright litigation. We've handled
17 hundreds of copyright cases over the last ten years.
18 We've tried these cases to a jury. We've had the honor
19 of asking the jury for statutory damages in a copyright
20 cases and then being able to discuss with them
21 afterwards how they arrived at that which was an
22 interesting experience, and I'm happy to be here today.
23 MR. LAPTER: I'm Alan Lapter. I'm also with
24 the U.S. Patent and Trademark Office.
25 MS. CHAITOVITZ: And I want to let you all

1 know that I hear that the mics are always on, so just
2 keep that in mind.
3 So commenters made a range of suggestions
4 about different ways to recalibrate statutory damages
5 for secondary liability, and they include -- I'll
6 mention four of them. One was a total damage cap. The
7 other was -- the second one is providing courts with the
8 flexibility to award less than minimum damages per work
9 when there's a large number of infringements. The third
10 is changing the innocent infringement criteria, and the
11 fourth is to limit the range of statutory damages when
12 there's good faith belief that the use is noninfringing.
13 So I have a couple questions for the panel
14 about those four ideas. What do you think of each of
15 them? And that's the first one. What do you think of
16 those ideas?
17 Okay. I got the first three. Mitch was first
18 and then Dennis and then Deborah, and then I lost it.
19 MR. STOLTZ: Thanks, Ann.
20 So copyright law has -- you know, its overall
21 goal is to promote the progress of science in the useful
22 arts. That's according to the constitution. And the
23 overall goal is not to stop infringement because
24 infringement is defined as we define it and it is
25 punished as we punish it, and those processes serve an

1 overall goal.
2 When we're talking about secondary
3 liabilities, we're talking about liability against
4 intermediaries, against really primarily technology
5 companies, technology providers, middle men, potentially
6 whose systems and businesses deal with, you know,
7 potentially hundreds of thousands of different copyright
8 works which, given the statutory damage provision with a
9 minimum and maximum of per infringed work, really
10 quickly sends the potential damages into the
11 stratosphere greater than the market capitalization of
12 most companies and sometimes many small countries.
13 I think one thing to keep in mind, statutory
14 damages -- sort of the common rationale given for them
15 are compensation where damages are difficult to
16 calculate and deterrents, but when we talk about
17 deterrents, I was happy to hear you say rational
18 deterrents are calculated deterrents.
19 When you're talking about large companies or
20 any company really sort of doing business openly selling
21 or providing a technology, the sorts of folks who end up
22 as defendants in secondary liability cases, they're not
23 difficult to find. They are out there publicly, and
24 they are open about their activities. That means
25 there's less of a -- this need for high penalties to

1 discourage people who think that they won't get caught.
2 Everyone who goes into business knows that if
3 they are in fact infringing, they're going to be caught
4 because they're putting themselves out there. I'll
5 leave it at that for now.
6 MS. CHAITOVITZ: Okay, Dennis. I think you're
7 next.
8 MR. DREITH: I think coming from the
9 standpoint of an artist, first I want to say that the
10 notion of like innocent infringement is probably
11 nonexistence to us. There is no such thing as innocent
12 infringement. I realize under the law there is.
13 I think my perspective might be a little bit
14 different than Mitch's. While coming from the artist
15 standpoint, we don't want to have a chilling effect on
16 new technology and commerce, but I do think that the
17 most important part of statutory damages really is the
18 deterrent. I think it should be used as a mechanism to
19 deter those who may consider -- not to the extent that
20 we want to disrupt commerce or chill new technology, but
21 I think it is important -- especially understand that
22 from the standpoint of many, many artists who are not
23 copyright holders, not the stakeholders, a number of the
24 nonfeatured performers, in fact, all of the nonfeatured
25 performers, we don't benefit from the statutory damages.

1 What we benefit from is people not infringing our
2 copyrights. Therefore, I think the actual deterrent
3 factor is the most critical for us.
4 Having said that, I also think it's very
5 important to allow the courts a great deal of
6 discretion. Oftentimes they're the ones who can decide
7 not to put somebody out of business. I think the
8 important thing is actually to keep the higher amounts
9 sort of visible and in front of the public as a true
10 deterrent.
11 MS. CHAITOVITZ: Thank you. And I do want to
12 try and request that if you have comments about those
13 four topics that were raised, you let me know those.
14 MS. MOORE: Okay. So don't get me started on
15 this subject. It is so important to a filmmaker trying
16 to survive in this environment to have these really high
17 damages and, you know, basically let people know this is
18 actually impacting our livelihood.
19 Ten years ago -- my whole entire focus in my
20 career has been to protect the money, and that's what I
21 do, which means that I protect the investor's money, and
22 the investors are getting scared to come into the
23 marketplace. They don't want to invest as much because
24 they know they're not going to be able to recover
25 because of piracy. There's other issues, but piracy is

1 such a huge part of this, and also the banks don't want
2 to lend against sales contracts because the foreign
3 buyers know that there are entire countries who we don't
4 even sell to anymore because of piracy. That doesn't
5 impact, you know, the U.S., but that perception that
6 piracy is such a big issue, is so rampant, has
7 completely moved the decimal point over in terms of the
8 amount of money that I can actually raise to make a
9 film.
10 So if I was making $10 million films ten years
11 ago, I'm now making $2 million films, and that not only
12 impacts my paycheck and my ability to survive. I'm a
13 mom. I've got two kids in college, but it affects
14 everybody down the line. It affects the actors. It
15 affects the crew. It affects the amount of people we
16 can hire, and it affects how many movies we can continue
17 to make for these pirates to infringe upon us. So it's
18 a huge, huge issue for us.
19 MS. CHAITOVITZ: Thank you. I'll trust you
20 guys to know who was next then.
21 MR. BORKOWSKI: Barring any objection, I want
22 to say one thing before -- I will try to address those
23 four questions. I do want to say one thing.
24 Holistically before that, it's fine to have a debate as
25 to whether the statutory damages copyright regime should

1 be modified in some ways, but I think you can't have
2 that discussion in a vacuum.
3 The statutory damages scheme is part and
4 parcel of other parts of the Copyright Act. I don't
5 think you can just modify or talk about modifying just
6 one part without seeing how it might impact other parts.
7 The statutory damages ranges that we have now were
8 increased by congress in 1999. That was the same time
9 that congress passed the DMCA and other legislation that
10 recognized the rise of technology and how those
11 technologies can have -- can cause -- create an
12 environment where there can be rampant infringement, and
13 so what congress did is it gave technology companies and
14 technology intermediaries certain safe harbors that
15 would protect them from secondary liability as long as
16 they did certain things.
17 However, because congress recognized that
18 there was a true danger of extensive infringement
19 because of developing technology, it raised the range of
20 statutory damages. So if we're going to do something
21 that might lessen or change the way statutory damages
22 are applied, we need to look at whether parts of those
23 other -- the other parts of the statute, whether the
24 DMCA or others might need to impose greater obligations
25 and intermediaries so that whatever deterrent effect is

1 lessened by lessening statutory damages is offset by
2 allowing -- by putting more obligations on
3 intermediaries to fight piracy and infringement, so I
4 think it needs a broader discussion not just focusing on
5 these.
6 But I will address those four questions just
7 briefly. I think, as Mitch said, the goal of copyright
8 law -- the goal may not be to deter and punish
9 infringement, but it is to try to enhance creativity.
10 You enhance and help enhance creativity by deterring and
11 punishing infringement because otherwise the people --
12 the creators are not going to be creating. They're
13 going to be creating a lot less and they're going to be
14 getting a lot less for their efforts if there's rampant
15 infringement and deterrents -- I mean and no punishment
16 or no effective punishment.
17 With respect to those four questions, on a
18 total damages cap, I don't think that's a good idea
19 because I think each case is very fact specific. I
20 think there's a wide range of statutory damages that are
21 available in any instance, and I think that when it gets
22 to a jury, the jury gets to process all of the facts
23 that are before it. They will be given a jury
24 instruction. Most likely that will give them several
25 guidelines and guide posts that they should follow

1 before they establish the established figure.
2 Those guide posts, maybe that's something that
3 can be uniform so that all juries have to consider them
4 and all judges have to make that charge. That is
5 something that I think is worth discussing, but I think
6 that each case is fact specific and, therefore, a total
7 damages cap is not a good idea.
8 Similarly the court's flexibility to lessen
9 the minimum statutory damages if there's a large
10 infringement, again, I think it's a jury issue. I think
11 the range of statutory damages is broad, and I think
12 that will take care of that issue, that problem, and it
13 also -- this seems to me would encourage large-scale
14 infringement because the more you infringe, the less
15 you're on the hook for the infringement, and that seems
16 contrary to what the goal of deterrents should be.
17 I will not change the innocent infringer
18 standard. It is a strict liability tort type regime
19 under the Copyright Act, and the jury can take into
20 account whether there's an innocent infringer. $200 is
21 not too much to ask someone to pay for an infringement
22 even if it was innocent.
23 And as for limiting the range when there's a
24 good faith belief that it was not infringing, I think
25 that also is subsumed under the current range of

1 statutory damages. You can get an innocent -- you can
2 get an innocent ruling that's only $200. You can get
3 something as low as $750 per infringed work. I think
4 it's already taken into account, and the good faith
5 belief that one is not infringing is a very powerful
6 defense I would suggest, and I think a jury would
7 consider that, and if you convince a jury of your peers
8 that you had a good faith belief you weren't infringing,
9 then I think the jury will take that into account when
10 setting the statutory damages figure.
11 MS. CHAITOVITZ: I think Scott was next. I'm
12 sorry.
13 MR. BURROUGHS: Okay. Excellent. A couple of
14 things. First I would agree regarding the good faith
15 basis. Adding another standard into an area of law
16 where there's already so much -- so much gray area.
17 Copyright law we're talking what substantial similarity
18 was the idea, was the expression taken. There's already
19 so much uncertainty there. Adding something as nebulous
20 or fluid as good faith belief I don't believe is a good
21 idea.
22 The Copyright Act says that nobody should be
23 able to profit from committing an infringing act or
24 selling an infringing product. It's a strict liability
25 tort. To the extent that somebody is -- had a good

1 faith basis or was quote, unquote, "innocent" in doing
2 so, in most cases they'll simply disgorge their profits.
3 It will be restitutionary. They will end up in a
4 position no worse than they were before the infringing
5 conduct, which brings me to this next issue about the
6 amount of statutory damages available right now.
7 The $150,000 cap that was changed not too long
8 ago is probably still too low. Why do I think that?
9 Because if followed the jury sheets or if you've been in
10 jury trials involving copyright cases, statutory damages
11 are almost never sought and almost never awarded by the
12 juries.
13 You hear about the RIA -- RIAA cases in the
14 news. Those are statutory damages awards but -- and I
15 haven't done the math on this exactly, but I'd say 75 to
16 80 percent of cases that go to trial and the jury -- in
17 front a jury, the defendants seeks actual damages. They
18 seek a disgorgement of profits.
19 Why? Because if you have a group of
20 infringers, which you often do. I'll use the example
21 of -- let's say there's a Batman bobblehead doll that
22 was created without the content owner's consent. That
23 bobblehead doll had probably been created by one
24 infringer, manufactured by another infringer, and sold
25 by ten websites, each of which is an infringer.

1 The law right now says you can seek 150,000
2 for all of those infringements. So you have -- let's
3 say there's ten websites and three parties involved in
4 chain distribution. 13 parties, 150,000 statutory
5 damages. That's not a deterrent. Most of these
6 websites, most of these infringers will sell the
7 infringing product. If they get caught one out of ten
8 times, it's the cost of doing business. So the
9 statutory damages cap right now in this new digital
10 media worldwide economy that we're dealing with is
11 probably too low.
12 And getting into the secondary liability for
13 online providers, I'm going to look at it from a
14 commercial context. The companies in marketplaces like
15 Amazon right now, they have -- they could apply for the
16 DMCA safe harbor, and they do. So what happens in a
17 case like that, if this Batman bobblehead is being sold
18 by Wal-Mart, Wal-Mart gets brought to court. It's
19 strict liability. If Wal-Mart made a hundred thousand
20 dollars selling this Batman bobblehead, they'd have to
21 disgorge it.
22 Amazon is probably not the same thing. Amazon
23 can say, "You told me about it. You gave me the DMCA
24 notice. I pulled it down. Even if I made a hundred
25 thousand dollars selling this bobblehead doll, I get to

1 keep that because I qualify for the safe harbor."
2 That probably needs to change. We need some
3 directive as to why Amazon.com can sell infringing
4 bobbleheads and keep the profits while Wal-Mart can't do
5 that. That's all I have for now.
6 MS. CHAITOVITZ: Okay. The rest of you, if
7 you could just go in order back to me.
8 MS. HODGSON: Hi. I agree with Scott
9 completely about the issue of the damages being too low.
10 I think while the attention has been directed to these
11 big award cases with multiple awards of statutory
12 damages, that's not the everyday infringement. That's
13 the cases you hear about on the news or that make the
14 big decisions.
15 The everyday infringer can't afford to
16 litigate a copyright case because they might have one or
17 two infringements and who can take a case for them?
18 90 percent of these plaintiffs in a copyright
19 infringement action don't have a lawyer or a law firm
20 they can pay. So I hate to say it, but it used to be
21 lawyers could possibly take these kinds of cases in a
22 contingency.
23 I have a case in federal court right now. It
24 should have been a 5- or $10,000 license, $25,000
25 license, but the defendant, a major TV network who will

1 remain nameless -- it's a cost of doing business. Why
2 would they -- they wouldn't even get a license. They'd
3 rather spend $150,000 in legal fees just to keep the
4 case going.
5 So where is the -- I think you can't consider
6 statutory damages for digital and talk about secondary
7 liability for ISPs and not also talk about the
8 average -- what's happening in the reality in the
9 marketplace for statutory damages and copyright. They
10 all go together. That's one thing.
11 And, number two, I think it's not just the
12 ISPs as I just alluded to, and I actually think it would
13 be really helpful on the issue -- and I know this is not
14 the direct topic, but it's related.
15 What is willful infringement anyway? The
16 decisions are sort of all over the place on what really
17 constitutes willful infringement, and I'd like to
18 suggest that it might be worth exploring some sort of
19 what are the factors to consider in arriving at a
20 statutory willfulness determination that can be part of
21 the statute that gives rise to a presumption, perhaps in
22 a digital environment.
23 Because I ask this question: If copyright
24 exists from the moment of creation, if I know by law and
25 by definition copyright exists by moment of creation and

1 I knowingly upload a song onto the Internet or I include
2 it in a movie or on a digital trailer that's on the
3 Internet for a year advertising the TV series, where is
4 the good faith? I mean how could you not know that
5 you're using a copyrighted work? Everything is
6 copyrighted.
7 Now, as to whether it's registered or not --
8 and I've actually seen some recent cases that have
9 talked about that as an issue as to good faith. Did
10 they look it up? Did they know was there a registration
11 for the work? But I mean there needs to be some
12 discussion on that area, and it just seems to me that
13 maybe there's a presumption in the recent act, the --
14 excuse me the -- not misstated because of the Fraudulent
15 Online Identity Sanctions Act actually created a
16 reversed presumption in that statute, and that was one
17 of the things Professor Nimmer talks about at length as
18 a presumption of going towards in the digital arena some
19 sort of presumption of willfulness or bad faith in
20 certain instances, and that could, I think, be helpful
21 in this context. Thank you.
22 MS. KAROBONIK: So I think one of the most
23 important things to keep in mind in the discussion of
24 statutory damages is it really is supposed to be a
25 deterrent effect. It has to be a rational deterrence

1 effect. Pulling numbers out of thin air and making it
2 very random doesn't really have a deterrence effect
3 because if people don't know what the consequences are
4 or the consequences are so large to be totally
5 inconceivable to them like they can't put those numbers
6 into meaning, then there really isn't a deterrence
7 effect.
8 So that's why I'm skeptical of the damages --
9 imposing some sort of damages cap since I think whatever
10 number we choose, I just -- realistically I can't see --
11 I can't see legislation being proposed with such a
12 number that actually reflects reality and sanity. So
13 I'm very hesitant to go down that road.
14 I would like to see judges have some more
15 flexibility in awarding damages. I think rather than
16 adjusting the innocent infringer standard or limiting
17 statutory damages alone, I think more of a comprehensive
18 test where judges are given a list of options much like
19 they are in Canada and Israel of options that a judge
20 and a jury should consider when awarding damages. Not
21 only things like they already considered the number of
22 works, was this willful or not but also maybe did they
23 have a novel -- is this a novel question of copyright
24 law since the reality is I work with a lot of small
25 businesses -- you know, the people that are taking

1 chances based on the copyright law they have, and it has
2 to be informed decision, and sometimes, as I think we
3 all know as copyright attorneys, you can't necessarily
4 give a black-and-white answer to someone who's really
5 pushing the boundaries of technology. And although, you
6 know, if they are wrong, maybe there should be some sort
7 of punishment, but the punishments right now under
8 statutory damages, they're not just business ending.
9 They're life ruining, and I think that's something very
10 important to keep in mind.
11 I also think that one of the things we really
12 have to look at is the importance of considering things
13 like fair use in the statutory damages -- in the
14 statutory damages context. The reality is fair use is
15 so important. And honestly, rational attorneys can
16 disagree, and rational attorneys will disagree, and I
17 think all of us have probably had at least one client
18 walk into our office with a fair use discussion where we
19 have been flummoxed because they fall right on that edge
20 where it really could go either way where they have to
21 make a rational decision, and I think that's something
22 that damages should reflect that, yes, it's a risk, but
23 it shouldn't be a life-ruining risk. That's just
24 absurd.
25 And I think another -- just another thing

1 since we've touched on safe harbors, I've always been
2 skeptical of how we called it safe harbor. Is it really
3 safe harbors? Is it a safe harbor if you have to
4 litigate for seven years and spend millions of dollars?
5 That's not a safe harbor.
6 Honestly, that's the type -- this type of
7 litigation has destroyed businesses, and it will
8 continue to destroy businesses. The companies that
9 we've seen be able to fight these lawsuits, they're
10 bigger companies. They have big legal departments and
11 bigger budgets.
12 So I'd be very hesitant to raise the bar on
13 what safe harbor is since it's already a pretty high
14 bar. It's an "and" test. So if a company makes a
15 single mistake they're kicked out of safe harbor, and
16 that's an incredibly high bar especially for younger
17 companies who don't have a team of copyright lawyers.
18 I think sometimes as copyright lawyers we tend
19 to overestimate how often -- we tend to underestimate
20 not only the availability of copyright lawyers for the
21 average small company and average consumer but also
22 their cost. The average small company can't -- doesn't
23 tend -- I mean they really can't employ a team of
24 copyright attorneys. That's unrealistic. Maybe they
25 get the advice of one or two, but they're certainly not

1 full time and they're maybe, if they're incredibly
2 lucky, have a general counsel who has some copyright
3 experience, but that's the rare exception, and I think
4 we need to keep this in mind as we go forward in
5 statutory damages is that really, if we raise the bar
6 too high, we will kill innovation and we will
7 essentially create a world where the incumbents who have
8 made it, they'll stay the incumbents.
9 MS. CHAITOVITZ: Thank you. I'm going to ask
10 that we don't do repeats because I do want to move on a
11 little bit. So --
12 MR. PIETZ: Sure. So you mentioned four ideas
13 for reforming statutory damages, and I think they're all
14 good ideas worthy of debate. What I'd like to talk
15 about is a fifth idea which is really simple and which
16 will solve a big problem, but before I get to the idea I
17 want to explain the problem.
18 This is an iPhone. Can anybody tell me what
19 this is worth? One answer might be -- I don't know --
20 $500, something like that. It's not the new newest one.
21 I think this is the second oldest model, but here in
22 statutory damages land, this phone is worth $500 million
23 if we assume that it's chuck full of infringing music.
24 Now, I want to ensure our colleague from the
25 RIAA that it's not, at least not this one. But that's

1 nuts. If somebody snatched this out of my hand and got
2 convicted of a crime, they would suffer less severe
3 consequences than would be the case if the RIAA choose
4 to put the screws to me for every song that was in this
5 phone. That's insane.
6 Let me tell you a story briefly which further
7 illustrates the problem. In a case that I litigated
8 here in Los Angeles against the now somewhat notorious
9 porn company and their lawyers, one of the things that
10 came out is there was some evidence suggesting that in
11 fact the lawyers were producing their own pornography
12 solely for the purpose of suing people for infringement.
13 I would argue that we've gotten pretty far afield of
14 promoting science and the useful arts when that's an
15 effect of our statutory damages regime.
16 So that's the problem. You have this huge
17 motivation out there where all of a sudden some crappy
18 piece of content that was never likely to be worth much
19 of anything, by the miracle of rapid online distribution
20 and sometimes mass joinder in the federal courts, some
21 two-second cat video becomes worth potentially hundreds
22 of millions of dollars in online infringement if we
23 assume that enough people are inappropriately sharing
24 it.
25 The Copyright Act was negotiated in the '50s

