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Fair Use: Its Application, Limitations and Future.

Sonia Katyal*

Paul Aiken[†]

Laura Quilter[‡]

David O. Carson**

John, Jr. G. Palfrey^{††}

Hugh C. Hansen^{‡‡}

*Fordham University School of Law

†The Authors Guild

‡Brennan Center for Justice at New York University

**US Copyright Office

††The Berkman Center for Internet and Society, Harvard University

‡‡Fordham University School of Law

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Panel III: Fair Use: Its Application, Limitations and Future

Moderator: Sonia Katyal*
Panelists: Paul Aiken†
Laura Quilter‡
David O. Carson§
John G. Palfrey Jr.¶
Hugh C. Hansen#

MR. ZHANG: Good afternoon, ladies and gentlemen. Welcome to the Copyright Panel. My name is Steven Zhang and I am the Symposium Editor of the *Journal*.

This year our panel will be discussing the fair use issue—its application, limitations, and future. We have a wonderful panel here. I would like to thank everyone here, and also everyone who has been supporting us since June in the preparation of this Symposium. I would also like to thank Professor Hansen, who is really the mastermind behind all this. Without him, we could not prepare this Symposium.

The moderator of this panel is Sonia Katyal. She is teaching intellectual property law classes here at Fordham Law School, and also civil rights classes and property classes. She has multiple publications on these subjects.

Without further ado, I will turn it over to Professor Katyal.

* Associate Professor of Law, Fordham University School of Law.

† Executive Director, The Authors Guild.

‡ Counsel, Brennan Center for Justice at New York University .

§ General Counsel, U.S. Copyright Office.

¶ Executive Director, The Berkman Center for Internet and Society, Harvard Law School.

Professor of Law, Fordham University School of Law. B.A., Rutgers University, 1968; J.D., Georgetown University Law Center, 1972; LL.M., Yale Law School, 1977.

PROFESSOR KATYAL: Thanks so much.

Greetings and thanks for coming to the final panel of our Intellectual Property Symposium for today, the much-awaited Copyright Panel, where we will focus on the ever-changing and ever-controversial issue of fair use.

Let me actually just start off by thanking our distinguished panelists for coming to speak at Fordham today, and also the organizers of today's Symposium; in addition, of course, to the staff and the moderators of the Fordham Intellectual Property, Media & Entertainment Law Journal, who have done a great job of selecting folks to talk about some of the various conflicts and considerations that we see in today's changing field of intellectual property law.

Sort of along these lines, fair use represents the best personification, in my view, of the various public and private considerations that animate the utilitarian balance within copyright law. It is also an area that, despite its statutory construction, is meant to be inherently malleable and flexible in order to adapt to the changing obligations and considerations regarding new technologies.

But it is also, precisely because of its malleability, incredibly subject to serious conflict and judicial variance in its interpretation. So the last few years have seen an enormously important slew of decisions regarding fair use—fair use in parody,¹ fair use regarding peer-to-peer technologies,² open access issues with respect to research, thumbnail photographs within search engines,³ anti-circumvention issues, musical sampling, safe-harbor issues with respect to Internet service providers, and so on. These are just a few of the issues that I think are currently challenging the fair use doctrine.

Many of these cases turn on the foundational and more philosophically rich question of whether or not we should think

¹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

² *In re Aimster Copyright Litigation*, 334 F.3d 643, 647 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001).

³ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

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about fair uses as a right, a privilege, a defense, or a limited creature of common law and statutory construction. Many commentators and judges, some of whom are on this panel, often have different views on this question, which often animates the divergence between narrow and broad constructions of fair use.

In addition, many of these issues are also overshadowed by the increasing reach of digital rights management and other technological controls over content that often foreclose or potentially narrow fair-use interests for consumers, often forcing us to explore whether or not fair use is becoming increasingly determined by technological controls rather than judicial constructions in its favor. So all of this is happening within the law.

But at the same time, outside of the law we see so many of these debates raging within the changing field of digital technology, where we actually see on the Web a tremendous explosion of illegitimate content through the use of sites like YouTube,⁴ prompting one commentator, Tim Wu, who is at Columbia, to herald a new phrase, the phenomenon of “tolerated use” rather than fair use, where copyright owners allow for a limited circulation of illegitimate content precisely because they recognize it either increases the market value of their brands or it does not necessarily harm preexisting markets in their content.⁵

This confluence, a potential narrowing of fair use marked by a potential expansion of tolerated use, signifies perhaps a new role for copyright law and potentially a new role for digital content generally.

Our speakers today are in many ways architects of the academic policy and judicial angles regarding fair use. Allow me to just introduce them all and then we will hear from each one. Our first speaker will be Paul Aiken, Executive Director of The Authors Guild in New York. Our second speaker will be Laura Quilter, who is Counsel at The Brennan Center for Justice at NYU

⁴ YouTube, <http://www.youtube.com>. YouTube is a website that allows individuals to upload and share video clips.

⁵ See Tim Wu, *Does YouTube Really Have Legal Problems?*, SLATE, Oct. 26, 2006, <http://slate.com/id/2152264>.

School of Law. Our third speaker will be David Carson, who serves as General Counsel for the U.S. Copyright Office in Washington, D.C. Fourth we will hear from John Palfrey, who is Executive Director of The Berkman Center for Internet and Society at Harvard Law School. Last, but definitely never least, we will hear from our own Hugh Hansen, Professor at Fordham School of Law.

Thank you so much. Let's actually start. I will turn things over to Paul. Thank you.

MR. AIKEN: Thank you, Sonia.

Let me start things out. There has been an increasingly fierce debate about fair use in all sorts of forums and all sorts of media. I thought I would start by talking about some of the broad public policy concerns, starting at the most basic with copyright itself, the public policy issues around copyright.

Often we are told that we have to balance the interests between rights holders and the public when we look at copyright issues. I think that is largely a false distinction. In many ways, the public's interests are perfectly lined up with rightsholders', because the interest in both is to create a real market for copyrighted goods.

The public's interest is in creating a market for books, movies, and music so people can go out and buy books, movies, and music that they value. When we hear that the public's interest is in, say, a large public domain, that is partly right. There is of course a genuine interest in a public domain, but that interest is secondary, and always has been secondary in copyright. Easily 90 percent of the value that copyright creates is in the market itself. We have to be careful that we do not undermine that market as we act in the supposed interest of the public or we risk destroying what we intended to create.

We have in this country a very strong market in food. No one asks, "What is the public's interest in the food market? I want to go to the market and get potatoes for free." We do not talk in those terms. We understand that just by creating a market for food, allowing people to go to the market and easily buy potatoes, we are acting in the public interest.

Another myth about copyright is that copyright is frequently spoken of as a monopoly. I guess in some sense it is a monopoly. It is a monopoly in the same sense that I have a monopoly in the use of my car or my house—I can decide how it is used; I can decide who is allowed in and who is not allowed in. But it is a very weak monopoly.

The types of monopolies we are concerned about as a matter of policy are those sorts that allow one to corner a market. A copyright monopoly in almost all instances does not allow one to corner a market. If Dan Brown, who wrote *The Da Vinci Code*, and Random House think they have a monopoly and so with his next book decide to charge \$90, they will quickly find out that they do not have a monopoly, that the relevant market is not Dan Brown books but novels generally, or mystery novels or thrillers generally. Copyright is not the sort of monopoly that we should be concerned about.

Copyright is often spoken of—a third myth—as locking up ideas. Copyright does not. This is fundamental but bears repeating. Copyright protects expression, not ideas.⁶ Most lawyers, of course, know this, but I hear this misrepresented time and again, even by experts, copyright professors, that copyright is somehow locking up ideas. It does not. It just locks up expression, the creative expressions of authors and others, and allows them to make money on those works through the marketplace.

Paul Goldstein of Stanford Law School often speaks of the idea-expression dichotomy as creating a vast commons coursing through every copyrighted work, the publicly held and freely copyable ideas the work contains.⁷ Certainly that is right.

If a particular author has creatively expressed an idea so well that another feels compelled to copy that particular expression, then one needs permission—that is, a license—and that is as it

⁶ 17 U.S.C. § 102 (2000).