1 and '60s. It was passed in the '70s before they had
2 even invented a fax machine. We need to substantially
3 revise what we're doing in the statutory damage realm,
4 and here's how.
5 There's a really simple way to fix the
6 problem. There needs to be a fundamental divide in
7 statutory damages between commercial and noncommercial
8 infringement. If what we're talking about is me having
9 thousands of songs on my iPhone for my own personal use
10 when I go to the gym, the $500 million penalty seems
11 outrageous. If on the other hand I have thousands of
12 songs which I am ripping and posting online in order to
13 drive advertising revenue to my website, that's a whole
14 other kettle of fish.
15 It's basically unfair to treat the individual
16 defendant who's downloading something to watch on Friday
17 night with the family the same as criminal copyright
18 conspiracies that are out there ripping off the studios,
19 and right now the law employs the willfulness standard
20 which is so vague and unclear as to be, you know, not
21 particularly helpful.
22 The system now is essentially million dollar
23 lightning strikes. Enforcement of statutory damages is
24 about as frequent as being hit by lightning, and the
25 effects are about as severe. What we do for the content

1 owners -- because what I'm proposing here is
2 substantially capping the damages for noncommercial
3 infringement. What you have to do to make it up is make
4 it easier for content owners to punish both
5 noncommercial infringement and commercial infringement.
6 So basically what we need is something more
7 akin to a small claim system for the individual
8 noncommercial infringements. One of the problems with
9 cases, with copyright infringement cases, particularly
10 for cases targeted at individual defendants, is there is
11 literally no way to sue somebody for copyright
12 infringement without making a federal case out of it.
13 The problem is that to get into any of these
14 cases or to argue your fair use, to argue your
15 nonwillfulness, you're going to spend hundreds of
16 thousands of dollars in attorneys' fees, and for most
17 people that's potentially life ruining. So there's a
18 problem. There's a big problem.
19 You see federal courts using words like
20 "deluge, "tsunami," with the flood of individual
21 defendant copyright infringement suits, but there's a
22 really easy way to fix it. The next Copyright Act needs
23 a divide between commercial and noncommercial
24 infringement. That's my piece. Thank you.
25 MS. STILWELL: Okay. With respect to the

1 total damages cap, if that were to be removed, it would
2 be a big detriment to the deterrent effect of the
3 statutory damage scheme as it exists now. The
4 Megauploads of the world and the Limewires and the next
5 generations of BitTorrent or whatever the mechanism of
6 delivery is -- these are big, big businesses, and to
7 impose a total damage cap would make these organizations
8 very happy, and the artists and copyright owners whose
9 work is being infringed would suffer greatly.
10 And this applies, I think, not just to the big
11 entities, the secondary liability situation, but even
12 private individuals who infringe can be capable of
13 causing a great deal of damage if one individual, even
14 without a profit motive involved, distributes a
15 recording or a film before its commercial street date,
16 that causes a lot of damage, and so to remove the total
17 damage cap I think would be a really big mistake.
18 With respect to increasing the flexibility to
19 award less per work infringed, the innocent infringer --
20 bottom line the minimum amount of damages is already
21 $200, which is plenty low from the perspective of an
22 artist. There's no reason to change that.
23 With respect to -- I'm going to lump these
24 together -- changing the innocent infringement criteria
25 and limiting the range of damages if there's a good

1 faith belief that the use is noninfringing, these --
2 first of all, I think juries are capable of separating
3 out really bad actors from those who are not. So I see
4 no reason to change these, but also these two go to the
5 culpability of the infringer only and don't really
6 address the potential damage to the copyright owner that
7 is suffered.
8 So I represent artists. I represented the
9 heirs of an artist who is the subject of a website, the
10 sole purpose of which was to have a hub for users to
11 exchange bootleg recordings of this deceased artist, and
12 the site was nonprofit, no subscription base and it
13 wasn't ad revenue based. It was just a nonprofit
14 bootlegging operation, but these were the hardest core
15 fans of this deceased artist, and so nobody was making a
16 profit either from the perspective of the people who
17 were organizing the site or the individual users.
18 And if you look at the community of users,
19 there are varying opinions about whether these people
20 are bad actors. In their world they were making the
21 world a better place by making music available that
22 wouldn't otherwise be made available. But from the
23 family's perspective, the harm that was caused by this
24 site was quite great, both in terms of finances and them
25 not getting paid what they should have been paid but

1 also in terms of the loss of creative control.
2 So to bifurcate the statutory damages
3 framework and impose restrictions on what a court can do
4 with respect to so-called innocent infringers, it
5 doesn't need changing, and it would harm the deterrent
6 effect. So I think for each of these four proposals, I
7 don't see the utility of it, and I think all four would
8 be ill advised.
9 MS. CHAITOVITZ: Thank you. So what about --
10 what do you think about allowing the court to calculate
11 damages that are not based on the number of works
12 infringed but based on the actor and the actions?
13 MR. PIETZ: I think it's a good idea, and in
14 particular, you know, say you get this situation, which
15 I have seen, where you get people who are downloading
16 stuff who really just don't understand that the stuff on
17 BitTorrent isn't all available there because it's free
18 content. Now, maybe in today's world that's a rare
19 case, but it does happen. There are people like that.
20 In that circumstance, you know, say that
21 they've been making the same mistake but over and over
22 again for -- you know, meanwhile they've downloaded
23 2,000 various movies, songs or other things. Even if
24 they're successful in proving innocent infringement or
25 perhaps they fall short of innocent infringement and

1 they just -- you know, they can't afford to hire a
2 lawyer to get the findings of innocent infringement, and
3 even if they just get the minimum statutory damages of
4 $750, it's still a big problem.
5 In my view the appropriate calibration for
6 noncommercial infringement is some multiple of what the
7 license fee ought to be to buy the work in the first
8 place. I think once you start talking about four or
9 five times multiples of the license fee, that's still
10 going to be a deterrent effect, but it's more like a
11 parking ticket kind of deterrent effect as opposed to if
12 we catch you, you're going to get the death penalty, or
13 at least the financial death penalty.
14 So I think in terms of -- I'm not sure that
15 the per-work statutory damage model is the right way to
16 calibrate it, at least in all cases. I think certainly
17 within the context of considering what to do about the
18 next Copyright Act, there ought to be room for
19 additional concepts beyond just the pro work or perhaps
20 alternatives.
21 MS. CHAITOVITZ: And also the question was
22 mostly about to allow judges discretion for secondary
23 liability for mass online infringement so that it
24 wouldn't be necessarily judged to the number of works,
25 but the judge would have the discretion to look at the

1 business.
2 I think you were next, George.
3 MR. BORKOWSKI: I think there's a lot of
4 exaggeration and speculation in terms of these types of
5 life-ending events that supposedly will result from
6 statutory damages. I don't think there's much empirical
7 evidence to support it. The problem I have with your
8 suggestion is that there's been a transition already
9 since the older copyright acts. The earlier acts, I
10 think the 1895 act and maybe even the acts that preceded
11 it, all of which have statutory damages, they allowed
12 statutory damages to be imposed per copy, and eventually
13 that moved over into what is interpreted as allowing
14 statutory damages per work infringed. So it's already
15 moved away from the per copy scenario which in the
16 digital environment would truly be life ending.
17 Um, but -- so it's already been weakened or
18 lessened to that extent. I don't think -- I think you
19 do need to take into account the number of works
20 infringed. I reject the notion that -- I know you're
21 talking about secondary intermediaries, but just to
22 harken back to one comment made earlier, I reject the
23 notion that an individual who downloads 200 movies has
24 no idea he's violating copyrights. That's nonsense.
25 With respect to intermediaries, I think the

1 amount of works infringed or that -- that -- that they
2 enable infringement of is part and parcel of the conduct
3 of that intermediary. So I don't think you can separate
4 the two. I think how bad the conduct is and how bad the
5 business model is is one thing, but you have somebody
6 like Megaupload who arguably is the largest secondary
7 infringer in history. The number of works that he
8 helped infringe is really significant. I think in the
9 calculus, and I don't think you should take away the
10 focus on the number of works infringed. If it's a
11 startup business model that kind of has something
12 interesting going on, I think you have a compelling
13 argument that, "Look, we thought we were on the right
14 side of the law. You said we're not. So, you know, we
15 shouldn't get popped too much for it." I don't think
16 there's a lot of statutory damages that are over the top
17 in these cases.
18 I will say one last thing. Then I'll pass the
19 mic. The pornography example is a bad example. I know
20 it's a really big problem. I grant that, but I think it
21 is really kind of unique to kind of sleazy lawyers in
22 that part of the world who are really trying to shake
23 people down, and they have done a lot of things which
24 are questionable ethics, and I think courts are starting
25 to recognize that, so I would hope that that isn't

1 driving the whole discussion because I think it is kind
2 of unique to that part.
3 I think you should take action against it
4 because I think some of this stuff is really terrible,
5 but I don't think that should drive the discussion. I
6 think that's somewhat of an outlier.
7 MR. STOLTZ: Very quick on that point about
8 the phenomenon we call copyright trolling, abusive
9 litigation against individual Internet users primarily
10 by pornography companies. There are also some others,
11 but there was an empirical study this year by Matthew
12 Sag, "An Empirical Study of Copyright Trolling."
13 Among other things, he noticed that copyright
14 trolling, which he defined as multi-defendant John Doe
15 lawsuits, again, primarily porn, they were one-third of
16 all copyright suits filed in the United States in 2013.
17 In four states they were the majority of copyright suits
18 filed. So that's not a niche. That's really a pretty
19 major component, a pretty major effect of the statutory
20 damages regime.
21 Getting back to your point, I think we can
22 talk for secondary liability talking about taking into
23 account the nature of the business and sort of what we
24 think of as a good actor and a bad actor. I don't know
25 that we need more flexibility. If anything, the regime

1 as it is right now is a little bit too flexible. There
2 are not guidelines for how to apply these notions of
3 good actor or bad actor. Those are very subjective
4 notions that will contribute to even more unpredictable
5 statutory damages awards, and unpredictability I think
6 is an enemy here. Certainly it may deter infringement,
7 but it deters a lot of conduct that the Copyright Act is
8 supposed to promote. It's going to deter the use of
9 exceptions like fair use. It's going to deter reuse of
10 works, preservation of works. It's going to deter
11 lawful speech, frankly, speech that all of our law is
12 supposed to promote. It's going to deter investment.
13 I there were some folks that were talking
14 about investment, but if -- if a business started in
15 good faith and with a reasonable legal position on
16 which, you know, reasonable minds might disagree -- is
17 facing the potential of, you know, up to $150,000 per
18 work that it touches, that really dries up investment.
19 Again, I'll point to another paper by --
20 Michael Carrier did a paper. I think this was mentioned
21 in one of the earlier roundtables called "Copyright
22 Innovation, The Untold Story," speaking mostly about the
23 aftermath of the Napster litigation.
24 What he said was investment in digital music
25 businesses all but vanished for several years after the

1 Napster litigation, and that was due in part, large part
2 because of the fear of statutory damages. So any
3 investment in technologies that were really going to
4 drive the market for -- the lawful market for content
5 for music especially was scared off. The venture
6 capital and the investment money went elsewhere.
7 I think regardless of whether we take into
8 account sort of good actor, bad actor for secondary
9 liability for intermediaries -- and this is really
10 especially true in the secondary liability context that
11 we have to start with the actual harm, either the actual
12 somewhat -- some attempt to measure the actual harm to a
13 copyright holder or the actual profits to an infringer
14 which is really going to be just like pretty much any
15 other area of law.
16 Copyright is unique in this way, and it's
17 really unique among copyright laws in the world in this
18 way that it really can be completely divorced from
19 actual harm. Now, it's easy to say, oh, well, this can
20 come up. The judge can talk about actual harm. The
21 jury can hear that. They probably do, but they don't
22 have to.
23 An award of statutory damages can, under our
24 system, be based entirely on emotional factors, on sort
25 of painting the defendant as a bad guy or the plaintiff

1 as a suffering victim, again, divorced from any notion
2 of actual harm.
3 I think if we start with actual harm, it
4 doesn't rule out a notion of punitive damage, a notion
5 that more deterrence is needed. It's just that it
6 should start with actual harm as it does in personal
7 injury law, as it does in this sort of other complex
8 statutory civil law like antitrust or civil RICO any
9 sort of complex regime similar to copyright.
10 The courts have evolved, you know, not perfect
11 but pretty good processes that folks generally agree
12 lead to, you know, a figure. You know, this is our best
13 guess. This is the jury's best guess based on evidence,
14 based on science, based on facts and testimony that this
15 is what will make the plaintiff whole or this is what
16 will disgorge unlawful profits, and then maybe we
17 multiply if there's willful -- if there's sort of
18 egregious or malicious conduct, but I think the more we
19 start talking about adding factors of, you know, is this
20 a good guy or a bad guy? We already have that, and
21 that's what led to, you know, verdicts like the
22 Thomas-Rasset case and the Tenenbaum case where we're
23 talking about $9,000 a song.
24 Say what you will about Jammie Thomas and Joel
25 Tenenbaum. Maybe they were bad actors, but those

1 verdicts, I submit -- those judgments, 9,000 a song,
2 $675,000 for 30 songs -- really just life-destroying
3 verdicts. We're based on appeals to emotion and not on
4 any notion of compensation and, frankly, not based on
5 any rational notion of deterrence.
6 MS. CHAITOVITZ: We've got time -- we're
7 running out of time, so if -- I'll continue. I don't
8 know if Cheryl or Dennis was next. I'll go with you,
9 Cheryl, and then Dennis. And just --
10 MS. HODGSON: I'll make it brief. On the
11 issue of deterrence, I think there's already a certain
12 amount of that built into the notion of willfulness
13 which goes back to my earlier comment. I think some
14 clarification on the factors to be considered in
15 willfulness, whether it's secondary liability or primary
16 liability, that all needs to be addressed, and I think
17 you can't talk about amending one aspect of statutory
18 damages without clarifying it all.
19 For example, right now there's a huge issue in
20 statutory damages that's largely been created by two
21 factors: One statute that says a compilation is to be
22 regarded as one work for purposes of calculating
23 statutory damages, and that got brought front and center
24 in many of the cases involving secondary liability and
25 music digital cases where the court said, well, even if

1 there are 15 songs on an album or ten songs on an album,
2 that's only one work.
3 Well, that leads to a very unjust result if
4 that's the blanket rule. That may be the rule for ISPs
5 or secondary liability, but it certainly should not be
6 the rule in the case of individual infringements, and I
7 will give you a very specific example. With the
8 consolidation of the music industry, we're now left with
9 three major labels that own massive amounts of the
10 content.
11 Under the current law, most of the judges --
12 and I've read three decisions recently, and I think
13 actually they're all wrong not because they didn't get
14 the law right but because it wasn't explained to them
15 correctly. If I'm a music publisher or administrator,
16 third-party administrator, I may not even own the rights
17 but I hold title to the copyright. If I have an entire
18 album of material that's infringed, I'm limited to one
19 award of statutory damages as one work.
20 However, each of those ten songs may have ten
21 different copyright owners. They may have ten different
22 composers. The composers have different royalty
23 obligations even if it is the same. Let's say it's Sony
24 music owns the album and Sony music owns the publishing.
25 The royalty obligations that they incur and where those

1 damage awards go are completely different for the
2 masters than they are for the songs, and yet if you go
3 to court now, that is all considered one award of
4 statutory damages, and a lot of that confusion has been
5 brought about because of the arguments made by the
6 technology companies when they were sued for
7 infringement, and that was the way they got the damage
8 awards limited.
9 I'm not saying theirs shouldn't be limited,
10 but I do think there has to be a distinction between
11 that situation and really taking away the copyright
12 protection in effect by saying it's one work when it's
13 not one work.
14 And, by the way, I'll close with this: The
15 test of the courts is is that copyrighted work capable
16 of living its own life, it's own independent economic
17 life? Well, now that people aren't selling albums, who
18 could argue that a digital download of one song is not
19 an individual economic life? Yet if you go to court on
20 an album with songs that are infringed, there's one
21 award. So I just think that whole thing needs to be
22 clarified together at the same time.
23 MR. DREITH: That's exactly correct that any
24 longer albums are really not a single work and they
25 haven't been for many, many years.

1 However, speaking to the question about
2 secondary damages and where there should be some
3 flexibility, I first want to say that truly bad
4 behaviors should face a business-ending event. If
5 somebody is engaged in bad behavior and there's a volume
6 of that, I think the sympathy that we don't want to put
7 somebody like that out of business is ridiculous. They
8 should be put out of business. They don't deserve to
9 have a business that continues.
10 Having said that, I think there are
11 circumstances, especially in a case of secondary uses
12 and secondary liability, where really some of the
13 behavior may appear to be widespread but is not a
14 company that should be put out of business for doing
15 that, and I think there should be some flexibility
16 allowed in the courts, and I know that that creates
17 uncertainty. I still think the deterrents should be in
18 place, but I think the court should be allowed some
19 flexibility in situations because it's just not a
20 one-size-fits-all situation.
21 MR. BORKOWSKI: I'll try to be brief. I
22 actually agree that it would be good to have a
23 discussion as to whether certain uniform guidelines
24 should be applied when it's making a determination as to
25 both the amount of statutory damages to be imposed and

1 whether there was willful infringement and whether the
2 damages should be enhanced because of willful conduct.
3 I agree that there isn't enough guidance out
4 there. I think some judges do give very detailed jury
5 instructions to juries on these issues; others may not.
6 And I think that some kind of uniform system would be
7 something to discuss. I think that is something that we
8 would definitely consider.
9 I just want to make two brief points in
10 response to Mitch. I think the second study that you
11 cited also said something like 89 percent of all
12 companies would rather do business under the U.S.
13 copyright scheme than in Europe where they don't have
14 statutory damages. So I'm not quite sure that that
15 study entirely shows that innovation or that statutory
16 damages are cutting back on innovation.
17 I also don't think there's much evidence
18 of that. There are currently 2500, at least, licensed
19 digital music businesses out there that we are aware of,
20 2500 using all sorts of technologies, and that's just
21 music, and there are plenty in other areas.
22 And the last thing I'll say is you can't -- in
23 my view, you can't focus on the actual harm because that
24 is contrary to the nature of statutory damages. The
25 whole idea of statutory damages is that you don't have

1 to show actual harm. You don't have to show actual
2 damage because it's difficult to show and that this
3 protects a public good and that copyright -- copyright
4 is a public good that needs to be protected.
5 Ever since the Williams court -- the Williams
6 case that the Supreme Court came down with decades ago,
7 and the whole notion is that it needs to be
8 disproportionate to the harm in order to have
9 deterrence; otherwise, what you're doing is you're
10 imposing a compulsory license on the content owners, and
11 if somebody gets caught, they essentially pay the
12 license fee or maybe a small multiple above the standard
13 license fee, and that's not the purpose of the statutory
14 damages which I do not think are unique. They are not
15 unique to the copyright realm. There are other areas of
16 law that have statutory damages, and they serve very
17 different purposes than compensation.
18 And, you know, I'm not going to get into the
19 discussion of Thomas and Tenenbaum, though I can, except
20 to agree with Dennis that bad actors need to be punished
21 more than not bad actors.
22 MR. BURROUGHS: Okay. I just want to add real
23 briefly, though we're running out of time, something
24 Cheryl said about the sufficiency of statutory damages.
25 The example of the online context is even worse for the

1 artist or the content creator because those ten songs,
2 if they're uploaded by or obtained by ten websites from
3 the subloader, you're going to be limited to $150,000
4 award against all ten of these websites. So if they can
5 use that material to drive advertising revenue to drive
6 traffic, it might be worth it for them. It might be a
7 cost of doing business to upload an album that they know
8 is widely disseminated because they know the statutory
9 damages are going to be limited to this $150,000 award
10 for this one chain of infringement. Now, we can fix
11 that easily by saying that the $150,000 award should be
12 discrete for each website for each actor in the chain. I don't think
13 that would cause much of an issue, and we can also make
14 it easy for content creators in today's Internet age to
15 bring a case by getting rid of the timely registration
16 requirement.
17 It just made sense 20 years ago if you're a
18 musician and you release your album through Universal,
19 there's attorneys there. They're making sure that
20 you're doing registration and you're doing it properly.
21 Today a guy in his bedroom with pro tools can create a
22 couple of songs and he posts those to his Web page.
23 Those are taken by, let's say, a car company and used in
24 a commercial. He probably doesn't have an attorney. He
25 cannot seek statutory damages, and if the Copyright Act

1 is there to spur innovation to protect contact creators,
2 we have to be cognizant of the fact that content
3 creators now are not always going to be part of a
4 company. They're often individuals or they're part of
5 small companies without the resources in a lot of cases
6 to seek registrations. So we might want to revisit the
7 requirement of a timely registration for seeking
8 statutory damages.
9 MR. GOLANT: Thank you all. We're going to
10 switch gears now, and I know time is limited. So I'm
11 going to do a quick one-we are going to go toward the individual
12 file share questions that I have before me, and this one
13 is should individual file sharers be treated any
14 differently from individual nonprofit-seeking
15 infringers?
16 So thinking about in that context, we're
17 talking about secondary liability, and now we're going
18 to look at the individual. Any ideas on how to answer
19 that question?
20 MR. PIETZ: So I think it's a great question.
21 And in particular, there was an example earlier today
22 about the nonprofit website that's sharing bootlegs, and
23 how is that different than from, say, somebody
24 downloading movies to watch them for their own personal
25 use?