⁷ See Paul Goldstein, *Copyright's Commons*, 29 COLUM. J.L. & ARTS 1 (2005–2006); Fair Use: Its Effects on Consumers and Industry: Hearing Before Subcomm. On Commerce, Trade and Consumer Protection, 108th Cong. 6 (2005) (Statement of Paul Aiken, Author's Guild), available at <http://energycommerce.house.gov/reparchives/108/Hearings/11162005hearing1716/Aiken.pdf>.

should be. A well-crafted expression should be compensated, or the borrower should simply limit the excerpt to the bounds of fair use.

Now let's move on to fair use in particular. We are told time and again that in order for a copyright to fulfill its constitutional purpose of promoting the arts and useful sciences and to provide a real public benefit, we have to make sure fair use is adequately broad.⁸ But this misapprehends the primary value of copyright, as we have seen, and the role of fair use in the copyright system.

Fair use, as most of you know, was originally a judicial doctrine, now codified in § 107 of the Copyright Act.⁹ It has traditionally helped define the boundary between commerce and free expression, between the commercial incentives secured by copyright and the right to free expression protected by the First Amendment.

Authors, of course, are really big fans of copyright, because authors like to get paid. But they are also big fans of traditional, transformative fair use. Say an author is writing a history of the Great Depression and finds a recent article in which some scholar says that the Depression was caused by the stock market crash of 1929. This drives the author nuts, because she believes it is well established that the stock market crash was only one of several factors causing the Depression. She wants to quote from this article to show just how wrongheaded it is. But the article is protected by copyright and its author may not be inclined to grant her permission to excerpt the work.

So what does our historian do? She uses it anyway. She copies a reasonable amount of that article, enough to make her point, and puts it into her own book, surrounding it with her commentary and criticism. She demolishes the scholar's thesis using his own words against him, and there is nothing that author can do about it.

⁸ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

⁹ *Id.* at 576. "Fair use doctrine remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act." *Id.* Compare *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (D. Mass. 1841) (No. 4901), with 17 U.S.C. § 107 (2000).

That author can do nothing about it, at least in terms of her use of his copyrighted work, because this is classical transformative fair use of the original author's work.¹⁰ She has taken a part of his copyrighted work and transformed it, including it in a new creative expression, something completely unlike his work.

As a society, we see real value in this sort of transformative borrowing from another's work. It is a vital part of the marketplace of ideas that free expression is meant to encourage. And it is everywhere—in book and movie reviews, of course; biographical and historical works; scientific and academic books and journals; novels and plays; poetry and songs.

Section 107 mediates between protected expression and free expression by setting forth four factors for a court to weigh in considering whether a use is fair, factors intended to permit the excerpting of copyrighted works needed for new creative expression, so long as the effect on the commercial market for the work is minimal.¹¹

An unfortunate result of the use of four factors to determine the bounds of fair use is that fair use appears to be a bit mushy. Advocates of all stripes can and do read into fair use what they care to read into it.

Fair use now is often seen as another flavor of the public domain. That is perhaps one way to think of it, but it is of an entirely different nature than copyright's real public domain. Fair use does not mean free use of entire works; that is the realm of genuine public domain. Fair use, in fact, has been transmuted by some into free use or good use or any other use that some interest group, industry, or a corporation wants to make of copyrighted works without paying for them. This is not, and should not, be what fair use is about. If we keep our eye on the true role of fair use—permitting the creation of new creative expressions without harming the commercial market for the work—we will not lose our way.

Let me close there for my opening remarks.

¹⁰ See 17 U.S.C. § 107(2) (2000); *Acuff-Rose*, 510 U.S. at 579 (discussing “transformative”).

¹¹ See 17 U.S.C. § 107 (2000); *Acuff-Rose*, 510 U.S. at 590.

PROFESSOR KATYAL: Thank you.

Next we will hear from Laura Quilter.

MS. QUILTER: Thank you, Paul and Sonia.

Fair use, I think, is something that I am very supportive of, as a creator myself and as a general advocate for free expression. Fair use is shaped significantly by public policy and by statute, as Paul has gone over with us. But it is also shaped significantly by the actual practice of private parties, and that is what I want to talk about today, how private parties interact with fair use in the most common way in which copyright disputes are handled. That includes looking at cease-and-desist letters, looking at the initial sorts of ways that people attempt to resolve disputes.

Let me back up from there and say several years ago, in the mid- to late-1990s, copyright holders, the large entertainment industries in particular, were very concerned about copyright infringement taking place on the Internet. And so, among other things, they spoke to Congress about trying to get some way to deal with this in the most expedient way possible, which would be to go after Internet service providers and get them to take material down when it was plainly infringing. So they were really concerned basically that somebody would be posting significant numbers of MP3s to their Web sites.

The ISPs got involved in this. Together, they ended up crafting in Congress a series of provisions for the Digital Millennium Copyright Act (“DMCA”), which are perhaps lesser known than the § 1201 anti-circumvention provisions but which have turned out to be very significant in mediating how people actually interact with copyright.

These provisions basically set forth a series of safe harbors, limited and contingent safe harbors, for Internet service providers—what I call “online service providers” [hereinafter “OSP”] after the statute—based on what kind of online service they provide and what they have to do to get access to the safe harbor. I am going to run through those very quickly, and then I am going to tell you a little bit about three studies that have gone on already and that are progressing that really look at how this actually plays out in the real world.

Of these provisions, there are three that are the most relevant and important provisions of § 512 for you guys to think about.

The first one is § 512(a), which directs what online Internet access providers have to do.¹² This one is a fairly straightforward safe harbor. It says that Internet access providers—meaning your broadband, your dial-up, your DSL provider, your cable provider—have a safe harbor so long as they develop and reasonably implement a takedown provision for repeat infringers.¹³ But other than that, if they have a policy that they implement for repeat infringers, they are good. They do not have to worry about being possibly liable for their subscribers' copyright infringements.¹⁴

Now, this one is important, because the broadband providers—Comcast and AT&T and Earthlink—are the ones who are providing access to the peer-to-peer file sharers. This was not even a twinkle in the eyes of the copyright and ISP industries in 1998 when the DMCA was drafted. So they were happy to concede, “Hey, let’s get a straightforward safe harbor and move on.”

They moved on to § 512(c), which has a fairly elaborated notice and takedown process. Section 512(c) applies to your Web hosts basically, people who are running computer systems and hosting somebody else’s content—your Web hosts, your email lists, archive providers, those kinds of people.¹⁵

It includes this notice and takedown process, which says if you are a copyright holder and you feel that somebody’s work is infringing on a Web site, you can send a notice, and so long as the OSP expeditiously removes the content or disables access to it, the OSP has a safe harbor from potential copyright liability for hosting that material.¹⁶

There is a counter-notice provision, which says, “Hey, if the user, the subscriber to the service, feels that they were wronged,

¹² 17 U.S.C. § 512(a) (2000).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* § 512(c).

¹⁶ *Id.* § 512(c)(1), (3).

they can submit a counter-notice and say ‘put it back up,’ and after a certain amount of back and forth, the material can go back up.”¹⁷

So § 512(c) is the most elaborated process in this statutory scheme.

Section 512(d), interestingly, applies to information location tools, search engines. It provides a safe harbor for linking to content that could be infringing.¹⁸ It is really questionable, if you think about it, what sort of infringement might have occurred anyway. If you simply tell someone where to go to find something, *maybe* you are enabling it.

The case law was really not there. So one might wonder what they were bargaining for when they were in Congress trying to get this. But basically it says: “If you provide notice to a search engine, if you provide notice to Google, that they are linking in their search engine to somebody who is infringing copyright, if they take it down, they have a safe harbor from whatever liability they might have had for linking to that content.”¹⁹

There is no counter-notice provision attached to that because the people who are at the search engine are indexing, they are not clients of the search engine. The search engine owes them no duty. There is really no good reason to give them a counter-notice process.

A couple of other provisions to note:

Section 512(f) offers a remedy for intentional misrepresentations by either notice senders or counter-notice senders.²⁰ That remedy is available to the OSP, to the notice recipient (the notice target), or to the notice sender, depending on who is making the misrepresentation.²¹

Section 512(h) offers a subpoena process for copyright holders to get access to the identities of people who are posting information.²²

¹⁷ *Id.* § 512(g).

¹⁸ *Id.* § 512(d).

¹⁹ *Id.* § 512(d)(1)(C).

²⁰ *Id.* § 512(f).

²¹ *Id.*

²² *Id.* § 512(h).

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So there is the system. It was set up with a vision of massive amounts of infringing content being posted on Web sites.