1 I think the difference ought to be reflected
2 perhaps in the realm of actual rather than statutory
3 damages. What I was struck by the example of the
4 website with bootleggers was that although what they're
5 doing -- they may have had a good faith belief that what
6 they were doing was allowed by the Copyright Act,
7 there's actual harm being caused by that website
8 potentially. It's measurable.
9 So I think that to the extent that statutory
10 damages under a future Copyright Act were calculated
11 based on some multiple of actual harm, there would be a
12 provision to potentially differentiate between
13 individuals and, say, nonprofit organizations.
14 MR. GOLANT: Thanks.
15 Does anyone else have any responses to that
16 particular question?
17 MR. BORKOWSKI: I think a lot of our earlier
18 comments that several people made did kind of answer at
19 least our views on it. I think the focus should be on
20 the nature and extent of infringement rather than the
21 actor because I think you can have bad individual actors
22 or not -- or less bad or close to innocent individual
23 actors.
24 I think the same is true with intermediaries
25 and companies. So I think it's the nature and extent of

1 infringement that should be the focus rather than the
2 type of entity.
3 MR. GOLANT: Very good. Dennis.
4 MR. DREITH: I actually tend to agree with
5 George. I think that while the sympathy seems to want
6 to say we want to treat people or not-for-profit
7 situations different than those who are profit-making
8 entities, I really think it has to be the extent or the
9 circumstances that really has to be weighed more than
10 whether it's a profit or nonprofit entity.
11 MR. GOLANT: Very good.
12 Mitch, you're next.
13 MR. STOLTZ: I think when it comes to
14 individuals, I think there's a faulty logic going on
15 regarding deterrents. On some trivial level any
16 increase in penalties or potential penalties increases
17 deterrents up until the point where a person has to
18 declare bankruptcy, at which point it's kind of all the
19 same above that, but at what cost?
20 We can talk -- we can say -- you know, it's
21 easy to say any increase in penalties increases
22 deterrents, and therefore any decrease in penalties will
23 decrease deterrents. You know, the real question is at
24 what cost? At what cost in incentive for abuse of the
25 system? What cost in over deterring creative work that

1 the Copyright Act is explicitly supposed to promote.
2 And it's interesting there's a disconnect on
3 some comments here. On the one hand, I feel like we're
4 hearing the broad range of statutory damages exist to
5 give judges and juries flexibility. The upper end is
6 rarely used. There's really no need to focus on the
7 upper end. It's just there for flexibility, and then on
8 the other hand we're hearing we need to keep higher
9 amounts visible to the public, and that's a real
10 interesting disconnect because I think that's a
11 recognition that those high amounts -- that 150,000, you
12 know, which shows up in the warnings before a movie. It
13 shows up in the labels on a music CD. You know, it's in
14 news stories. It really is put before the public that
15 that number and discussion of it and this -- you know,
16 the message that that law sends has at least as much
17 effect as actual jury awards.
18 MR. GOLANT: Thanks. I think we had Rachel.
19 I think you were next.
20 MS. STILWELL: So with respect to treating
21 individual file sharers differently, individual file
22 sharers, as I said before, can cause great harm. If an
23 individual is leaking copyrighted work before its street
24 date, it causes substantial harm, and the courts should
25 have the present level of discretion to address the

1 really bad actor individuals just as well as they do
2 the big entities for secondary liability, and in the
3 case of -- similarly in the case of the bootleg site --
4 by the way, I want to clarify that artist did write
5 all of his own work, and so it wasn't just bootlegging
6 laws being violated. It was copyright infringement.
7 In the eyes of the family, those individuals
8 that offer bootlegs that they know that or they believe
9 that the artist would not have wanted released, that
10 that caused them a great deal of harm, and they would
11 want a judge to be able and a jury to be able to
12 consider those factors, and, you know, I just don't
13 think it's necessary to treat them differently.
14 MR. GOLANT: I think, Teri, you had the card
15 up. We'll take your response, and then we'll ask if
16 anyone has any comments from the audience and then
17 break.
18 MS. KAROBONIK: Okay. I'll try to keep it
19 short. I think the distinction between individual file
20 sharers and small nonprofit file sharers might be a
21 false distinction. I think the reality is a lot of
22 these individuals, no matter what side they're on, I
23 think we overestimate how much the public really
24 understands, not only our area of law but the
25 technologies that govern copyright law. Yes, there are

1 some bad actors out there who do know exactly what
2 they're doing, but I do work with on a daily basis a lot
3 of younger creators.
4 So think about yourself in high school. Think
5 about yourself in college. Would you have had the
6 sophistication to deal with complicated copyright
7 exceptions like the archive exception? Honestly I'd
8 like to think I was fairly savvy in college, but I think
9 that's something that I would have struggled with, and
10 the average high schooler, you know, college-age student
11 or even someone who just doesn't have that level of
12 sophistication, they probably won't have access to an
13 attorney.
14 So, you know, it's really hard to group those
15 people who are -- you know, who make mistakes just
16 because they misinterpret the law with those clear bad
17 actors, and I don't think they should be grouped
18 together.
19 MR. GOLANT: Great. Thanks for all of your
20 responses. Anyone in the audience have any comments?
21 Just comments. Not questions.
22 MS. CHAITOVITZ: And online too. So if you're
23 online, you can call the phone bridge.
24 MR. GOLANT: Steve.
25 THE OPERATOR: This is the operator. I show

1 no questions from the phone bridge at this time.

2 MR. TEPP: I'm Steve Tepp representing the

3 Worldwide Peace Center of the U.S. Chamber of Commerce.

4 Just a few observations about a couple of things that

5 were said during this discussion.

6 It was suggested that the purpose of copyright

7 is not to stop infringement. My free right speech is

8 being infringed.

9 So there was a suggestion that the purpose of

10 any copyright system must include an element to prevent

11 violation of the rights it provides or it's meaningless.

12 So clearly one of the purposes of copyright law is in

13 fact to prevent or stop ongoing infringements. That's

14 fundamental.

15 It was also suggested that infringements are

16 not difficult to find. In some cases that may be true.

17 Unfortunately, in all too many cases, they are very

18 difficult to find. Very difficult to find the people

19 who are behind them even if you can identify the

20 infringing activity, and in fact the legislative history

21 of the 1999 amendments that brought us to the current

22 level of statutory damages focused on exactly that

23 problem as a rationale for the increase at that time.

24 Third, there's a question of abusive

25 litigation. I think there certainly should be and are

1 ways to address abusive litigation tactics both in the
2 Copyright Act and in the rules of civil procedure,
3 particularly where you have a claim that is meritorious
4 where there is a copyright owner with a copyrightable
5 work that is being infringed. I think trolling is an
6 inappropriate term and villainization of copyright
7 owners is probably not the best way to have a discussion
8 about the proper level of statutory damages.
9 But to end on maybe a positive note, one of
10 the suggestions seemed to be that a small claims system
11 could be a useful approach here because, of course, as
12 the Copyright Office report on the subject has
13 indicated, that would be up to a certain level of
14 monetary awards, and I think when the parties are
15 voluntarily before such a body, that is a useful way to
16 approach at least some of this issue and maybe a way
17 forward that's not particularly controversial. Thank
18 you.
19 MR. GOLANT: Thanks, Steve.
20 MR. STOLTZ: Steve, your organization, the
21 U.S. Chamber of Commerce has called statutory damages a
22 serious burden on small business owners and an
23 invitation to lawsuit abuse. That was in the context of
24 junk faxes. I was wondering why you believe copyright
25 is different from junk faxes as far as the incentive for

1 lawsuit abuse.
2 MR. TEPP: I'm not familiar with that
3 particular quote, so I can't verify it, but copyright is
4 property right. It's been shown that the harm from
5 copyright infringement is difficult, if not impossible
6 to prove, and so I think it's quite fundamental, and
7 that's the reason statutory damages existed before the
8 constitution was ratified and state copyright laws and
9 has been in U.S. federal copyright laws since 1790
10 without interruption.
11 MR. GOLANT: We've got one more comment.
12 MS. ROSENBLATT: Very briefly. Betsy
13 Rosenblatt from the Organization for Transformative
14 Works. I have a comment that goes a little bit to the
15 willfulness question that Cheryl raised and also the --
16 also Morgan's suggestion about profit seeking versus
17 nonprofit seeking.
18 There's a huge difference in the place that I
19 think many of the panelists are coming from between
20 wanting to deter and punish piracy on the one hand and
21 on the other hand behaviors that may be very close to
22 the line of infringement. I'm about to be on the remix
23 panel, so you can tell what's on my mind, but I think
24 any regime for statutory damages would do well to take
25 into account that there's a huge difference between

1 piracy and forms of infringement that are closer to the
2 line.
3 MR. GOLANT: Thanks for the comments. We have
4 one more minute. Does anyone want to respond to what
5 these two people from the audience have said?
6 Morgan.
7 MR. PIETZ: I just want to make one really
8 sort of brief and fundamental point about deterrence.
9 If you wanted to draw up a law on economics calculations
10 for how to effectively achieve deterrence -- right? --
11 we're here today really focused on the wrong variable,
12 which is what's the punishment?
13 You know, the bigger variable when we're
14 talking about effective deterrents as far as copyright
15 infringement goes is what's the likelihood of
16 enforcement?
17 So I guess my comment is this: We've heard
18 from people on one side that for the bad actors, however
19 that's defined, the penalty should be higher. At least
20 my message here has been on the low end of the scale.
21 When we're talking about individuals in the
22 noncommercial context, the statutory damage number needs
23 to be lower.
24 I propose the commercial/noncommercial divide,
25 but my point is just this: A more effective deterrent,

1 even if you lower the number for statutory damages for
2 noncommercial infringement, if on the other hand you
3 increase the likelihood of enforcement for that, you end
4 up with a net overall increase in deterrence despite the
5 fact that you've lowered the statutory damage down to
6 something that I think most people would see as a lot
7 more reasonable. So that's all. Thank you.
8 MR. GOLANT: Thanks for that, and with that
9 comment we wrap up our statutory damages panel. We'll
10 have a half-hour break, convene back at 11:00 for
11 remixes, and we'll see you then.
12 (Recess taken.)
13 MS. CHAITOVITZ: Hello. And welcome to our
14 second panel today. Our second discussion is about
15 remixes. So advances in digital technology have made
16 the creation of remixes or mash-ups easier and cheaper
17 than ever before providing greater opportunities for
18 enhanced creativity. The Green Paper defines the term
19 remixes as creative new works produced through changing
20 and combining portions of existing works.
21 These types of user-generated content are the
22 hallmark of today's Internet, in particular video
23 sharing sites, but because remixes typically rely on
24 copyrighted works as source material, often using
25 portions of multiple works, they can raise daunting

1 legal and licensing issues. So there may be
2 considerable legal uncertainty given the fact-specific
3 balancing required by fair use and the fact that
4 licenses may not easily be available.
5 So before I get to my first question, I'm
6 going to ask that we go down the panel and that
7 everybody introduce themselves, and also as I ask
8 questions, when you want to respond, if you'll just turn
9 your card this way, I'll try and remember the order that
10 they get turned around.
11 So Gerard, do you want to start?
12 MR. FOX: Sure. I'm Gerard Fox, and I'm with
13 the Law Offices of Gerard Fox, and I'm a trial attorney
14 who litigates quite a few copyright cases across
15 different industries.
16 MS. LaPOLT: My name is Dina LaPolt, and I'm a
17 transactional entertainment lawyer in Los Angeles at the
18 firm of LaPolt Law. We represent creators, authors,
19 actors, any owners and controllers of intellectual
20 property. In addition, I teach at UCLA extension a
21 class in music law, and I'm also a musician. My
22 undergraduate degree is in music.
23 MS. KAROBONIK: Hello again. I'm Teri
24 Karobonik from New Media Rights. New Media Rights is a
25 nonprofit organization that provides free and low cost

1 legal services, primarily providing transactional to
2 artists, creators and entrepreneurs of all kinds.
3 MS. ROTHMAN: Hi, I'm Jennifer Rothman. I'm a
4 professor of law here in the Joseph Scott Fellow at
5 Loyola Law School. I specialize and teach and write in
6 the areas of copyright and intellectual property, and I
7 also advise clients in those areas. And in a prior life
8 before I was doing IP law, I was also a filmmaker, both
9 independent as well as working with some of the major
10 studios and doing documentary and fiction works. Sort
11 of a nexus of the two worlds.
12 MR. FREUNDLICH: I'm Ken -- I'm Ken
13 Freundlich. I'm with the firm of Freundlich Law. I'm
14 an intellectual property litigator. I have offices here
15 and in New York, and among my clients are artists,
16 producers, filmmakers and copyright owners of all
17 different kinds, and I've had a fair amount of practice
18 across all industries in various copyright issues.
19 MS. MUDDIMAN: I'm Helene Muddiman. I'm a
20 composer and a songwriter, and I just started a company
21 called Hollywood Elite Composers which is aggregating
22 catalogs from composers and song writers.
23 MR. TURLEY-TREJO: My name is Ty Turley-Trejo.
24 I here from Bringham Young University over in Utah, and
25 I work as a licensing administrator in our copyright

1 licensing office primarily dealing with music licensing,
2 and I also am a student. I'm a -- I got my
3 undergraduate in music and getting my masters in
4 orchestral conducting. So I'm a musician as well. And
5 I also, before I worked as a licensing administrator,
6 ran a private clearance company for music clearance
7 company for film and television.
8 MR. COOPER: My name is Jay Cooper. I double
9 on saxophone, clarinet and flute. That's where I
10 started my life.
11 I'm the founder of the entertainment
12 department at Greenberg Traurig here on the West Coast.
13 My practice is principally on the -- representing
14 artists in music, television and motion pictures.
15 MS. ROSENBLATT: I'm Betsy Rosenblatt, and
16 continuing with the theme, I actually am also a former
17 musician and composer, but now I'm a professor at
18 Whittier Law School where I run the center for
19 intellectual property law, and I'm also here on behalf
20 as legal chair of the organization for transformative
21 works, which is a nonprofit focused on protecting and
22 preserving transformative noncommercial fan works and
23 fan cultures.
24 MS. CHAITOVITZ: Thank you. So our first
25 question is many of our commenters, both owners and

1 users, point to a large number of remixes that are
2 available online and conclude that fair use, combined
3 with marketplace mechanisms, function.
4 Do you agree? Is the current case law
5 interpreting fair use handling the issues appropriately
6 and is the creation of remixes being unacceptably
7 impeded by legal uncertainty?
8 MR. FOX: I'll jump in here.
9 MS. CHAITOVITZ: You've got to put up your
10 card.
11 So Dina, you were first.
12 MS. LaPOLT: No, but I'm going to defer to my
13 colleague.
14 MR. FOX: Well, first of all, I'd just would
15 like to say that there's a lot of confusion, and that's
16 the most important thing to note, and the uncertainty is
17 created by the fact that media entities like You-Tube
18 now are developing their own processes for handling
19 this. For example, You-Tube content, if you qualify for
20 the program, you can actually take down what you
21 consider to be an infringing use. And then, you know,
22 that overlooks concepts such as fair use, which is very
23 complicated, and gives the copyright holder, I think,
24 too much authority.
25 And in terms of dealing with this situation, I

1 think one of the things that has to be looked at very
2 seriously is a small claims copyright court because no
3 matter how you're looking at these issues in the real
4 world application, often the amount and controversy is
5 simply not enough for the court system to be used,
6 especially with the attorneys' fees provisions, and I
7 think there's been a lot of discussion, both on the
8 congressional level and elsewhere, about a small claims
9 copyright court.
10 So those are some just opening comments.
11 MS. CHAITOVITZ: Thank you.
12 MS. LaPOLT: Thanks, Ann.
13 Why are we talking about this? I mean, I'm
14 going to tell you the system is not broken. Okay. So
15 if you own a property and someone wants to use your
16 property, you need to get permission. And I know that
17 in the Green Paper that we -- you talk about the remix
18 issue and you don't -- you don't advocate nor do you
19 oppose any compulsory licensing or government
20 regulation.
21 However, with these roundtable sessions, these
22 issues have been raised, starting with the first session
23 in Washington D.C. on December 12 when Peter DiCola was
24 on the panel. He was the first one who talked about
25 compulsory licensing, so it set the tone for the rest of

1 the roundtable. So I need to address that issue even
2 though you have not written about it specifically in the
3 Green Paper because I represent creators, music creators
4 largely. My passion is advocating for their rights. I
5 feel as though I have to get my statements on the
6 record.
7 And the issue with the remixing is it's a
8 derivative work. We are not so -- we don't have the
9 moral rights of authors the way they do in Europe. So
10 the only thing we have is the derivative right, and we
11 put any limitations on the derivative right or we oppose
12 any type of compulsory licensing or any portion of
13 derivative right, it will substantially devalue music.
14 Okay.
15 This is a perfect example of the way it works
16 with the willing buyer, willing seller standard. And by
17 the end of the day, if someone says no, you can't use
18 it, you can't use it.
19 Now, I've been on the other side. I've been
20 on both sides of the spectrum. I represented the estate
21 of Tupac Shakur for almost 13 years, and I'm telling
22 you, sometimes we try to clear samples and we were told
23 no. I went to the ends of the earth stalking people to
24 try and get clearance because we needed a Tracy Chapman
25 song. She doesn't approve anything. So I accosted

1 her -- well, at the dessert table at the American Music
2 Awards. I saw her and I went up to her and I explained
3 to her why I needed the song, and we actually got the
4 clearance, but the point being that it was her right to
5 say no, and sometimes it was very difficult to call the
6 client to say we couldn't get the sample clear or the
7 remix clear, but that's the breaks.
8 On the other hand, representing someone that
9 says no. You know, I appreciate that, you know, people
10 will call me up and try to explain their plight and why
11 they think the remix or the mash-up and the sample
12 should be approved. But at the end of the day, if it
13 changes the artistic integrity of the song writer or the
14 recording artist intended when they recorded or wrote this song, my
15 clients
16 have the right too say no.
17 Specifically, Steven Tyler with "Dream On."
18 That's a song that has great meaning to him. Every time
19 the song is covered, which under Section 115 is a good
20 example of why we have these compulsory licenses that
21 don't really help the artist or the songwriter. So when
22 anybody covers "Dream On," if it's a cover version that
23 he doesn't like or that's upsetting to him, he's very,
24 very upset on that. And explaining to him that people
25 are allowed to cover his songs is always a conversation
26 that I have to have and it's a difficult conversation.

1 Now, on the other hand, if someone was allowed
2 to create a remix of his song or mash it up with another
3 song, it changes the artistic integrity of what he
4 intended when he wrote song, that's a painful
5 experience. I wouldn't even want to call him and have
6 to go through with him.
7 So I'm sure we're going to have other comments
8 from the panelists, but I did want to get my statements
9 on the record. Thank you very much for having me.
10 MS. CHAITOVITZ: Thank you. I couldn't see
11 the order that everyone else put up their thing, so
12 we'll just go in order.
13 So Terry, you can be next and then we'll just
14 go in order.
15 MS. KAROBONIK: First, I wanted to briefly
16 address the music licensing issue just because it came
17 up. I think with licensing we often at these panels
18 create this false sense of -- almost that it's easy to
19 get a license that, oh, yes, absolutely. Just get a
20 license. Well, I've had the "just get a license"
21 conversation with a wide variety of users. Some of them
22 have been high school students that don't have jobs.
23 Some of them -- understandably some of them have been
24 college student. Some of them have been young
25 documentary filmmakers.

1 If you do not and cannot afford a zealous
2 advocate -- a zealous advocate who is a music copyright
3 licensing attorney, often the licensing is pretty much
4 closed off to you. That's just the reality, and I think
5 that's a problematic world.
6 I think one of the things that's really great
7 about the U.S. is that we have things like fair use that
8 really have that right -- that preserve our right to
9 speech, to comment, since ultimately that's what
10 creativity has always been. We're always commenting and
11 critiquing other people's creativity.
12 Before I went to law school I was a creative
13 writer, so I understand how painful it can be sometimes
14 to see someone do something to your work that you didn't
15 think of, but that's one of the things through fair use
16 that we do allow some room for because it does add value
17 to society, and I think that's something important to
18 remember.
19 But getting back to the original thing, the
20 original question, I think it's kind of a false
21 statement, and it's a statement I hear a lot and a myth
22 I deal a lot with with some of my clients that just
23 because there's a lot of something on the Internet
24 doesn't mean that there's a problem. Often enforcement
25 can be huge. Just because something has been taken down

1 doesn't necessarily mean it's okay.
2 So I think just showing that there's a
3 proliferation that's allowed to exist in a vacuum just
4 because someone hasn't had time to enforce it yet or has
5 for whatever reason decided, um, no, maybe I'll enforce
6 it. Maybe I won't. Maybe I'll just ignore it for now
7 and see what makes the most financial sense.
8 I think one of the key problems here comes
9 down to education once again. Now we have -- every
10 person has the tools to become a creator. Every single
11 person from middle school students to college students
12 to all sorts of independent creators to even
13 grandmothers. The reality is we've all been brought up
14 in a system that teaches plagiarism and not fair use.
15 Plagiarism and copyright law, while they have
16 some similarity, they're not the same. So we've created
17 a generation, indeed an entire culture of creators who
18 don't understand the very basics of copyright law, the
19 law that governs what they do.
20 We have done some education, but a lot of that
21 education has boiled down to don't pirate. Essentially
22 we've given the keys to the cars to a kid but without
23 teaching him how to drive, just telling them not to
24 drink and drive and we're upset that they're landed up
25 on the lawn. I think we should be grateful that they

1 ended up on the lawn and use this really as an
2 opportunity to start some comprehensive education and
3 that education -- I'll emphasize this again. It has to
4 be comprehensive. It has to include things like fair
5 use. It has to include the basics because if it
6 doesn't, it's not going to help create a society of
7 creators who know when things are fair use and when they
8 might want to seek out legal counsel to in theory help them
9 get a license if they can afford it.
10 MS. ROTHMAN: So in addressing the questions,
11 I want to first pose a different one and then reframe
12 perhaps the question asked.
13 So first you asked essentially is the system
14 working now, and I think it's very important that we not
15 repeat the perhaps failings of past legislative regimes.
16 We don't want to just answer does it work now but will
17 it work in the future? And so when we think about
18 remixing, I think we really need to think about the
19 framework of the future and technology that's going to
20 come online and not just say does the current technology
21 adequately provide room for these uses or adequately
22 stop these uses. So I think we need to look further
23 down the road.
24 Second, I think in the discussion -- we're
25 just beginning it here, but in looking at some of the

1 prior roundtables, and I've already heard it today,
2 there seems to be a polarization between what people
3 think of or sort of two world views.
4 One, it's our copyrighted material and the
5 right to say no, and I heard it today from Dina, and I
6 heard at other roundtables the right to say no. And
7 then the other which is there's all this material out
8 there and people should be able to remix it and it's our
9 cultural property.
10 So I want to sort of chart maybe a middle
11 course between those by raising a slightly different
12 question, which is that we need to think about remixes
13 not as an entire whole, but there's different types of
14 remixes. There are remixes that's are fair and that, if
15 litigated, are likely to be found fair. There are ones
16 that, if litigated, would be found not fair and would be
17 infringing and perhaps substitutionary or ones that we
18 might not want distributed on line. And then there may
19 be a third category of gray uses where we can't really
20 decided and should we err on the side of getting rid of
21 them or keeping them up.
22 And so I think it's really important to
23 understand this array of types of fair uses and their
24 sort of categories when we think about whether they're
25 being impeded or not.

1 So I'm of the camp that -- maybe it's not a
2 camp, but that there are some fair uses online and that
3 it's important to protect a zone for them. We have to
4 recognize that we have made a shift to a digital age and
5 that what people are doing online now is very similar to
6 what we were doing sort of in the brick-and-mortar, you
7 know, pen-and-paper world. People are making collages.
8 People are making diaries. They're doing their term
9 papers online. They're doing new transformative
10 creations, parodies, critical commentaries, all in the
11 context of what might be categorized as a remix. I
12 think it's very important as we move forward that we do
13 provide space and protect a zone of fair use for those
14 sorts of uses.
15 And I am concerned by both the current
16 technology and as we look down the future I think
17 increasingly good technology to take down what most
18 non-sophisticated parties might put up online that
19 creates copyrighted content. So I think it's very
20 important in terms of the legislative arena that we do
21 think about how do we protect in the realm of technology
22 and the sorts of content ID programs like on YouTube, a
23 space for fair use.
24 Now, there is a dispute among the studios
25 about whether mash-ups, for example, are fair or not,

1 and I am not sure that it's a good place for congress to
2 get into the mix of trying to determine whether
3 individual uses are fair or not, but I think there are
4 nevertheless the ways the technology can provide room
5 for fair use.
6 For example, current technology is largely
7 programmed software to take down at the instruction of
8 copyright holders any copyrighted material that's
9 detected. That's not always true. Some music studios
10 in the recording industry are advertising against it or
11 suggesting you can download the songs. There are
12 different strategies, but in some they're saying just we
13 picked up our copyrighted work, take to down. But you
14 could of course build in some breathing room, and I've
15 spoken to some technologists at NBC that could do
16 this and. We might disagree on what it is. We might want
17 to defer into the market about how they would build in
18 fair use into the technology but perhaps like allowing
19 five-second clips of various things sort of as a basic
20 software build in. So that's something to think about.
21 At the same time, I think it's important that
22 we do provide space for market solutions. So let's
23 think more of perhaps either about gray areas or less
24 about gray areas and more about things that I think are
25 probably are not fair use. So for example, if someone

1 wants to mash up a mix of Netflix, hits like "House of
2 Cards" or "Orange is the New Black" because they think
3 that might be cool, I'm not convinced that that's fair
4 use.
5 On the other hand, it is a sort of driving
6 instinct of making consumers who want to go and that or
7 to collect together all the scenes with their two
8 favorite characters as they fall in love. I'm open to
9 that not being sort of in the fair use protected
10 technology content category.
11 On the other hand, I think it's important that
12 the market starts getting into that arena and perhaps
13 even facilitates it. So it would be great if ABC said,
14 hey, we have this great editing program. We'll let you
15 use clips up to a certain amount of our material to make
16 these wonderful mash-ups. So I think the market could
17 really come in in those ways to provide solutions, but I
18 nevertheless think that technology -- that congress
19 needs to step in and make sure that technology doesn't
20 shut down very important fair uses in this day and age
21 and continues to protect a fair use zone.
22 MR. FREUNDLICH: I agree with most of what
23 Dina said. From a litigator standpoint, I think the
24 system now -- you asked if the system now works. The
25 system now is you ask for permission. You negotiate

1 your licenses; you get paid.
2 Another part of the current system is there
3 are market-based solutions I think being imposed both in
4 the form of perhaps the creative commons license. If
5 someone wants to allow their to be mashed up for
6 whatever reason, they can set parameters for how they
7 want it to be used, whether they want to get paid, you
8 know, every detail of the kind of license they're
9 looking for, but I don't think that there's a need for
10 any legislation to change what already exists, which is
11 under 106 there's certain rights that you have in your
12 copyrighted material, and then the flip side of that is
13 Section 107, which is how, you know, we impose our first
14 amendment type concepts on the copyright system.
15 And I think while it is true that the courts
16 have been all over the map on fair use and that it's a
17 case-by-case analysis, I think there's much more danger
18 in trying to create some sort of category of mash-up
19 that you can use statutorily as opposed to voluntarily
20 which I think is something that's already happening.
21 I've heard that YouTube, for instance, has a
22 situation where you can opt in to get paid if you want
23 to if you're a publisher. Again, it's voluntarily. And
24 as long as it's voluntarily, if somebody wants their
25 things to be used and to get paid for it, I think the

1 law is there for that. And this whole concept of fair
2 use is built into the litigation framework that we
3 operate in every day in this area.
4 So I don't really see any particular need for
5 reform in this area while also recognizing that it
6 exists in the realm of case-by-case analysis.
7 MR. TURLEY-TREJO: I really agree with the
8 comments of Jennifer and Teri in particular. I think
9 just -- and from a licensing standpoint, I mean
10 licensing music is not easy. Otherwise companies like
11 the one that I created to be the intermediary between
12 licensor and licensee wouldn't exist, rights clearance
13 companies wouldn't exist because the whole premise of
14 that business is that we know the people. We know the
15 negotiations. We can get the clearance for you much
16 easier because it is difficult. It is daunting.
17 Fair use is working, I think, to some extent,
18 for a lot of these remixes and mash-ups. I think the
19 market is struggling to try and find a solution on
20 YouTube, and YouTube has the power to sort of strongarm
21 a lot of publishers into agreeing to these license terms
22 and content ID because it's impossible to track down and
23 litigate, and so there's -- it's a difficult situation,
24 but I think, especially with some of the case law with
25 fair use, it is working, but Jennifer mentioned

1 something about possibly introducing -- I think she said
2 a five-second limit or some sort of parameter.
3 The issue is that fair use is obviously
4 intentionally ambiguous so that can it can be flexible,
5 but most people just don't understand that, and most
6 people -- a lot of maybe young creators who are acting
7 on culture and remixing and recreating, which is part of
8 our current culture, don't even know that they're
9 using -- that they're utilizing fair use through
10 transformative use, but thankfully there's that part of
11 the law that helps to protect that.
12 But, I mean, I'm a musician, and ever since
13 the history of music being created, it has been building
14 off the prior composers or the prior generation and
15 Beethoven and Mozart and Heiden and Wagner and
16 Mendelson, all of those people quoted each other and
17 used each other, but there was also a culture that if
18 they copied somebody, then they were looked down on. They
19 were looked down on as not creative or as not original.
20 And it's a different type of transformative
21 use culture now where we can actually excerpt and
22 extract audio clips from somebody's work so it's a
23 direct copy, but it's a different type of transformative
24 use, and I think it should be protected, and I think
25 maybe adding some parameters to the law could help,

1 especially those who are unfamiliar with the law, which
2 is primarily the people who are doing it. And then
3 there's people like on the panel who help those creators
4 to navigate the law.
5 MS. CHAITOVITZ: Jay.
6 MR. COOPER: If licensing were easy, we
7 wouldn't need attorneys, and that's not a good thing.
8 Copyright is a property right. It's a
9 property right. It's in the Constitution. I don't want
10 somebody taking my property at will. The reason -- the
11 reason for it -- the reason for that is -- first let me
12 step back.
13 Remix is a misnomer, okay. The word of art
14 for remix is what they do in the studio when an artist
15 goes in and they make a recording and they go in for a
16 remix session and they say we need the voice louder. We
17 need the voice softer. We need the base amplified. We
18 need the horns up or we need the horns down. That's a
19 remix. That goes on all the time, and we're confusing
20 terms here because what the people out there are doing
21 are not remixing. They're really mashing up. That's
22 what they're doing. They're creating something else.
23 They're taking my property or my client's
24 property rights and they're taking it and doing it for
25 what they want with it, which the client may or may not

1 approve and may or may not want. It's his property.
2 It's his right to say no. It's his right to say I like
3 that or I don't like it.
4 I've had clients agree and say, "Fine, I
5 really like that. Go ahead with it." But you know what
6 we do? We work out a financial arrangement. And so the
7 client then participates in that new work, if you will,
8 the mash-up. They participate. They get a royalty and
9 the royalty is negotiable.
10 Now, there are some people who say, "I don't like
11 my things being done like that. I like it the way it
12 is." The copyright law says you can do arrangements of
13 it, but you can't change the fundamental character. And
14 so when you create a work of art, and these are works of
15 art. These are works of art. The creator does not want
16 somebody to take their creation, to take their creation
17 and do something with it at will that may alter that
18 creation to a point where it's unrecognizable or not
19 what it was meant to be in the first place.
20 The French have created great food. They have
21 created great wines, and they also have a moral right.
22 And this couldn't happen. This conversation that we're
23 having here wouldn't happen in many of the countries in
24 the world because they protect the rights of the
25 creator. They protect the rights of the artist. It's

1 fundamental to creation.

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

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

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

21 The first is to address an example that
22 Jennifer mentioned of making a mash-up of two characters
23 interposed, and I just want to point out that the video
24 "Buffy Versus Edward," which does exactly that to
25 highlight the contrast between various treatments of

1 characters, specifically identified by the copyright
2 office in the 1201 exemption proceedings in the 2012 as
3 an exampling of a clearly fair use.
4 The other is the licensing question, and I
5 think we're looking at two very competing rights. One
6 is the right to control what happens with your work.
7 The other is the right of speech. And as Jay pointed
8 out, many people struggle for years to hone their
9 crafts. Many of those people who are struggling for
10 years to hone their crafts are doing so by playing cover
11 songs, for example, or by making mash-ups through which
12 they learned editing skills, video skills, that sort of
13 thing and licensing not only prices.
14 Many of these struggling artists out of
15 creation, but also breeds censorship. As I think the
16 examples highlight, naturally Steven Tyler doesn't want
17 people using his music in that particular example, but
18 that's exactly why we have fair use to allow people to
19 make commentary without getting his permission.
20 But now I want to turn to the uncertainty
21 question which is what you asked. Legal uncertainty
22 permits overreaching by copyright holders, and
23 particularly in concert with the Digital Millennium
24 Copyright Act notice and takedown procedure can be used
25 to suppress commentary or criticism by playing on the

1 risk aversion -- the rational risk aversion of
2 intermediaries who don't want their safe harbor taken
3 away, and uncertainty also disproportionally chills
4 speech by the smallest and least privileged speakers.
5 Fair use regimes -- generally our fair use
6 regime generally favors transformative noncommercial
7 speech. So generally would favor, and we hear this all
8 the time. This isn't just the organization for
9 transformative work saying it. Generally favors the
10 sort of remix embodied in the sort of mash-up embodied
11 in fan works and fan cultures, but when paired with the
12 burden shifting regime of the DMCA ends up being very
13 chilling because it moves the burden of proving
14 noninfringement to the remix artists and away from
15 proving infringement to the copyright owners.
16 What that means is it harms those who already
17 face financial or social barriers to speech or have
18 difficulty finding or paying for legal services. As an
19 example, we at the OTW get e-mails and calls from men
20 who say, "I've got a take down notice. I'm going to
21 fight it. Help me." We get calls and e-mails from
22 women saying, "I'm afraid to post My Little Pony fiction
23 because I'll get kicked off the Internet." Those are
24 very different reactions to the same law based on the
25 amount of privilege that they have going in.

1 So I have some concrete suggestions for how to
2 approach this. Remix creators need to know that they
3 have a right to create without permission, and they
4 don't just exist at the sufferance of copyright owners,
5 and the law should expressly permit noncommercial remix
6 through doctrines very much we have now, fair use, safe
7 harbors but -- and these should be flexible -- but not
8 permit the sort of uncertainty we have now.
9 For example, they shouldn't make remix
10 illegal, as 1201 would if not for the Copyright Office
11 exemptions provided in 2010 and 2012, and we should
12 seriously consider the possibility of a specific safe
13 harbor for noncommercial remix as Canada has.
14 MS. CHAITOVITZ: Thank you. I see some people
15 have their things up a second time.
16 MS. LaPOLT: I just have a few short comments.
17 MS. CHAITOVITZ: If everyone just keeps it
18 brief we can go again.
19 MS. LaPOLT: Thanks, Ann.
20 So I just have a couple comments to make on
21 the panel from what was stated. So Tara for one says,
22 you know, if you don't have a seasoned music attorney to
23 go clear the rights, then you can't get the rights.
24 Yeah, if you don't have a seasoned real estate broker
25 and resources to buy property, you can't buy property.

1 That's how that works.

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

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

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

1 you're stealing the property.
2 If someone wants to come in and use my
3 bathroom and I say no, you can't give me notice and come
4 up with some kind of guidelines on what constitutes fair
5 use and then come and use my bathroom. It's just this
6 way we have to talk about it.
7 And it's like when you're representing
8 creative people, this is how they feel. And, you know,
9 we have to respect their wishes, and right now when
10 you're talking about creating best practices for fair
11 use or guidelines or this, that and the other, yeah, the
12 music business is complicated, but so is life. Life is
13 complicated. Figure it out, people. Okay, if you want
14 to get it done, hire someone smart and get it done. If
15 you don't want to get it done, stop whining and
16 complaining that you can't get it done because you can't
17 get it done. All right.
18 If you want to be a successful musician, you
19 have to create original works of art that people notice
20 that could be exploited and monetized. And trust me,
21 when you become successful and someone starts using your
22 stuff without permission, you're going to be just as
23 upset. Thank you.
24 MS. CHAITOVITZ: Thank you.
25 MR. FOX: I think there's a real danger, a

1 very serious danger in creating exceptions for remixes
2 and mash-ups, and this relates to a very important
3 copyright concept that the courts themselves disregard,
4 and even experienced lawyers.
5 Copyright analysis is a qualitative analysis,
6 not a quantitative analysis. And that's particularly
7 important to keep in mind when you start throwing around
8 concepts like creating an exception for a remix or a
9 mash-up.
10 I tried a case for the Isley Brothers when
11 they sued Michael Bolton. Michael Bolton didn't create
12 a remix or a mash-up, but he took their song, Love is a
13 Wonderful Thing, and he added a bridge and he made what
14 might be considered to be, or certainly argued through
15 very good lawyers, was a non-infringing song.
16 But the point is, and Judge Baird, who I
17 really commend as being one of the few district court
18 judges in this circuit who understand this, focused on
19 the fact that creation, copyright is the combination and
20 music, all the notes are common, and what you create is
21 a beautiful thing is the unique combination of some
22 number of notes.
23 I try these cases for a living, and I'm always
24 with the artist or the infringer. The artist will tell
25 you a beautiful story about how they created it. The

1 Neville Brothers created their music by pounding on
2 buckets on the street. The infringer will always have a
3 counterfeit story. The artist will always remember the
4 point of creation almost with the exact amount of
5 emotion that a person would consider giving birth to a
6 child. It's very important to them. It's something
7 that came out of them, God given.
8 And so I think that if we start dancing down
9 the road to, you know, creating exceptions for a remix
10 or a mash-up, because really what you're doing is you're
11 saying is quantitatively different if you really break
12 it down, but if at the heart of it, even if there's a
13 couple beats that are unique, then you are infringing
14 under the copyright law. It's a qualitative analysis,
15 not a quantitative analysis.
16 I think the most constructive thing congress
17 can do besides making a complicated body of law more
18 complicated, would be to focus on this concept of a
19 small claims court for copyright claims because the
20 point that you'd have to have $200,000 sitting in a bank
21 account to assert a fair use defense is problematic, and
22 many, many, many of these issues, young artist, people
23 who are creating on YouTube who want to assert a
24 legitimate fair use defense or a young artist who is
25 being infringed have absolutely no recourse. They don't

1 even qualify for some of these YouTube programs because
2 they haven't created enough content, and court is way
3 too expensive, and they don't want to go hire a lawyer
4 like me and spend $200,000. They want to be able to go
5 into a small forum just the way other people do in small
6 claims matters and be able to work it out.
7 MS. KAROBONIK: So just a couple of points. I
8 think it's fundamental that we remember intellectual
9 property is distinct from real property. Copyright is
10 not the same thing as real property, and for very good
11 reason because it involves speech, and that's a distinct
12 we've always made.
13 If you look at certain countries that do have
14 stronger moral rights, often those moral rights will
15 come at the cost of the First Amendment because many of
16 these countries don't have a first amendment.
17 One of the interesting things that I get to do
18 at New Media Rights is we'll sit down with journalists
19 from other countries. Often these countries don't have
20 a first amendment. Often their country is in the Middle
21 East or their country's in Slovak regions, and they're
22 always understandably confused by fair use since they
23 don't even have a concept of what free speech is and why
24 it might be important. And I think that's something to
25 remember going forward that as this discussion goes on

1 we need to keep fair use in mind since it really is one
2 of the few ways that our First Amendment is being
3 exercised on the Internet.
4 Jennifer mentioned market solutions, and one
5 of the things -- this is more something I want to flag
6 for later, but as speech increasingly moves online, it's
7 as much as we think of statements on Facebook or YouTube
8 as public statements made in the public square, they're
9 really not. They're made on the Web sites of private
10 companies.
11 So this should be something we think about as
12 we're looking at how we regulate speech as to what
13 degree can these companies make rules and make decisions
14 on how speech is regulated, and that's something I'll
15 just -- I just wanted to touch on briefly.
16 And a few of the other points, I think fair
17 use, we often run into this problem with fair use. Fair
18 use isn't everything. It's not -- and there's
19 definitely cases where I have told people, like no, no.
20 Your use really isn't fair use but fair use exists for
21 those cases where licensing might be impossible, where
22 you're commenting or critiquing something like in the
23 Acuff-Rose case, for it be told, very few musicians will
24 license in circumstances where they're being critiqued
25 or being treated critically.

1 One of the other things I wanted to -- no.
2 I'll skip that for now. And -- yeah.
3 MS. ROTHMAN: So I just want to back up a
4 moment and address a few thing that have been said and
5 clarify. So I think that hopefully we all agree,
6 although sometimes it sounds like some of us don't, that
7 fair use exists. It's an important doctrine that
8 protects First Amendment rights. I think also
9 substantive due process rights, and as we switch, as I
10 said, to a digital environment, it's important that we
11 protect that space online.
12 At the same time, I want to make a very
13 important distinction just so what I said earlier is not
14 taken out of context. So I think that there's a lot of
15 things that are fair use. I don't want to get into a
16 Buffy/Edward -- I'm not really a vampire person. Is
17 that really fair use or not? I'm not sure is the
18 answer, and so -- and that's okay to not be sure.
19 So what do we do with that as a legislative
20 matter? I know that's sort of mentioned in exemptions
21 that the exemptions exist again as we project ourselves
22 forward in a world in which that's not licensable. But
23 if we shift to a world in which the WB starts creating
24 an online sort of fan site of its own in which you could
25 get that material licensed and mix it up itself, then

1 all of a sudden there is a market and it becomes a
2 little bit like the phone unlocking in which you can buy
3 an unlocked versus a locked in which the copyright
4 office actually changed its mind about that exemption.
5 So I think that we need to project ourselves
6 forward a little bit more and think in terms of my
7 initial comments are coming from two perspectives. One
8 is what is the appropriate place for legislation? What
9 can congress do? Congress can't sit there and legislate
10 these are all fair uses of remixes or mash-ups and these
11 are all not fair and create some broad exemption. I
12 think that would be a treacherous road. I think it
13 would be very difficult to find any agreement about
14 that.
15 So that's one perspective, and that's not to
16 say that I don't think fair use should be more expansive
17 than what the market might produce. So I think we need
18 to provide room for market experimentation to help
19 license mash-ups while protecting this fair use zone.
20 So when I talk about a fair use zone, I'm
21 saying some zone of protection from technological
22 impingement. That's not the same as it being completely
23 encompassing of the scope of fair use which would likely
24 be much broader than just an exemption.
25 What I'm concerned about is as we talk about

1 whether things that are or are not fair, and some of us
2 would say nothing's fair and some of us would say almost
3 everything is fair. That in some sense this entire law
4 is going to be irrelevant because of the emerging
5 technology online, and what not we're talking about are
6 sophisticated parties who can go and license stuff and
7 work around it and get it put back up when YouTube takes
8 it out.
9 We're talking about your average person who is
10 trying to express very important things online using
11 copyrighted digital technology, and do we want to permit
12 a world in which the market shuts that down completely?
13 And I think no. I think very strongly no, and so how
14 can the legislation encourage space for that? So that's
15 why I was talking about some sort of build in that
16 doesn't require individualized determination of what's
17 fair or not, but says, hey, look, if you want to try
18 some market solutions for people who aren't going to
19 litigate and using technology to protect against piracy,
20 you also need to think about providing some space for
21 fair use.
22 Now, I might say it should be at least a
23 minute of copyrighted material that can be used. Others
24 might say 30 seconds. I think that even the studios
25 could agree on five seconds, but wherever that is is not

1 the point. It's not the amount, it's the notion that
2 there needs to be some online breathing room.
3 MS. CHAITOVITZ: I can't see the front of the
4 card.
5 MS. MUDDIMAN: Hi. As a composer and
6 songwriter, it does seem strange to me that people can
7 say that we can have too much power by being a copyright
8 owner. To me it doesn't exist that we can have too
9 much. There is no such thing as a composer or a
10 songwriter having too much power over their own
11 copyright. In the same way that -- and I think you have
12 to compare it to the ownership of a property, a physical
13 property. You have to compare it because in my mind
14 it's so similar.
15 It's a creation as much in my mind as the
16 bricks and mortar or the wood that is in your home.
17 Someone created that home and you own it, and you have
18 absolute right to determine what happens to your home.
19 If you want someone to rent it, you can negotiate what
20 happens within that rental agreement, but nobody can
21 force you to rent your home.
22 How can that possibly be a rational way of
23 dealing with intellectual property that you are not a
24 hundred percent in control of what happens to it?
25 So that's my first point. And coming from

1 Europe where this conversation, as Jay said, this would
2 never happen. It frightens me. It shocks me. I'm kind
3 of nervous that we can even be having this conversation.
4 And the idea that somehow I, by protecting my
5 copyright, prevent you from having your freedom of
6 speech is nuts to me. You could say whatever you like,
7 just don't use my music to embellish what you want to
8 say. Don't use anybody's copyright to embellish what
9 you want to say unless you have their permission.
10 If you cannot create something without using
11 someone else's property to create, I question whether or
12 not you're actually creating, and I say to people who
13 ask me well, you know, can I own some of your copyright
14 because I sang your song? I say you can own a hundred
15 percent of it. Just write it yourself.
16 If you want someone's property, you have to
17 negotiate to own some of it to use it. Otherwise create
18 our own property.
19 One more thing. Sorry. I pressed the wrong
20 button.
21 Five-second rule. I'm not quite sure I
22 totally understand the five-second rule because in my
23 book I don't know if you've ever played the game name
24 that tune. Most people can name it in one or two or
25 three notes. Five second rule, everyone, even a

1 computer can recognize music within a fraction of five
2 seconds.
3 I remember someone once telling a story about
4 someone was appalled by how much money Usher wanted from
5 the da-da da-da da-da, it's like it's just three
6 seconds, how can he want so much money? I'm like
7 because it's so recognizably what it is. Everyone can
8 recognize most things. If you cannot recognize it
9 within five seconds, it's obviously not that good
10 perhaps. So I don't really get the five second rule.
11 Education is the bottom line. You have to
12 educate, and I don't mean just the public. I mean
13 everyone within the industry, and I mean from lawyers
14 through to people who are making videos, filmmakers,
15 even composers and songwriters.
16 Sadly, the composers and the songwriters and
17 the people who are creating copyright are the ones who
18 need educating the most because their ignorance is what
19 is causing us to be sitting in this room right now.
20 MS. CHAITOVITZ: Thank you.
21 MR. TURLEY-TREJO: Amen to education. I think
22 that's critical, and I'm in the educational field. And
23 I'll tell you, when people come into my office and ask
24 me -- students, film students, music students, can I do
25 this? Can I create this mash-up, this parody, which I

1 have to educate a lot on what a true parody really is.
2 That is definitely needed. And I think that's maybe one
3 thing everyone can agree with, the education would help
4 in a lot of ways.
5 But I really, for the record, would like to
6 say that what Teri said about intellectual property not
7 being the same as property is very real. I mean,
8 intellectual property expires. It's temporary.
9 MS. MUDDIMAN: It shouldn't.
10 MR. TURLEY-TREJO: That's an opinion, yeah.
11 But, I mean, as far as the U.S. Constitution is
12 concerned, it's to secure for the limited times.
13 MS. MUDDIMAN: I don't understand that. I
14 don't understand why that would be.
15 MR. TURLEY-TREJO: And that's probably a
16 different argument for another day, but the fact is
17 that's what we're working with. And I think -- and I
18 agree with that. I mean, even being a young and not
19 platinum selling musician, I'm fine with that. I think
20 copyright lasts too long with the states and family
21 members that didn't even create it who are benefiting,
22 which is good.
23 MS. MUDDIMAN: But do you want to get your --
24 MR. TURLEY-TREJO: It's true. I don't mean to
25 create pandemonium. All I'm saying is I think

1 intellectual property is different from real estate or
2 from property because it is limited and that's what the
3 constitution says, so maybe we'll just end it there.
4 And I think as far as the five-second rule or
5 the 30-second rule, that would encourage -- because if
6 you're using a small amount, you're not supplanting that
7 work. You're utilizing it in a way, and it depends on
8 the user obviously, but if you have a creative person
9 who a lot of these mash-ups -- because we're dealing
10 with culture here. Culture has an intangible real
11 estate which is why it's difficult to compare, but that
12 culture is part of our identity. So that's why speech
13 comes into play, and to be able to use that to create
14 something new and different and ultimately unique in the
15 sense of the creation, even though it's a derivative
16 work, which sound recordings are a derivative work of an
17 underlying composition. I think that is really -- I
18 think that's important to the culture and the
19 advancement and progression of the useful arts and
20 sciences.
21 And so I think because of that, remixes or
22 however you define it, mash-ups, should be allowed and
23 under fair use they are, but I agree with Jennifer that
24 if we do introduce some legislation, that it definitely
25 should have some breathing room for fair use, and the

1 problem is that the conversation is always so skewed
2 towards this property which I understand the emotional
3 investment involved in that creative property, but if
4 legislation is enacted with that only in mind, then
5 you're not going to have the breathing room that is
6 necessary to help progress and advance the use of arts.
7 MS. CHAITOVITZ: Thank you.
8 MR. COOPER: Well, fair use is in the
9 Copyright Act. It defines fair use in the Copyright
10 Act. There have been innumerable court decisions over
11 the years concerning fair use and what is allowable and
12 what is not allowable, how it's defined, what is not.
13 Criticism, commentary, teaching, et cetera, how much can
14 be used, what can be taken. I don't understand why
15 we're having a conversation all of a sudden to give
16 people the right or the free right to create the
17 derivative works without compensating the person who
18 created the original work. I'm really baffled by that.
19 I'm a little baffled by your comment, Betsy,
20 about the safe harbor. Safe harbor is a disaster -- a
21 disaster for entertainers. What I spend a lot of time
22 on, and I'm not the only one, is sending notices about
23 infringement. And then, of course, the company responds
24 back, "Yes, we'll take it down," and the next day it's
25 back up. There is a term of art, "whack-a-mole," and

1 that's what we're doing on a constant, constant basis.
2 I know it's not the proper conversation here
3 of safe harbor, but that's another day to talk about
4 safe harbor. It ain't working, safe harbor. Not at
5 all, and it is a disaster in a lot of ways.
6 But I don't think that we have -- we should be
7 sitting here with the creators saying basically, "Oh,
8 it's okay take my work." Create a derivative work.
9 You're opening up all kinds of possibilities. Film,
10 television, et cetera, et cetera, people go out and
11 create it. This is not free speech. Free speech is you
12 have the right to say my work sucks. Okay. You can say
13 anything you want. You can say this really is terrible.
14 It's awful. Say anything you want about my work. Do a
15 parody in certain limited instances as parody is defined
16 in the present time.
17 This is not what we're talking about. We're
18 not talking about free speech. We're talking about
19 taking my work and my property and you creating
20 something different and new using my property or
21 additional, creating my property, and not paying any
22 proper compensation to me for creating that property,
23 which my artists have spent years, money, sweat, blood,
24 tears, and a divorce in order to create this.
25 So I don't think -- I don't know why we're

1 having this conversation. It's not a free speech issue
2 at all. It's a question of doing a derivative work.
3 Derivative work traditionally has been you go to the
4 original -- you go to the person whose work you want to
5 incorporate in this new work and you get a license.
6 No, you can't get licenses for everything, but
7 that's okay. You have multimillions or maybe billions
8 of songs to choose from if you want to take a song. So
9 you don't get this song. There are another billion
10 songs you can go get to create whatever you want to
11 create. Why is my property so important to you that you
12 only can do your creation with my property? I don't
13 think it's right. I don't think we should be having
14 this conversation at all, and I think it's sending the
15 wrong message, period.
16 MS. ROSENBLATT: Thanks. And, Jay, by the
17 way, I think we can agree that the safe harbor is a
18 disaster but for totally different reasons. It's not
19 good at preventing piracy in the whack-a-mole sense, and
20 it over deters various kinds of free expression. So it
21 is both over inclusive and under inclusive I think in
22 many ways.
23 But that -- I just wanted to address a couple
24 things that have come up. One is just to the -- to sort
25 of refer you to our Green Paper submission because

1 there's about 60 pages that I wouldn't want to repeat,
2 but just to point out that fans often have similar
3 emotional attachments and amounts of dedication to the
4 fan works they create, which often also take years,
5 dollars, sweat and tears to make, and also often include
6 immense amounts of creative input and technical skill.
7 So we have many pages on that in the Green Paper
8 submission. I won't dwell on it here.
9 I'd also just want to go back to the licensing
10 solution point and point out that I'm not sure to what
11 extent we're actually putting forward -- anyone is
12 actually putting forward the idea of licensing solutions
13 as alternatives to fair use, but I wanted to just
14 mention a couple reasons why they may augment fair use
15 but aren't adequate replacements for fair use not only
16 because they invite censorship and have heavy cost
17 concerns, as I mentioned before, but also as the
18 Copyright Office has pointed out, there are
19 technological barriers.
20 If, for example, Warner Brothers made clips
21 available of its work for use in remix, there's a high
22 chance, as we have now, that those might not be
23 available in the particular formats or qualities
24 necessary to make the remix works that fair use permits.
25 So just want to sort of reiterate what the Copyright

1 Office has said on that point.
2 And finally just say that I think maybe many
3 of us can agree that fair use does a good job of making
4 room for commentary, criticism, transformative work, and
5 particularly for noncommercial transformative work, and
6 that when we can agree looking down on the fair use
7 factors that some things should be fair use. I know not
8 everyone in this lineup will ever agree on particular
9 kinds of use. When you look at the fair use factors,
10 there are many uses that you actually can find.
11 You know, you can walk down them and they fit
12 the fair use rubric. They only use part of the
13 original. They transform meaning. They're
14 noncommercial, they're non-substitutive, and our
15 suggestion is for those sorts of works, there is
16 something we can do that not only does what the current
17 fair use rules do now, but also makes the world more
18 certain for people who want to do what is currently fair
19 use now by, for example, making a clear carve-out for
20 those sorts of works.
21 MS. PERLMUTTER: Before we move on, just to
22 say, we're aware, of course, that a lot of the issues
23 that have been raised in the Green Paper tend to
24 interact with each other and it's difficult sometimes to
25 discuss things completely separately, but just to make

1 the point that for those on the panel or in the audience
2 who are concerned about the aspects of this issue as it
3 relates to the operation of the notice and the takedown
4 system under the DMCA, we do have a separate process
5 going on simultaneously with this one which is a
6 multistakeholder forum discussing ways in which the
7 operation notice and takedown system can be improved
8 which is likely to address a lot of issues that have
9 been raised here.
10 For those of you who are interested, it's open
11 to the public. The next meeting is going to be in
12 Washington on September 10, and you can join by webcast
13 or in person, and there's information about that also on
14 our website. So that's the brief advertisement before
15 we move on.
16 MS. CHAITOVITZ: What I'd like to do is move
17 on to the next question, but you all at the end, if we
18 want to come back, if you have things to say, we will do
19 that.
20 So our discussions in Nashville and Cambridge
21 yielded some suggested approaches, so I'd like to hear
22 your all take on them. A number of participants
23 suggested two things: A combination of fair use
24 guidelines and, at least in music, licensing
25 collectives.

1 So I want to break these down into separate
2 conversations so we don't get tangled up. First I want
3 to talk about voluntary guidelines like the ones that
4 have been issues by AU and best practices. There were
5 suggestions. Another suggestion was a Copyright Office
6 brochure as better -- as a better way to enable reliance
7 on fair use.
8 So I was wondering if you all think these
9 guidelines help. Would other types of guidelines or
10 copyright office brochures be of use?
11 Okay. I think Dina was -- you were really
12 first. You're fast.
13 MS. LaPOLT: All right. Okay. Best practices
14 are really dangerous. Really dangerous. They're not
15 the law. Okay. Best practices -- any governmental body
16 that issues best practices for coming within the
17 confines of fair use is a gross misrepresentation to the
18 American public.
19 You think people aren't educated now on the
20 Copyright Act and then you get some 20-year-old kid who
21 gets some best practices and thinks like, yeah, I can do
22 it. It's fair use. That's not the law. So then you
23 have these young kids thinking that they can just, you
24 know, remix and mash-up and bastardize people's property
25 because they fall into these fair use -- I mean, these

1 best practices guidelines, and I just think it's not the
2 way to go.
3 The documents are not created by courts or the
4 legislature, so someone can still land in deep trouble
5 if they go ahead and claim that they used their best
6 practices and started mashing up or sampling remixes of
7 someone's property. They get in a lawsuit and then it
8 becomes liability. Well, were these best practices
9 misleading to the point that it creates liability to
10 whatever body has put them out? It's just a nightmare.
11 I agree with Jay. For us to be sitting here
12 and discussing this, that's a gross misrepresentation.
13 Okay.
14 I mean, Helene, I'm very sorry that you have
15 to be over here in this country and have to go through
16 this. You know, I'm so tired of America being the
17 biggest country in the world that sets the cultural
18 precedent for how the rest of the world consumes music.
19 We have the biggest artists, the biggest songwriters in
20 the world, yet we treat our creative people the worst.
21 We treat them like dirt. Okay.
22 Now we're talking about taking away their
23 rights and creating a best practices to where stealing
24 their music and trampling on their rights can come into
25 some kind of best practices.

1 Okay. What was your second question, Ann?
2 MS. CHAITOVITZ: The second one comes later.
3 MS. LaPOLT: Oh, okay. Thank you.
4 MS. CHAITOVITZ: I think Gerard was next.
5 MR. FOX: Yeah, I would strongly encourage
6 those who are thinking about adding fair use guidelines
7 not to do it. What you end up doing when you add
8 guidelines is you broaden exceptions essentially, which
9 creates a situation where you begin to swallow the set
10 of rights you intend to protect. So I think that any
11 time you sit down and try to take away something that's
12 already too complicated and too broad and flesh it out
13 more, you make it more detailed and more broad and there
14 will be other problems.
15 Collectives are fine for a label that has a
16 huge catalog, and this does not get to the heart of the
17 problem. And while it might sound like I'm off topic
18 here, this all finds its way to the idea of a copyright
19 small claims court.
20 We're all dancing around this, but there's a
21 core problem here. Educated users and consumers of
22 music usually get it right. Not all the time. But you
23 do have a younger generation. Now, these younger
24 generation of folks are executives at places like Vice
25 Media, and they are brought up in a world where they

1 really believe they can -- you know, they're very quick.
2 They're very quick. They do Comic Cons. They know how
3 to create, and they don't see a problem, with no
4 disrespect to the artist, with what they're doing, until
5 they're caught. And I think that the system that
6 they're thrown into right now is Draconian, and it's
7 ignorant and it's not effective.
8 You shouldn't have to be dragged into federal
9 district court if you have a small profit on an
10 infringing work. There should be a way that you should
11 be able -- and by the way, if you're the artist and you
12 want to enforce your rights, you shouldn't have to pay a
13 $50,000 retainer to go get a lawyer to handle it. These
14 situations, which we're going to be keep circling
15 around, no matter how much you try to define fair use,
16 are going to keep happening.
17 The younger generation is quick. There's an
18 infinite number of new channels and types of creation,
19 and there are going to be artist that are going to be
20 nailing these young people and bringing them somewhere.
21 Where is that place? Because if you don't get a
22 license, you're going to be arguing about more than fair
23 use. You're going to be arguing about things like
24 allocation. Okay. I used part of your song but, hey,
25 my stuff is really good too and I mixed it together, and

1 what's really selling this is the way that I put this
2 like film behind it of someone skateboarding because you
3 allocate damages in a copyright suit.
4 Now, that's highly expensive in a federal
5 district court action in the type that I'm involved in,
6 but I think 20 or 30 years from now defendants will
7 Skype into some type of copyright small claims court,
8 put together their defense very quickly and have an
9 outcome. And, by the way, get educated through the
10 process so that they do the simple thing, which is go
11 get a license.
12 MS. CHAITOVITZ: Thank you. Now I'll just go
13 down to Teri.
14 MS. KAROBONIK: So, first of all, I want to
15 say I actually do like the American University
16 guidelines. I find them a very helpful starting place
17 to work when I'm working with documentary filmmakers to
18 at least get them up to speed, but I'm not fond of the
19 idea of one set of fair use guidelines.
20 The idea is a little bit ridiculous when you
21 think about how many different types of copyrighted
22 works, fair use touches and fair use is so fact
23 dependent. So creating one set of guidelines that would
24 fit all of those factual scenarios is probably not
25 something that's doable, and then breaking it down to

1 each type of possible reuse may be doable, but I have a
2 hard time seeing a process, especially a
3 multistakeholder process that would result in guidelines
4 for all of these areas and it actually getting done. It
5 seems rather unworkable.
6 I think the better approach here is really to
7 have groups that have boots on the ground that are --
8 that really do focus on educating users. Since I will
9 say there's some very talented copyright attorneys that
10 I've run into, very experienced, but sit them down with
11 the average user and some of them -- I think it's that
12 trick of experience. As we get more experienced as
13 attorneys as this copyright becomes second nature to us,
14 we forget the little details. We forget how confusing
15 some of this stuff was.
16 And I see this all the time with my students
17 since part of what I do is I teach the New Media Rights
18 clinic, and I think we really need people that are
19 developing these guidelines to have those boots on the
20 ground and also to be the type of attorneys that can
21 explain something to the average person since that's a
22 very, very unique skill as an attorney.
23 I'd love to see it, and it's something I'd
24 really like my students leave with, but I'd really love to
25 see that to be more widespread, but that's another

1 discussion for another day.

2 MS. CHAITOVITZ: Thank you.

3 Jennifer.

4 MS. ROTHMAN: So I've previously written about

5 some of my concerns about best practice statements, and

6 I won’t enumerate them all here. Some of them have

7 been raised, but I think it's most important to think

8 about the way in which they developed and the fact that

9 they are not particularly representative of the

10 stakeholders, and even though they may represent

11 particular needs of the documentary community, although

12 there's some dispute about that, as a former documentarian, and

13 I think it throws some really good uses under the bus.

14 But the online code I think is one of the

15 stronger ones, and it's certainly written by people who

16 I have a tremendous amount of respect for, but it still

17 didn't include many of the stakeholders, or pretty much

18 all the stakeholders whose works were being used, and I

19 think they that overall discount the role, sometimes not

20 even mentioning it, of market harm and really focus

21 on -- only on transformativeness.

22 But, again, I don't think it's worth getting

23 into the nuances of. Except to say, we should allow

24 guidelines and different communities to develop them,

25 and people can look at them as reference points or not.

1 I certainly don't think the ones from American
2 University should be adopted, and so I think the more
3 interesting question is should the Copyright Office or
4 the USPTO develop some alternative guideline that might
5 be useful for remixes or mash-ups or more broadly about
6 fair use. Some of that could be useful in terms of just
7 educating people about fair use and the factors and what
8 they mean, but we still have the problem that no one can
9 really agree. I think we can probably have almost
10 fisticuffs on this panel about various things and
11 whether they're fair uses or not, some of them saying
12 that nothing is ever fair.
13 But there could be some sort of update of
14 examples of recent case laws so people know sort of when
15 they're in a more fair space or less fair space and/or
16 things that are routinely accepted, perhaps, you know,
17 uses in biographies or something like that, but even has
18 some gray zones, so it is sort of a treacherous ground.
19 But it may be that providing some sort of fair use
20 guidelines combined with some sort of good faith defense
21 in an effort to comply with those fair use guidelines
22 that could at least protect people who are really trying
23 to figure out a very difficult set of laws or maybe even
24 some pre-use opinion letters which is something that I'd
25 really like to advocate as an area for clinics, for

1 legal clinics, but maybe it can come from the Copyright
2 Office as well where someone who is not sure whether
3 something is fair could at least get an opinion letter
4 that says you made a good faith effort. There's some
5 reasons why we think it's fair, and maybe it wouldn't
6 ultimately be adjudicated that way, but it might perhaps
7 pointing to our earlier discussion of statutory damages
8 or something else along long those lines. So those are
9 my thoughts about guidelines, but generally they make me
10 uncomfortable.
11 MR. FREUNDLICH: That last suggestion has a
12 lot of merit to it, but I don't know how that could
13 possibly work in the sense of volume of requests that
14 would come in. I know in the tax area that works really
15 well, and there's big transactions and people get
16 revenue release before they jump.
17 I have complete fear of any guidelines that
18 come with the Copyright Office in prompture because I
19 think the courts are working fine within the guidelines
20 of Section 107, which is purpose and character, nature
21 of the use, amount of substantiality, effect on use in
22 the potential market. All concepts that have come from
23 various ones of us at different times during this
24 colloquium.
25 I think the law as written is fine. I think

1 the courts would be confused by any other statement of
2 guideline by the Copyright Office. Is that another way
3 of saying that there's a safe harbor if you follow the
4 guidelines? And then, of course, there's a problem of
5 trying to agree on what the guidelines are.
6 I think instead of adding clarity to the
7 situation it would actually add another large layer of
8 complexity and disclarity, if that's a word.
9 MS. CHAITOVITZ: Thank you.
10 Helene, I think yours --
11 MS. MUDDIMAN: I totally agree. I think
12 giving people more room to maneuver and be "creative,"
13 in quotes, is to me, again, kind of laughable that
14 somehow taking someone's property and adapting it to
15 their thinking in a creative way. I mean, that's your
16 opinion, and you should not have the right to tell the
17 person whose property it is that you are adapting their
18 property in a creative way.
19 If they think it's not creative, they
20 absolutely should have the right to say you cannot use
21 my copyright to be "creative," quote/unquote. I mean,
22 by all means ask them if they would like their property
23 to be used in that way, but if they say no, no means no.
24 And they have absolute right, and you should not in any
25 way stop people who own copyright from having that

1 permission to say no is my view.
2 And then I'd just like to say, if you want to
3 create a guideline, the guideline should be get
4 permission, and if you don't have permission, don't use
5 it.
6 MS. CHAITOVITZ: Ty.
7 MR. TURLEY-TREJO: I think coming from the
8 Copyright Office, some sort of -- I mean it sounds like
9 with this Buffy versus Edward video and some
10 organizations claiming that this is a great example of
11 fair use. Like those types of things are helpful, and I
12 think it's helpful to the laymen, and that's what's
13 important. That's what I think could be beneficial
14 coming from an official standpoint is saying --
15 explaining (inaudible) in a simple way that the verdict, so
16 you're not creating law, and you're obviously
17 disclaiming that this is going to be legal advice. It's
18 just they're guidelines. They wouldn't hold up in court
19 or anything like, that they would just be used as some
20 sort of educational reference, and I think that would be
21 helpful.
22 And I think, to clarify, it should all start
23 with an initial respect out of creators because, without
24 creators, there's absolutely nothing to infringe. So I
25 think if that balanced viewpoint is presented in the

1 guidelines perspective or maybe not as formal as the
2 guidelines but some sort of informational brochure would
3 be really helpful and to educate, to go back and to
4 educate young people and say, listen, first and foremost
5 you need to have respect for the art that you are trying
6 to use, and then you need to understand these guidelines
7 and the defense of the fair use and what it is intended
8 for and, you know, the careful lineup when you're
9 exploiting somebody else's work for your own benefit as
10 opposed to using it for creative purpose.
11 MS. CHAITOVITZ: Jay and Betsy.
12 MR. COOPER: Good point, Ty. I'd like to make
13 a general comment. As the music business started its
14 decline in the year 2000, to the point now where for a
15 high percentage of creators, it's a disaster out there.
16 A serious financial disaster, and it's taking -- it's
17 disastrous and it's depressing for new people coming
18 into this business, which is bad for everything. Which
19 is for everybody.
20 Music is more ubiquitous than it's ever been
21 in history. And what has happened is music is now
22 becoming a commodity to sell everything else. To sell
23 Internet services, to sell subscriptions, to sell
24 products, to sell everything else of that nature. But
25 the money has declined substantially. Really

1 substantially. And that's bad for the creative health
2 of our country. Really seriously bad.
3 And what I'd like to see the Copyright Office,
4 the Commerce department is to give emphasis to how do we
5 protect the creator? We need to protect the creator
6 because there ain't anybody protecting the creators at
7 this particular point in a general way.
8 They don't have the money. They don't have
9 the resources or anything of that nature, and a lot of
10 big corporations are doing very good for themselves, but
11 music is being used to benefit them and the creators are
12 not receiving the same benefits, and that's where I
13 think the emphasis should be and that's where I think
14 the study should be within the government at this
15 particular point.
16 We have a valuable resource in this country
17 that's not being fully protected, and I'd like to see
18 that emphasis being made.
19 MS. ROSENBLATT: Very quickly. Earlier on the
20 panel I heard a number of people saying they were in
21 favor of education, and I think there's an interesting
22 potential for overlap between whatever guideline ideas
23 and education ideas may be coming out of this process.
24 I think there's a lot of benefit to official resources
25 that help the lay person understand the law. One of

1 the -- one of the great things that's happened in recent
2 years is we've had many sources coming up with their own
3 resources. One of the terrible things that's happened
4 in recent years is we've had lots of entities coming up
5 with their own resources. Many of which disagree with
6 each other.
7 So having a unitary source of information
8 seems good. The down side is, as some have said, it's
9 unworkably complicated to address every possible input
10 and remix situation. The other, and I think this is a
11 major trouble, is it could become quasi law. And I
12 think creating an official source that's quasi law
13 that's creates some sort of baseline where you can
14 violate it and that would be per se infringement,
15 et cetera, would be a real detriment. So if there's a
16 balance to be made, I think it would be addressing those
17 things.
18 MS. CHAITOVITZ: Thank you. Now, we’re going to move
19 to the second part of the kind of solutions that were,
20 or approaches that were presented as solutions in
21 Nashville and Cambridge. And so far it's focused on
22 music. It should be pretty quick answers because we're
23 running out of time. But some participants favored a
24 voluntary licensing scheme or society as a way to
25 eliminate the transaction costs of individual

1 negotiations in getting licenses.
2 They talked of things like HFA or PROs that
3 would, you know, give -- as a hub to give licenses for
4 remix works. So I'm wondering, especially since before, we
5 heard a lot against compulsory licenses, a lot of the
6 artists' reps spoke against compulsory licenses, but
7 what would you think of a transaction facilitating
8 institution similar to HFA or the PROs?
9 MR. FREUNDLICH: I think it's all well and
10 good if it's voluntary. I mean, if people want to be
11 involved in such a system and it creates a pool of
12 money and allocates it, that's fine. But if what you're
13 talking about is compelling everybody to allow their
14 stuff to be licensed, then that doesn't work.
15 MS. CHAITOVITZ: No. Like the HFA or PRO, it
16 would be an opt in.
17 MR. FREUNDLICH: Yeah. I don't see why not if
18 people want to use it.
19 MS. CHAITOVITZ: Betsy?
20 MS. ROSENBLATT: I've already said why I think
21 licensing is an alternative to fair use. If -- the
22 real question to me would be if such a thing existed,
23 how would it interact with fair use facilitating
24 licensing. Sounds appealing on one hand. On the other,
25 does that mean that if someone -- you know, we have --

1 people making fan works are not sophisticated people
2 necessarily. Some are very sophisticated. Some are
3 not. Some are kids. Some are -- don't have the
4 privilege and resources to be able to even figure out
5 whether someone belongs to this licensing organization
6 or not.
7 And so if it wouldn't impact the fair use
8 analysis, that's one thing. But if it would, I think it
9 creates real difficulties for people who want to make
10 what would be fair uses now.
11 MS. CHAITOVITZ: Okay. Jay and then Jennifer.
12 MR. COOPER: I think there's possibilities in
13 that. The problem is that there is no universal
14 database. None whatsoever. And there's been a number
15 of attempts at it. None has been completed to this day.
16 And the problem for anybody, even for the most
17 sophisticated is to find out who owns the rights and who
18 has all the rights, and so many rights are split up.
19 And I'm always fascinated when I go to the ASCAP or BMI
20 awards and they announce a song and ten songwriters get
21 up and 25 publishers. It's wonderful.
22 So there is no one source and that's the
23 problem for everybody. Not just for the person who
24 wants to do the derivative work, but is responsible for
25 everybody who wants to even license something.

1 So at some point we need a universal database.
2 But the idea of central source is a very good idea, but
3 I think it's a long way in coming and it won't happen
4 until we get a universal database.
5 MS. CHAITOVITZ: Jennifer?
6 MS. ROTHMAN: I think there's nothing wrong
7 with doing collective licensing in conjunction with creative commons.
8 It's just not going to
9 be sufficient both because there's not going to be a
10 universal database of every work that anyone might want
11 or licenses at a reasonable fee and then also
12 presupposes that fair use is solely about market
13 failure. And so I think we need to understand that,
14 that there's some other aspects of uses that we'd want
15 to protect regardless of whether licensing -- collective
16 licensing is a great idea that people know that at least
17 these are approved uses, but I've been wanting to give
18 three examples just very shortly that I think relate to
19 some of the discussions about fair use and I think
20 relate to this licensing because I wouldn't ever think
21 that they should really be licensed uses. There's the
22 Stephanie Lanz case, which most people know about where someone is filming
23 their kid
24 dancing to Prince's Let's Go Crazy. Prince is on and
25 posts it on YouTube. She's just filming her reality.
26 Someone using Fox News clips to perhaps point out errors

1 of fact and intermixing that.

1 If your child is competing in the Olympics,
2 for example, and you want to show them touching the wall
3 for their gold metal, NBC's technology will take it
4 down. These are things I don't think you need to get
5 licenses or go through collective licensing, and I think
6 even some of the more robust artists rights folks might
7 think are fair and worth providing room for.
8 MS. CHAITOVITZ: Thank you.
9 MR. FOX: Just to make one point.
10 MS. CHAITOVITZ: Oh, okay. We'll go to
11 Helene. But just so you understand, we're not
12 suggesting this as an alternative to fair use. We're
13 suggesting this because when people want -- when something
14 is not fair use and a license is needed, people have
15 talked about the issues with transaction costs and so we
16 are wondering if this would be a way to help alleviate that
17 burden.
18 MS. MUDDIMAN: I absolutely think the only way
19 we can move forward is to have some form of PRO kind of
20 Harry Fox agency type organization and I think it's
21 going to be very, very difficult, but then so was
22 building a Harry Fox Agency on a PRO. And in fact,
23 every single country in the world who has a PRO, it was
24 not easy to do. And especially when they first created
25 them they didn't have the sophisticated technology that

1 we do have today. So I think in many ways the idea of
2 creating this global database is to me the only way
3 forward and not at all daunting because I think what we
4 have nowadays in our technology is much easier than back
5 in the day when they created them without any
6 technology.
7 So I think it's inevitable. We have to do it
8 and we have to do it quickly.
9 MS. CHAITOVITZ: Okay. Quickly because we're
10 out of time so then I'll have to go to the floor. And
11 if people have comments, if you could go to the mic
12 while they're talking to you.
13 MR. FOX: Yes, just very quickly. I'm all for
14 creative comment system and how it simplifies and reduce
15 costs.
16 Just a footnote that, you know, it becomes
17 problematic -- most of what we're talking about now is,
18 you know, people create stuff on YouTube and then they
19 monetize it. And somebody will go out and they'll get a
20 sync license, and get a mechanical license and they may
21 think that they've got all the licenses they need, and
22 they think they might have the master use license but
23 they don't because it's reverted to the artist. And so
24 these aren't pure solutions because even within this
25 system which I've dealt with, because it's such a

1 complicated network of licenses, the user can still get
2 sued if they didn't pick up something like a master use
3 license.
4 MS. CHAITOVITZ: Thank you. We have a long
5 line. And we're going to need to alternate between
6 people here and people online if there are any.
7 MS. AISTARS: Thanks. I'm Sandra Aistars with
8 the Copyright Alliance. A couple comments. And I'll
9 start by saying the fair use is a doctrine that's
10 incredibly important to artists and creators and the
11 artists are the main people who rely on it. So anything
12 that I'm saying here is intended to distinguish cases
13 where fair use applies from cases where we're talking
14 about a derivative work where you should be asking for
15 permission from the creator.
16 So comments were made by a number of speakers
17 about social barriers that exist to speech when you have
18 to go and seek permission. And I would suggest that
19 copyright law exists to promote both the creation and
20 the dissemination of work to our community, our society
21 and the way that that is accomplished in part is by
22 allowing creators to feel comfortable and secure in
23 releasing their work out into the community.
24 One thing that we hear very frequently from
25 our grassroots artists is that when their work is used

1 without their permission for derivative works that alter
2 the meaning of the work, that makes it very unlikely
3 that they will feel comfortable releasing their work
4 into the wild, shall we say.
5 There were suggestions made that we should
6 have a compulsory license for noncommercial users, and
7 there are various recent examples where noncommercial
8 speech could be very damaging in a way that prevents
9 artists from releasing their works, and I'm talking
10 about instances where we're talking about hate speech.
11 There was a case that was just recently
12 settled where a photograph taken, where an engagement
13 photograph of a gay couple was taken and used by an
14 antigay marriage group in a very hateful manner. The
15 photographer was able to bring a claim and it settled
16 because the court found that it was beyond fair use and
17 that would not have happened had we such a provision as
18 is being suggested here.
19 Similarly, just a week or two ago, the
20 Westboro Baptist Church, a nonprofit, noncommercial
21 speaker rewrote the lyrics of "Hey Jude" as a
22 anti Semitic creed, "Hey Jews." And is now performing
23 that on YouTube, and, you know, publicizing it.
24 So again, something that if you're Paul
25 McCartney, I'm sure he's not very pleased with that use,

1 and I'm sure that he would be objecting quite
2 strenuously to a noncommercial compulsory license that
3 would allow this.
4 How is the marketplace working? I think, you
5 know, one positive comment to make is I think with
6 respect to some enforcement mechanisms that exist, and
7 notably I think Google and YouTube are quite good at
8 this. There are actually already attempts to account
9 maybe imperfectly, but account for fair use in the ways
10 that works are identified online. So for instance, with
11 motion pictures, you've got the ability to set the
12 controls so that you are looking for works and ensuring
13 that you've got like audio and video running
14 concurrently and for a specific period of time so that
15 you're only picking up things that are more likely, you
16 know, than not to be the true, you know, work that
17 you're looking for. Granted it's not perfect, but I
18 think there's good will and good attempts at, you know,
19 trying to account for these sorts of situations that
20 Professor Rothman was importantly raising.
21 There's also various services in the
22 marketplace that allow you to not only use clips from
23 commercial, you know, studio clips and others for
24 remixing and for fan fiction uses, but also allow those
25 to be monetized by the remixer and the fan fiction

1 author. Amazon Kindle Worlds in an example of. That
2 doesn't supplant fair use, but I think that shows that
3 there are attempts by copyright owners to try and
4 accommodate the sorts of things that people are talking
5 about wanting to do.
6 And one other note, there was a good point
7 made about this five second rule and should we allow
8 sampling of five seconds or less as part of a remix
9 consideration. Yeah. A five second sample may actually
10 be the heart of the work, the hook when you're talking
11 about a musical work.
12 Another point, you know, you hear often these
13 days about orchestras being replaced, you know, when an
14 opera is performed by a digital, you know, facsimile of
15 an orchestra and those I am, you know, presuming are in
16 part at least created by the use of sampling technology.
17 Certainly a sampling if it is sampling that doesn't harm
18 the composition, may nevertheless harm the musician, the
19 performer. So if we're going to be allowing, you know,
20 creating these sorts of technologies and creating these
21 sorts of works, there should be done in an authorized
22 way so that the original musicians who are ultimately
23 potentially getting replaced, have at least some say in
24 whether their works are used that way or not to create
25 the technology. So thank you.

1 MS. CHAITOVITZ: Thank you. We should --
2 okay. Jacqueline.
3 MS. CHARLSWORTH: Jacqueline Charlesworth. The
4 line is long, so I will be very brief. A couple remarks
5 were made about a Buffy the Vampire video. I just want
6 to clarify that that was in the context of the Section
7 1201 rule making where the Copyright Office looked at a
8 specific video, that one, and said that's likely fair
9 use and therefore there was basis to grant an exemption.
10 I just didn't want people to have the impression that we
11 had spoken broadly on remixes.
12 The second point is just that we are in the
13 process of developing a fair use index, which is going
14 to be designed for laypeople which will simply index
15 cases and give sort of the very, sort of crystalize the
16 outcome of the case so people will be able to look at
17 that and hopefully achieve some guidance and it is being
18 written for laypeople. So be on the lookout.
19 MS. CHAITOVITZ: Thank you.
20 MR. THOMAS: Good afternoon. My name is
21 Nissan Thomas from the Law Offices of Nissan Thomas, and
22 I'd like to make several comments, and I'll be as brief
23 as possible. I think that when you're talking about
24 original works, I think everybody's inspired by somebody
25 else, and so originality is what it is, but I think we

1 are all inspired by somebody else's work. And in
2 relation to, I think about hip-hop music and how they
3 use samples without authorization and we have a whole
4 new genre of music that came out of using other people's
5 work, so I say that to say this, that I believe that the
6 copyright law and the office and the government's role
7 is to take, you know, the issues and arguments on either
8 side of the debate and try to figure out a solution.
9 We're here today because of YouTube and people
10 are taking people's work and not being compensated for
11 it. That's why we're here today. And so I would
12 advocate for a synchronization right, a compulsory
13 synchronization right limited for digital distribution
14 on certain types of platforms in the case of YouTube and
15 creating mash-up remixes of music on the case of Sound
16 Cloud and then creating an organization to collect the
17 sums and the monies and also to help educate licensees
18 on what is the proper use. Thank you.
19 MR. COOPER: You're correct about the hip-hop,
20 beginning to use other people's work. However, what
21 happened was after a few lawsuits they started getting
22 licenses.
23 MR. THOMAS: No, I agree. But what I'm trying
24 to say is the activity occurred prior to the law or
25 people catching up. So what I'm trying to say is that

1 the reality exists. People are going to use other
2 people's work regardless if they're going to go get
3 authorization or not because of the fact that the
4 technology exists.
5 MR. COOPER: Technology exists and the law
6 exists. The law didn't have to catch up. But they had
7 to catch up with what the law was and they finally did,
8 and so it because constantly they come in to everybody,
9 to the labels and all that for the licenses, so they
10 learn that you have to get a license.
11 We're not saying anything different. With
12 mash-ups you get licenses.
13 MR. THOMAS: What I'm saying is we've already
14 addressed the difficulties and you've even mentioned
15 there's not a global database so how do you find the
16 rights? You've got, you know, 20 writers and 15
17 publishers.
18 MS. LaPOLT: You hire a skilled music
19 attorney.
20 MS. PERLMUTTER: We're going to have to cut
21 this off.
22 MR. THOMAS: There's a medium ground. I get
23 those arguments, but there's arguments on both sides and
24 this task of this panel is to find the middle ground.
25 And if we want to find and help musicians who want to

1 create more work, we're trying to figure out solutions
2 to create more money in their pocket because obviously
3 at the end of the day people are taking this work and
4 that's the reality.
5 MS. PERLMUTTER: Thank you. Can I just ask
6 everyone since we're now five minutes into the lunch
7 hour if you can keep your comments very short.
8 MR. DREITH: Dennis Dreith, AFSA. I will be
9 very brief. I was just going to say random thoughts.
10 The idea that I've heard about protecting the creativity
11 of those who are taking the creative works of other
12 people was just an anathema to me. I think the idea
13 that we have, they may be doing it in a creative fashion
14 but these are derivative works. You're taking someone
15 else's creativity activity and somebody else's
16 creativity and putting them together.
17 If I want to make a new aspirin, I want to
18 make a Bayer aspirin, I want to make a new and improved
19 Bayer aspirin, I'm not making, I'm not creating
20 something brand new. It's a derivative work and that
21 should be licensed. So I think there's just no doubt
22 under any circumstance for that.
23 And the notion that we should create a time
24 limit for fair use. I've spent a great deal of working
25 with documentary film makers as a composer working in

1 this industry. I will say that fair use is the most
2 confused and misunderstood and oftentimes misclaimed
3 doctrine I’ve ever seen -- most of the time when
4 people think it's fair use, it's not. It gets them into more
5 trouble than I've ever seen expanding fair use and
6 certainly expanding over a time line would be
7 ridiculous. I mean, is there anybody who couldn't
8 identify the Jaws theme in two notes? So I think I'll
9 leave it with that.
10 MR. STOLTZ: Mitch Stoltz with the Electronic
11 Frontier Foundation. I was moved by the passion of a
12 lot of the advocates on this panel on all sides of this
13 issue, and I'm moved by our art and creative works of
14 all kind.
15 I want to -- I'd ask everyone here and
16 everyone watching online that if you too are moved by
17 creative work and the passion of the people who create
18 it, is to take another look at the Green Paper comments
19 submitted by the Organization for Transformative Works.
20 This was pages and pages of incredibly moving
21 personal stories about people, and these are for the
22 most part marginalized people. These are women. These
23 are people of color. These are new Americans. These
24 are LGBT using fan work, using video and writing and
25 music and other media and using mainstream creative work

1 to talk back to popular culture, to participate in
2 popular culture, to enrich it and maybe to change it.
3 And I was moved to tears by some of these stories.
4 These are folks who most of them will never be
5 able to afford the hourly rates of Dina or Jay or even
6 lesser attorneys. Some of them will. Some of them will
7 probably become mainstream artists, and in so doing,
8 change our culture for the better. Most won't. They certainly
9 don't right now, I encourage everyone, I would
10 encourage the task force and the Copyright Office to
11 take another look at those comments. And once you have,
12 I think there's no way that anyone would be able to come
13 back to the task force and say that these people are not
14 creative, that they are not creators. That they don't
15 contribute to our shared culture, that they don't
16 deserve the same protection and the same freedom that
17 our laws give to the mainstream artists. Thank you.
18 MS. PERLMUTTER: And the last word. Professor
19 Cruise.
20 MR. CRUZ: Thank you. I will keep it brief.
21 My name is Kenneth Cruz. I'm a copyright attorney here
22 in town, and I've come from a long career in academia
23 where working with publishers, working with academics,
24 working with universities, museums and libraries and
25 working with people who have often equally passionate

1 but very different issues from the ones that we've heard
2 here today, but where I'm constantly reminding them that
3 we are on all sides of these issues simultaneously. We
4 are all owners and we are all users.
5 And, in fact, I would say in my experience
6 perhaps the most confusingly befuddling aspect of
7 copyright law is not at all fair use. It's ownership.
8 It's the fact that stuff is protected and it's protected
9 automatically and it's protected for decades and decades
10 and that these rights extend around the world. This is
11 probably the biggest shock to anybody who is new to the
12 system of copyright is to discover how ubiquitous it
13 really is.
14 So a couple of closing points that touch on
15 exactly the substance of our issues today. One is you
16 can't talk about guidelines and thoughts about
17 guidelines without learning from the past, and that past
18 guidelines begins in 1976 with so-called classroom
19 guidelines about photocopying. 1981, about copying
20 recording off the air, and CONFU. If that has --
21 creates blank looks, that means we're not learning from
22 the past.
23 The CONFU, the conference on fair use
24 generated a set of guidelines that purported to define
25 fair use. About the kindest thing that I can say about

1 all of those efforts to create guidelines is they have
2 utterly failed to meet their goals. So we need to learn
3 from the past.
4 My strongest interest is in creating good law.
5 Good law that makes responsible social and private
6 choices, and good law that's functional and makes sense
7 in the environment and the diverse environments within
8 which we are all working. And a good example of that is
9 one that bridges this panel with the panel that came
10 right before you.
11 Let me turn the attention back to statutory
12 damages. A couple of aspects of statutory damages
13 statute are wonderful role models for us as we think
14 about new law. In other words, you get statutory
15 damages by timely registration, and I know that
16 there's some critique of that. But it's actually a
17 fantastic way of demonstrating that you are serious
18 about copyright. That you're not going to come to me
19 60, 70 years from now and tell me you're serious now
20 where you weren't before. So that it's a way of
21 demonstrating you're serious. If you're not serious
22 enough to pay the modest registration fee, we have to
23 wonder why you're doing what you're doing.
24 And also, registration creates a record. It
25 let's the world know that you're serious and it let's

1 the world know how to find you.
2 Another aspect of the statutory damage statute
3 is the provision for the remission of statutory damages
4 upon, for certain institutions who are engaged in
5 certain types of activities. It doesn't matter the
6 details for the moment because the key point is that the
7 statute allows for the remittance of statutory damages.
8 If you do your homework. If you're engaging in fair
9 use, not because you stumbled into it. Not because
10 you're pulling it out of the back pocket when you need
11 it. It's because you did your homework. You thought
12 about what you were doing it. You made a detailed
13 analysis of fair use and you acted in good faith and
14 then you get the benefit of the remittance of statutory
15 damages.
16 Notice what the statute does? It educates and
17 encourages the public going in as owners and it educates
18 and encourages the public as users. This is a good role
19 model for us to think about. Thank you all very much.
20 MS. PERLMUTTER: Thank you. So what we're
21 going to suggest since we are running late and I don't
22 want people to have to be too rushed, is that we will
23 resume at 1:45 instead of 1:30, but we will still
24 conclude at 3:00 o'clock. We're not going to need the
25 full time for the closing remarks.

1 So please be back and we'll start promptly at
2 1:45.
3 (Recess taken.)
4 MR. GOLANT: Hello, everyone. We are going to
5 start our panel on first sale right now. So we're going
6 to follow the same instructions as before. If you have
7 any questions, put up your placard and we'll go through
8 the series of who's who after I read a brief
9 introduction about the topic, and then we'll have some
10 questions, and then we'll have a lively engagement on this
11 issue about first sale.
12 So what are we talking about right now? The
13 first sale doctrine as codified in the Copyright Act, allows the owner of
14 a
15 physical copy of a work to resell or otherwise dispose
16 of that copy without the copyright owner's consent by
17 limiting the scope of the distribution right, but the
18 copyright owner's remaining exclusive right, notably the
19 right of reproduction, are not affected. As a result,
20 the first sale doctrine in its current form does not
21 apply to the distribution of a work through digital
22 transmission where copies are created and the copyright
23 office concluded so in 2001 that the doctrine should not be
24 extended. So with that brief introduction, let me go
25 down the aisle starting with Steve here and ending all
26 the way to the right.

1 MR. TEPP: Thank you, Ben. My name is Steve
2 Tepp. I am the president and CEO of Sentinel Worldwide.
3 I'm here representing the Global Intellectual Property
4 Center, U.S. Chamber of Commerce.
5 MR. DENNIS: My name is Don Dennis here with
6 the law firm of Don Dennis where we focus on Internet
7 and intellectual property law issues.
8 MR. THOMAS: My name is Nissan Thomas from the
9 Law Office of Nissan Thomas. I am a transactional
10 entertainment attorney, among other things, and a proud
11 alumnus of Loyola Law School.
12 MR. KARI: I'm Doug Kari, executive vice
13 president, one of the principles of Arbitech. We are a
14 computer products distributor. I authored an amicus
15 brief on behalf of 380 technology companies in favor of
16 the petition in the Kirtsaeng case, and it was cited in
17 the court's decision. So this is an area close to my
18 heart.
19 MR. VILLASENOR: I'm John Villasenor. I'm
20 with UCLA and the Brookings Institution. At UCLA I teach in the schools
21 of
22 engineering, public affairs, and management, and I was one of the
23 witnesses who testified at the recent digital first sale
24 hearing at the house judiciary committee held a few
25 weeks ago.
26 MR. BRANCH: Hi. I'm K. Christopher Branch,

1 also an alumnus of Loyola Law School. Also adjunct
2 professor of lime law here at Loyola Law School. I'm an
3 intellectual property attorney, a startup internet
4 attorney as well as an alcohol attorney practicing
5 throughout California.
6 MS. BRIDGE: Hi. I'm Catherine Bridge,
7 assistant general counsel at the Walt Disney Company,
8 and my practice focuses primarily on copyright,
9 trademark and right of publicity issues.
10 MR. TRONCOSO: My name is Christian Troncoso.
11 I'm with the Entertainment Software Association. We
12 represent most of the largest game publish -- video game
13 publishers in the U.S. as well as the three major
14 console makers: Nintendo, Sony and Microsoft.
15 MR. GOLANT: Thanks, everyone. And for those that have been
16 following
17 our roundtables in Nashville and also at Cambridge in
18 June. Some of these questions may be familiar to you.
19 We'll start off with this one:
20 So from a practical perspective, is there a
21 need for a secondary market for online music, video,
22 and video games analogous to the secondary market for
23 physical media? Why or why not?
24 Who would like to take first crack at that
25 type of question? Put up your sign and we'll follow up
26 from there.

1 Catherine?
2 MS. BRIDGE: Okay. I would say no, and I'm
3 speaking primarily for movies and the types of
4 television shows that our company creates. You know, at
5 this point the law and technology converge to enable a
6 very robust licensing model, and that gives us the
7 ability to give consumers access to very high quality
8 content when they want it, how they want it, where they
9 want it, and to multiple authorized users.
10 The market is meeting consumer demand through
11 streaming electronic download and services with similar
12 names. This is a much more dynamic and flexible
13 landscape for the consumer with a great deal of choice,
14 different price points, and, you know, from free online
15 viewing or free mobile viewing to downloads of movies
16 for prices that are similar to DVDs and, you know, none
17 of this involves the transfer of a physical object.
18 And the first sale is a limitation on the
19 distribution right that is really there to facilitate
20 the alienation of physical property, and that's not what
21 we're talking about here. We're talking about digital
22 distribution, digital access.
23 Consumers that prefer that model and prefer to
24 purchase the physical good on which the content is
25 distributed. You can still buy books and DVDs, and

1 first sale is applicable to that disposing of that
2 physical good, but we're finding that consumers are
3 moving to access-based models which are based in
4 licensing readily and that we're meeting demand and it's
5 giving them great advantage.
6 I'll just offer a personal anecdote which is
7 last weekend I drove down to San Diego with my daughter.
8 What should have been a two-hour drive was a four-hour
9 drive, and, you know, I was very happy to have the iPad
10 that was loaded with a lot of content and probably a lot
11 more content than, you know, had I had the presence of
12 mind to bring a DVD player and some DVDs or something or
13 something else. So for me that -- it's just a personal
14 anecdote, but there's reasons why, and that's just one,
15 why these electronic services are terrific and meeting
16 what consumers want.
17 Um, so, you know, we're also not seeing a
18 ground swell from consumers for a resale market for
19 digital goods. I mean for digital distributed content,
20 and that's because it's flexible and it's dynamic, and
21 if we saw that, the market would respond, but we don't
22 see a need for the government to step in with, you know,
23 first sale based on, you know, notions of alienation of
24 physical property for a marketplace that we think is
25 working very well.

1 MR. GOLANT: Thanks. Appreciate your
2 comments. I think, Nissan, you were second and,
3 Kristin, you were third.
4 MR. THOMAS: I would like to take the opposite
5 position and advocate for a first sale doctrine in the
6 digital context. I know it's a very difficult position
7 given that digital media is somewhat intangible. You
8 can't really touch it. You don't own it. I mean you
9 can't give it away and things of that nature, but I
10 think the challenge is first if we want to define the
11 first sale right, we need to define what ownership is in
12 the digital context.
13 I think you go to different types of platforms
14 and download different types of media, whether that be a
15 book or music, and the ownership of that is different,
16 you know. Music you might be able to house it and store
17 it on your hard drive, but a book from Amazon, maybe you
18 only have access to it to a certain extent.
19 So if there may be some uniform language
20 around what ownership is in a digital context, then we
21 could probably move into a place that we can start to
22 see resale of digital works.
23 MR. GOLANT: Thank you. Christian.
24 MR. TRONCOSO: Thanks. I mean I think for
25 this whole issue there's really sort of two related

1 questions. The first is whether the public is
2 experiencing any problems because the first sale
3 doctrine is not currently applicable to works that are
4 distributed online, and then the second is whether
5 fixing that problem is actually going to advance the
6 public interest, and I think it's on the second question
7 that really, you know, what I'm here to discuss because
8 a lot of the business models Catherine was discussing
9 and the business models that are prevailing in the video
10 game industry are based on licensing and that's because
11 they involve sort of an ongoing service that game
12 publishers are providing consumers where they're able to
13 provide an interactive experience rather than 15 years
14 ago when the video game industry was pretty much just
15 games sold on disc where you take it home and you play
16 that game and it's sort of just a stand-alone product.
17 Now that games are so dynamic and being
18 updated all the time and players are playing against
19 each other one a game publisher's servers, there really
20 is a necessity to use licensing as the distribution
21 model, and so any fix that would undermine the ability
22 of content producers to rely on licensing that is
23 enforceable would really undermine their ability to
24 offer those types of business models, whether it's the
25 subscription services that are big in the video game industry

1 and also in the music and film industries or sort of the
2 newer distribution models for the video game industry
3 which are oftentimes games distributed for free but then
4 monetized through in-game transactions or the like.
5 So any sort of tinkering with that sort of
6 freedom of contract for game publishers to offer their
7 works to the public is going to sort of turn the hand of
8 time back and make it very difficult for them to offer
9 the types of games that consumers are gravitating
10 towards now.
11 MR. GOLANT: Understood. Christopher.
12 MR. BRANCH: Yeah. It's just a point though.
13 We're really talking about thievery and stealing things,
14 and I think it's a 64,000-pound gorilla in the room to
15 allow individuals and companies to sit there and take
16 property that belongs to somebody else, make a gazillion
17 copies of it, and send it out and then say, "Oh, but I'm
18 the secondary user so I'm allowed to do that" is just
19 plain out old-fashioned thievery, and whether it's some
20 file thing or something else. And sure, there's all
21 this technology (inaudible) simply take it out of your
22 machine and put it on somebody else's. Yeah, but you've
23 got 6,000 backup copies and you've got the clouds and
24 you've got all this stuff unless somebody is swearing
25 under penalty of perjury, and we know what that does.

1 There's no ability to really have the initial
2 creative artist control what he or she has done with it.
3 Whether it's a company, whether it's an individual, and
4 until such time as technology catches up with that,
5 there's nothing we can do to control that flow of
6 creative genius that started the whole process.
7 MR. GOLANT: Thanks. Steve, you have a
8 follow-up.
9 MR. TEPP: Just a couple of quick thoughts.
10 You asked -- you posed the question should we have a
11 secondary market. First of all, we do, of course. We
12 have a secondary market for the traditional application
13 of the existing first sale doctrine.
14 To the extent what you're asking should we
15 have a forward and delete model in furtherance of what's
16 arguably a secondary market, I would argue that's not a
17 secondary market at all because, as you know, the
18 quality of the digital file does not degrade and is
19 instantly transferable over unlimited distances, so it's
20 going to substitute one for one for sales in the primary
21 market. So it's really just another version of the
22 primary market except it's not authorized by the
23 copyright owner.
24 MR. GOLANT: Understood. And this is in
25 follow-up. Since we had some comments about consumers,

1 I'm going to ask questions about that right now, and the
2 first one is when consumers pay for access to content
3 online, how do they know that they may not be able to
4 freely resale or give away the music, e-books and games
5 that they purchase?
6 John?
7 MR. VILLASENOR: So I guess I'll answer that
8 by giving some context. I think the question of first
9 sale is, with all due respect to all of us, becoming
10 less important. As a gentleman on the end noted, fewer
11 and fewer pieces of content are distributed pursuant to
12 sales, and so I guess regardless of what we might think
13 about secondary markets, I happen to think they're good.
14 Introducing a first sale -- digital first sale
15 doctrine wouldn't address any concerns that may or may
16 not exist today because this content isn't being sold.
17 That does move the license issue is that I think that
18 content owners -- probably many people agree -- have not
19 gone to distributors -- people facing consumers have not
20 done a particularly good job or as good a job as they
21 could in making clear to consumers what rights they have
22 or do not have in the content.
23 If there's a button that says "buy" and a
24 consumer presses the button and finds that he or she in
25 fact owns nothing, I think there's a pretty reasonable

1 argument that there's at least not a particularly
2 forthright disclosure regarding the consumer's rights.
3 So I think if consumers were in possession of
4 clear information about what their rights are or are
5 not, then the market would lead to pressures that would
6 lead content owners and distributors to provide more
7 flexible offerings of content that would perhaps include
8 the opportunity to have downstream secondary
9 distributions which, remember, are perfectly lawful if
10 they are done with the authority of the content owner
11 even in a licensing model.
12 MR. GOLANT: Thanks. I think we have -- let's
13 see -- Nissan first and then Don.
14 MR. THOMAS: Yes. So obviously piggybacking
15 with what John said, it's a consumer protection issue,
16 and whether consumers are adequately disclosed and know
17 their rights when they buy something because obviously
18 purchasing and buying connotes ownership and certain
19 rights with that.
20 So -- and, again, it goes back to having to
21 define what ownership is in the digital content --
22 context and having these digital platforms abide by that
23 and so that there's one kind of set uniform rule in
24 regards to digital what is actually ownership, and I
25 don't think we can have a secondary market or resale

1 doctrine without knowing what ownership is in a digital
2 context because obviously it's different than in the
3 physical.
4 MR. GOLANT: Thanks. Don, go ahead.
5 MR. DENNIS: Yeah. I agree pretty much with
6 what everyone has stated, and also I think it would be
7 something akin to creating a very reasonable shrink wrap
8 license that you already have where you kind of spell
9 out the terms of what a consumer exactly is entitled to
10 and then also probably adding onto that what devices
11 that they're going to be accessing the content from.
12 For example, devices that are only owned by that
13 consumer if you're trying to limit them transferring it
14 to other individuals that would be typically precluded.
15 MR. GOLANT: I think, Christopher, you put
16 your card up?
17 MR. BRANCH: Well, let's broaden this a little
18 bit though. I mean we talked about the last panel
19 and the best practices. We talked about all these
20 various things to educate the consumer. We give them
21 license agreements. How many of you have ever read any
22 license agreement for any item you've ever bought? Only
23 one person in the entire room. We have a room full of
24 lawyers. We have a law school. We have lawyers all
25 over the place.

1 I'm not sure, number one, the public cares.
2 Number two, I think that if they need to learn what
3 they're entitled to when they get certain things, that
4 they need to consult counsel or figure it out or read
5 the documentation that they have, but I think to come up
6 with more guidelines and more issues to educate this one
7 narrow set of consumers, you know, puts to light, well,
8 okay, so you can't reproduce something. You just paid
9 $3 million for a painting, but you can't reproduce it
10 and put it on a wine label because that wasn't included
11 with your purchase of the painting because you didn't
12 have reproductive rights.
13 Well, then, we need to come up with a pamphlet
14 for that. Then we need to come up with a pamphlet for
15 everything that we do here and basically re-explain the
16 law of this entire law library behind us and the whole
17 Lexis-Nexis and West Law, and I think to start going
18 down that road to educate consumers is just asking for
19 too big a project.
20 MR. VILLASENOR: If I can respond, we can
21 disagree or agree about how much we should educate
22 consumers, but we shouldn't deceive consumers, and I
23 would argue that the big fat "buy" button deceives
24 consumers. And so I think it would be disingenuous --
25 and, again, just for the record here, I do not think we

1 should modify copyright law to have a digital first sale
2 doctrine.
3 It would create all sorts of problems now in
4 the contract world, but I don't think it's reasonable
5 advice to say that consumers should, quote, "consult
6 with counsel." Consumer -- my 13-year-old daughter is a consumer
7 of digital media. Should I ask her to consult with
8 counsel when she buys something? I think consumers have
9 a right to reasonable clarity regarding their rights
10 with respect to content, and I actually -- maybe I'm
11 over naive. I think it's a win-win. I think if
12 consumers had better clarity regarding their rights, I
13 think you'd see the market act with more clarity in
14 terms of the offerings and you'd find an even greater
15 variety of offerings than we have today.
16 MR. GOLANT: Thanks for your comment.
17 Catherine, I think you had your card.
18 MS. BRIDGE: Yeah. I think we can all agree
19 that consumer expectations and speaking to consumers and
20 distributors speaking to consumers in ways that are
21 clear and transparent is in everybody's interest. So I
22 think there's no debate about that.
23 I do think -- I would just respond to the
24 point about the buy button which is only that I think,
25 you know, it is something that in this access -- you

1 know, access environment where people are getting their
2 content and consuming it online and mobile through
3 digital environments, I think it speaks not necessarily
4 to an ownership model.
5 I mean -- you know, I haven’t done a survey I can't speak
6 scientifically about this, but I think more and more
7 people would understand that you can buy a license to
8 have content, you know, pursuant to the terms of the
9 license, you know, and they get the license and are
10 presented with it, and we all know there's issues
11 around, you know, how much we all agree in terms of use,
12 but I would just say that I don't think use of the buy
13 button is a deception, and I think it's kind of an
14 iterative process in that people are consuming content
15 are understanding that it's not a physical ownership
16 model.
17 MS. PERLMUTTER: There was some discussion at
18 one of our prior panels about the possibility of having
19 the button say not just "buy" or "buy access" or "buy
20 license."
21 Would that deal, John, with some of your
22 concerns?
23 MR. VILLASENOR: I think it would be very
24 helpful because at least it raises the question because
25 in the wider world, if we buy a candy bar, we own the

1 candy bar; right?

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

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

13 MR. GOLANT: Christopher.

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

23 Now you're talking about making money and
24 profit or sharing certain things with other people, and
25 just like you buy and sell CDs on eBay or cars on eBay

1 and now you're talking about buying and selling, and
2 it's at that point where I'm not sure that the consumers
3 have the expectation that when they hit the buy button
4 for some music that they're thinking about how they're
5 going to resell it.
6 If you go buy a CD at Amoeba for $2, you may
7 take it back to Amoeba and try to resell it to them for
8 $.50, and that may or may not -- but at least you have
9 an exchange, and that's where the first use doctrine
10 really comes in or the first sale doctrine comes in is
11 you're ridding yourself of that CD.
12 Now, whether you put that on your iTunes or
13 something else is not what we're dealing with here.
14 We're looking at consumer expectation when they buy, and
15 by pressing the buy button in electronic format, I'm not
16 sure any consumer is expecting to resell that in the
17 next hour.
18 MR. GOLANT: Excellent. Thanks.
19 If there's no other comments, I think I'll go
20 to the next question. This is a thread I picked up from the
21 previous comments, and the question goes like this:
22 Would a voluntary best practices regime
23 establishing standard definitions, terms and conditions
24 for online rentals and purchases be useful. That's the first part. And
25 how

1 could such a regime be constructed that takes into
2 account the needs of both the creators and the
3 consumers?
4 Who would like to go first in answering that?
5 Doug.
6 MR. KARI: Before we get too far in discussing
7 physical versus digital, I think it's important and the
8 reason that I'm here is to point out that you could do
9 mischief if you begin to think of these concepts as
10 strictly separable because sometimes they are not.
11 For example, there is embedded digital content
12 in myriad physical objects, digital content that is
13 essential for the operation of those objects, whether
14 they be the automobiles that Christopher mentioned,
15 whether they be refrigerators, things like hairdryers.
16 Myriad of objects. Anything with a digital display, for
17 example: A clock radio, a DVD player.
18 This was why in the Kirtsaeng case we pointed
19 out in our brief that it was very important that the
20 rule be established that allows for transferability,
21 alienation of these items because, as digital content
22 begins to permeate the physical world, it's important to
23 have a rule that doesn't allow mischief to be done by
24 the manufacturers who want to piggyback on the rights,
25 the intellectual property rights within a physical

1 object in order to restrain the secondary trade in the
2 object.
3 So in this discussion, I don't have a problem
4 when folks are talking about pure digital content or
5 purely a physical object that has no intellectual
6 property rights in it, but beware when you begin to mix
7 the two and some of the statements -- the broad
8 statements that are being made can do mischief in the
9 physical world if they're carried to their logical
10 extreme, and I would just caution everyone to think
11 about that, and I would ask the PTO as well to consider
12 that. It is not necessarily black and white that
13 dividing line between physical and digital.
14 MR. GOLANT: Well, thanks. Yes, Christopher.
15 MR. BRANCH: I think Doug makes a good point,
16 and we're sitting here in 2014, and we don't even know
17 what the next four to five years are going to be. I'm
18 involved in so many cutting-edge projects around the
19 world that I can't tell you about, but there are so many
20 things going on that we sit here that we don't even know
21 about, and so to change the rules for what we see on the
22 radar in the next year is almost not going to apply
23 three or four years from now.
24 So you have to be very careful about changes
25 we make to doctrines like this because we have no idea

1 what's on the horizon. Things are changing
2 exponentially as we sit here, and what used to take 20,
3 30, 40 years to change is now taking 20, 30 and 40
4 seconds, so we have to be very careful about changes and
5 make sure that whatever changes or additions we make are
6 going to cover things like the merging of tangible
7 property and intellectual property and digital property
8 and how it all fits together.
9 That's, I think, a huge concern about changing
10 the rules at this point for what we know and understand
11 today as far as consumer behavior, as far as the
12 internet. I mean Napster was a big thing ten years ago,
13 and now I don't think any teenager has ever heard of it.
14 So there's something new, so you always have to be
15 careful about changing for today's standards.
16 MR. GOLANT: Understood. Christian.
17 MR. TRONCOSO: I was just going to return to
18 your initial question, but if others had comments on the
19 sort of physical goods with code that is essential to
20 its operation, I'll sort of wait.
21 MR. GOLANT: Anybody? Go ahead.
22 MR. TRONCOSO: So the idea of best practices I
23 think sounds very appealing. I think much like the
24 discussion in the prior panel on fair use best
25 practices, creating a set of best practices for selling

1 goods on the Internet is going to be very difficult
2 because there's just so many different types of business
3 models, even within my industry. So creating a best
4 practices document that would be relevant to even a
5 small segment of my members would be very difficult and
6 very difficult to achieve consensus on.
7 And the other point I wanted to raise on this
8 contract issue is that we need to not forget that there
9 are already a lot of remedies in contract law that
10 address a lot of the concerns that have been brought up
11 on this panel. So if contracts are unconscionable,
12 obviously they're not going to be enforceable, and
13 there's also the FTC who has the power to intervene if a
14 contract is unfair or deceptive.
15 So to the extent -- I think John Villasenor's
16 point is very well taken. If the contracts online are
17 deceptive, that's bad for everyone. That's bad for
18 every industry, and I think there would be a lot of
19 consensus around sort of dealing with this issue that
20 way, either through contract law or in instances where
21 there truly is a deceptive practice going on for the
22 FTC.
23 MR. GOLANT: Excellent. Thanks for that.
24 Let's move on to a question about copyright owners and
25 their interests. So here it is:

1 How will existing business models be affected
2 if the first sale doctrine is extended to digital media on theonline
3 marketplace, and how will such an expanded
4 first sale document affect the income of small and
5 medium-sized copyright holders?
6 John?
7 MR. VILLASENOR: The caveat here is that most
8 content is, as well all know, not distributed pursuant
9 to the sale. But -- so the license content wouldn't be,
10 in my view, particularly effective. But for the
11 substantive content that is actually digitally sold,
12 electronically sold, I think a first sale doctrine would
13 be a huge problem because what you can do, for example,
14 is then have these -- you could make loans that don't
15 last two weeks but that last 20 milliseconds, and you
16 could basically have people loan to pools in the clouds
17 so that an artist would never sell any more copies of
18 the work than there were people who happen to be
19 listening to it at any one time which would decimate the
20 market for artists, and the ability to do these
21 millisecond or microsecond type loans is absolutely no
22 analog in the physical world.
23 So I think it would be a huge problem, but the
24 very existence of that problem would be all the more
25 reason why distributors would move away from sales

1 models to contract models so they would simply become --
2 finish the transition.
3 MR. GOLANT: Okay. Steve and then
4 Christopher.
5 MR. TEPP: So harkening back to the copyright
6 office report in 2001 that you mentioned in the
7 introduction, there were three elements of the office's
8 conclusion as to why the first sale doctrine should not
9 be extended to authorize the forward and delete model,
10 the third of which is the most relevant here, and that
11 is the practical effect.
12 The first sale doctrine, when it was created
13 by the courts back in the beginning of the 20th Century
14 and codified in the 1909 Act and not too long after, was
15 necessarily limited in its effect on the market for
16 copyrighted works by the practical logistical realities
17 of the time. If you have a hard copy of the work and
18 you wanted to transfer that, first you had to find
19 someone who wanted it, and then you had to physically
20 deliver it to them.
21 Both of those transaction costs are reduced
22 virtually to zero in the modern age because of the
23 combination of digital technology and the interconnected
24 network age that we live in. So the result is that a
25 forward and delete model would have a much more dramatic

1 and harmful effect for the market for copyright owners
2 arguably to the point where it would threaten their
3 ability to make a living at it.
4 Add to that the recent decisions we've seen
5 regarding mass digitization, and there's been an
6 affirmance by the circuit court of one of the lower
7 court decisions not too long ago. If those are all
8 lawfully made copies, which of course is the statutory
9 test now. It's not about first sale anymore even though
10 we continue to use that name.
11 If those are 10, 20 million lawfully made
12 copies, and then the Section 109 is changed to authorize
13 forward and delete, every one of those can then be
14 forwarded and it's hard to see what, if anything,
15 remains of copyright for works that are subject to that
16 use.
17 MR. GOLANT: Okay. Thanks for your comment.
18 Christopher, you're next.
19 MR. BRANCH: I'm going to hold off.
20 MR. GOLANT: Okay. Nissan.
21 MR. THOMAS: So, again, I would argue that if
22 we're going to talk about first sale right doctrine in
23 the digital context that we define what ownership is,
24 and in that context ownership probably should be
25 unlimited access 24/7 for that individual that made a

1 purchase, and in that sense that the actual file does
2 not reside in the hard drive of whatever device that the
3 download occurred that is actually still housed on a
4 remote server through the platform, then there might be
5 plausible opportunities to allow the original rights
6 owner the platform and the purchaser to participate in
7 the income stream of the resale of that work which would
8 virtually mean that once they sold it, they will lose
9 access to it, and so I mean I think for us I think the
10 challenge is to try to find new ways of compensating
11 copyright owners, and that's what this panel and the
12 government's role is to do.
13 MR. GOLANT: Thanks.
14 MR. BRANCH: So I think that this is wonderful
15 for the large companies who can afford to put out
16 licenses and for those kinds of entities that can sign
17 up, but for the garage bands, the small musicians who
18 compose one or two or three CDs and then make those
19 available digitally to the world and charge $.99 a song,
20 I think it's that core little group of people are the
21 ones who would basically stop doing what they're doing
22 to get compensated to buy their guitars, to rent their
23 studio space.
24 It's the real small individuals who really
25 suffer, I think, in this. And sure we could go to this

1 entire licensing thing and every song that you get is
2 licensed and all of these wonderful creative things, but
3 it really puts those really small entities who are just
4 looking for enough money to pay for their next guitar or
5 their guitar string or what have you out of their
6 ability to do that and go back to their day jobs and
7 just do whatever they can for fun.
8 MR. GOLANT: Thanks. Anybody else want to
9 respond to any of the questions, comments so far?
10 MS. BRIDGE: I would just say that the
11 question was focused on smaller, medium-size companies,
12 but I would say I would think even with content that
13 comes from a large company such as ours, really
14 consumers -- the marketplace is responding now to
15 consumers with different price points, different types
16 of platforms, and if there were a digital resale
17 overlay, that would require us to change the economics
18 of the first transaction.
19 It would have to be -- I mean it would have to
20 be significantly higher to pay for the investment that
21 goes into making the movies that we're making, the
22 television shows that we're making, and that would be a
23 radical alteration of the marketplace, and I think
24 ultimately consumers would be harmed by that.
25 MR. GOLANT: Good point. I have another

1 question for the crowd, and it goes like this:
2 How do existing or planned online business
3 models provide consumers with the benefits associated
4 with the first sale doctrine such as the ability to lend
5 a book to a friend or buy a cheaper secondhand copy of
6 the textbook?
7 MR. KARI: There's a thriving online market in
8 copyright protected items of all kinds, and the
9 existence of that online market has really extended
10 worldwide so that it's important that whatever rules are
11 adopted by the Patent and Trademark Office and by congress
12 keep in mind the ability of U.S. consumers and
13 businesses to participate in this thriving electronic
14 marketplace where transactions occur from all over the
15 world, and with modern logistics and shipping things can
16 move readily, and that's getting better and better, and
17 that's good.
18 In general it's economically healthy,
19 environmentally healthy to have objects freely tradeable
20 and to maximize their lifespan and to maximize their
21 value. This is good. You don't want things ending up,
22 for example, in the garbage dump because people are
23 afraid of reselling them and they're afraid that they're
24 going to be infringing on someone's rights.
25 Anytime you possessory rights from the rights

1 of alienation -- and I'm talking in the physical -- in
2 the physical world, you create mischief. It's
3 counterintuitive. Most people believe that the physical
4 right of ownership, that possessory right of ownership
5 also includes the right of alienation. You try to
6 separate the two, it creates great headaches, and it
7 creates burdens to free alienability, free trade, and to
8 maximize the use of things in the physical world. The
9 online world has been terrific in allowing things to
10 move around the world to be put to maximal use and for
11 their value to be maximally realized for the benefit of
12 all of man kind.
13 MR. GOLANT: Thanks. Anyone want to respond
14 to that?
15 MR. DENNIS: Not necessarily respond but what
16 I was thinking in regards to your question in terms of
17 small businesses and up and coming companies in the
18 future of how they would continue to thrive and stay
19 alive in this new environment would be something they
20 might consider a subscription-based service where, if
21 they couldn't get the entire upfront cost in a large
22 amount, they might break it up over a period of time.
23 In addition, that would allow them a little
24 bit more flexibility to remain in business while
25 actively trying to create new content that will gather

1 more consumers to keep the drive. Otherwise, it
2 wouldn't be worth it to go through all the changes and
3 difficulties they have to come up with new and creative
4 and appealing content if they knew it would only be one
5 sale.
6 MR. GOLANT: Thanks for your comment.
7 Anybody else want to respond to the question
8 so far?
9 All right. Here's another one for you, and
10 this is a factual question. If you know it, please
11 speak up.
12 Are there any types of works in digital
13 markets that are always licensed and never sold?
14 Christopher.
15 MR. BRANCH: Every piece of software I've ever
16 seen has a license attached to it, and I've actually
17 boughten older pieces of software on eBay that came with
18 a license or you just buy the license number from
19 somebody else, and so because there's a tangible item
20 with a license, then it seems like it's subject to the
21 first sale doctrine, and the same way with that's all
22 part of the contract. That's all part of contract law.
23 And so -- (inaudible).
24 But you bought the license, and then somebody
25 else -- you bought the rights to that license from

1 somebody else.
2 MR. VILLASENOR: We're seeing in the ninth
3 circuit (inaudible) which would argue against --
4 MR. BRANCH: It was Lotus 123.
5 MR. VILLASENOR: If I could respond to your
6 earlier question. I think I should also say to the
7 extent it's not obvious, all of my opinions are my own and
8 I'm not claiming to represent UCLA.
9 There have been content (inaudible) provided
10 the ability to loan digital content or to share on
11 multiple devices and I applaud those efforts, that’s really good.
12 The concern though is that it still leaves in
13 the control of the content holder or the distributor a
14 far greater level of control than has historically been
15 possible, and ideally -- and I'm not saying that the
16 solution is to then strip the content holder's right or
17 copyright holder's right away because that leads to all
18 of these bad consequences we talked about.
19 It would be nice if it was possible for
20 content distributors or copyright holders to enable
21 these kinds of sharing while also having some layer of
22 anonymity; right? In other words, through technology.
23 So I could loan a piece of digital content with the
24 consent of the copyrighters for two weeks, for example,
25 and the copyright owner could verify that I had loaned it but

1 wouldn't need to know exactly who I loaned it to, just
2 that I had loaned it, and it was one of a copy, and I
3 didn't have access to it while this other person did and then I got it
4 back after two weeks or something like that. But I
5 think there are anonymization protocols, which I'm optimistic might help
6 in those respects. So
7 I think there's an opportunity for progress there.
8 MR. GOLANT: Thanks for your comments.
9 Christopher, do you have a follow-up?
10 Anybody?
11 MR. KARI: I just wanted to add one comment.
12 Just again to make the distinction it is true that
13 software applications, operating systems and such are
14 generally handled by way of license agreements, but
15 there is software in a myriad of forms that is typically
16 handled by way of sale because it's just -- it's
17 embedded. It's there.
18 For example, in a computer typically the
19 operating system is handled by a license agreement. The
20 BIOS is not. People expect that there's going to be a
21 BIOS that enables them to load that operating system and
22 start the machine in the first place, and the same would
23 apply to embedded software in a myriad of other context,
24 and again this is where my concern comes that mischief
25 can be done when we talk broadly.
26 I know what Christopher meant, but if you take

1 the words literally and say that all software is handled
2 through licensing agreements, that's simply not true.
3 There's software on devices that every one of us use
4 today that we did not sign a license for, and if you
5 drove here by automobile, you were utilizing software,
6 and you never signed a license agreement for that
7 software, and you expect that you own that software and
8 when you resale that car that you have the right to do
9 so, and Toyota or Ford or whomever else manufactured
10 your automobile doesn't have the right to come in and
11 say, "You need to a new license agreement from me in
12 order to carry out that sale."
13 And if that sounds intuitively correct to you,
14 that would be intuitively correct and I think legally
15 correct in a variety of other context and devices that
16 we all touch all the time. So, again, we have to make
17 those distinctions. I think they're intuitive, but it's
18 important to keep them in mind.
19 MR. VILLASENOR: If you didn't sign a license
20 agreement, then under contract law you're not bound by
21 the contract; right? So it may not be as much of a
22 problem as you're suggesting because, when I buy a car,
23 I don't seen a license agreement saying I can't resell
24 I'm not in any way mitigating the issue, but there's a difference between
25 a
26 unilateral license which someone might claim your

1 party to and a contractually binding license which you have explicitly
2 agreed to. I
3 think that distinction is important to keep in mind.
4 MR. KARI: But there are manufacturers who
5 will take that position and try to hide the ball on the
6 embedded software and then utilize it later as a
7 tool to attempt to restrain secondary market trade, and
8 there are many examples of that that those of us in the
9 trade world have seen, and again the concern is that we
10 not develop a standard of practice that enables -- that
11 enables people to use the excuse of embedded software as
12 a way of beginning to restrain secondary market trading
13 in everyday physical objects.
14 MR. GOLANT: Any other responses from the
15 panel?
16 Well, then, let's move on to any questions
17 from the audience or online.
18 Hollis, anyone online asking anything?
19 MS. ROBINSON: No, not yet.
20 MS. PERLMUTTER: We have a shy audience.
21 MS. ROBINSON: Yes, we do.
22 MR. GOLANT: Anybody want to stand up to the
23 microphone? Oh, we have some people here.
24 MS. MUDDIMAN: Hello. Helen Muddiman,
25 composer/song writer. Just want to ask the question.
26 What is the right of the resale?

1 Are we talking about entertainment is the
2 problem or is it -- because you are talking about cars
3 and those kinds of licenses and entertainment that
4 Disney is talking about. They are so different, and I
5 just -- how are you -- how are you going to try and
6 marry them together when the things are inherently so
7 different?
8 MR. GOLANT: Do you want to respond to her
9 comment?
10 MR. KARI: Carefully, thoughtfully.
11 UNIDENTIFIED SPEAKER: I was just going to
12 respond to your last question as examples of maybe not
13 content but business models that are entirely licensed
14 based. Stock imagery is a very good example. And if
15 you look at the services, whether it's somebody who is
16 huge like Getty Images or the hundreds of small picture
17 licensing services that exist across the country that
18 may be owned by individual photographers or small groups
19 of photographers, those typically exist entirely
20 conducting licensed transactions online.
21 They are licenses. They are a one-time
22 transaction with the photographer or the stock imagery
23 company, and so if you are considering some of the
24 precedence, for instance, in the EU which would
25 try and define a license agreement that has, you know, a

1 one-time transaction, no follow-up, those sorts of
2 characteristics as a sale rather than a license, that
3 would be very problematic and would undo entire, you
4 know, long-standing, you know, categories of businesses.
5 Nobody who enters into a stock image license
6 agreement expects that they can then resell that image
7 in competition with the photographer to another magazine
8 or newspaper or, you know, Web site once they're done
9 using the image on their own Web site.
10 MR. GOLANT: Thanks for that.
11 Anyone else?
12 Great. So we conclude our session on the
13 first sale, and I thank you all on the panel and in the
14 audience for coming here today and listening, and we
15 have some closing remarks from Shira.
16 MS. PERLMUTTER: This will be brief, so we'll
17 make up for some of our lost time.
18 Again, I wanted also to say thank you to
19 everyone who came here and participated in these
20 discussions. I thought they were probably more
21 fireworks at this one than either of the other two
22 roundtables which hopefully will illuminate the issues,
23 so we really appreciate it. And I also wanted to
24 particularly extend a special thank you to our own
25 terrific team from the Patent & Trademark Office, Hollis

1 Robinson, Linda Taylor and Angel Jenkins, for handling
2 all of the logistics to make this possible because it
3 is more complicated than you would think, and it's only
4 because of their good work that it looks so easy and
5 smooth, and also to give a very warm thanks to Loyola
6 Law School for their generous hospitality, for their
7 beautiful facilities and for their hopefully flattering
8 photography.
9 And just a final housekeeping note. A
10 transcript of the hearing and also a recording of the
11 webcast will be posted on both the PTO and NTIA Web
12 sites in August if you'd like to look back at them, and
13 we will be having our fourth and final roundtable
14 tomorrow at Berkeley Law School, and if you're so keen
15 to continue this conversation that you want to tune in,
16 it will also be watchable by Web site, by Web cast, and
17 you're also welcome to weigh in remotely if you'd like
18 to.
19 MR. MORRIS: Or you can join us on the flight
20 tonight.
21 MS. PERLMUTTER: Exactly. And if you want to
22 keep track of all of our various Green Paper related
23 events and activities, you can sign up for copyright
24 alerts which we send out to you if you go to the PTO Web
25 site to the copyright page, and hopefully our plan is to

1 aim toward a paper that would reach some conclusions and
2 make some recommendations on these policy issues that
3 we've been discussing today hopefully by the end of the
4 year or at least early next year. So thank you again
5 very much.
6 (Whereupon, the proceedings concluded at
7 2:43 P.M.)
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