Well, it turns out that the massive amounts of infringing content were posted in people's homes, on their own personal machines and not on hosted machines, so the notice provisions for § 512(c) that were well articulated for Web hosts really did not apply.²³

That is the legal layout of the land.

Now, in the late 1990s and early 2000s, a number of legal scholars, including Wendy Seltzer, who led the initiative, became concerned that the ways in which copyright and other intellectual property disputes were being mediated very informally and very rapidly with cease-and-desist letters and they were worried about the potential free expression issues.²⁴ They set up a database of cease-and-desist letters, called the Chilling Effects Clearinghouse.²⁵ That has become largely a database of § 512 notices, because there are so many of them being sent. With this database, two different projects have looked at the results. I am going to very quickly talk about those and then quickly talk about the follow-up work I am doing.

The first project was done by Marjorie Heins, a colleague of mine.²⁶ It basically looked at all of the trademark and copyright, including § 512, notices from the year 2004 in the Chilling Effects Database. Many of these were submitted by Google, which submits all of its notices to the database.

They basically found that the take-home is that twenty-one percent of all the notices they looked at presented either very weak

²³ Compare 17 U.S.C. § 512(c), with, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 918–20 (2005).

²⁴ Jennifer Urban & Laura Quilter, *Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006); Wendy Seltzer, *Chilling Effects Clearinghouse*, <http://www.chillingeffects.org> (last visited Jan. 18, 2007).

²⁵ See Seltzer, *supra* note 24.

²⁶ See MARJORIE HEINS & TRICIA BECKLES, BRENNAN CENTER FOR JUSTICE, *WILL FAIR USE SURVIVE?* (2005), <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>. Marjorie Heins directs the Free Expression Policy Project at the National Coalition Against Censorship (<http://www.fepproject.org>).

initial underlying claims or strong, or reasonably strong, fair use of free expression or other defenses. Of those notices, about thirty-one out of fifty-four of them—they looked at a set of about 320 notices in total—or thirty-seven percent, ended up being removed from the Internet. So thirty-seven percent of notices that presented a strong fair use claim or a reasonable fair use claim or a weak underlying substantive claim to begin with ended up getting taken off the Internet.

I point this out because, from First Amendment perspectives, if you look at this process, it is effectively a prior restraint with no judicial review, because the § 512(f) standard says, “Hey, if there is an intentional misrepresentation, you can deal with it.”²⁷ An intentional misrepresentation is an extremely high standard to meet. It turns out that § 512(g), the counter-notice provision,²⁸ for various reasons is rarely used and tends to be fairly ineffective. So that was the first study.

The second study, which I was working on with Jennifer Urban, a colleague of mine at USC, came out just a little bit after that.²⁹ We basically looked at only § 512 notices. We looked at close to 900 of them, covering a period from 2002 to 2006. We found somewhat different findings, because we were looking at a different set of notices.

The fair use findings: we found slightly higher percentages of fair use and invalid claims and those kinds of things; we found closer to thirty percent. So I think you can ballpark and say between twenty and thirty percent of these claims that we were looking at—which, again, is a particular circumscribed set—were problematic substantively.

I found a few other things more interesting, in a sense, about what we found.

One is that § 512(d), the search engine takedown provision,³⁰ is tremendously popular and it has basically become a tool in the search engine ranking wars. People are complaining that their

²⁷ See 17 U.S.C. § 512(f) (2000).

²⁸ *Id.* § 512(g).

²⁹ See Urban & Quilter, *supra* note 24.

³⁰ 17 U.S.C. § 512(d) (2000).

metatags are being used, that their short, pithy phrases that describe this or that product, have been appropriated by somebody else and are being used and that that other person has ranking. They are quite explicit about this. They say “and now they have a number one ranking in Google and I have a number three ranking.” So they are very unhappy about this.

Another key finding is that fifty-five percent of the search engine notices related to competitors that were these kinds of notices—advertising jargon, relatively short phrases—really, almost all of them were of questionable copyright. But we took a fairly conservative approach in looking through the fair use on that. Those notices are increasing. So the § 512(d) notices are the most popular sorts of notices that are being sent under §§ 512(c) and (d).

Third, the movie and music industries, and more generally the creative industries, do not use the §§ 512(c) and (d) processes.³¹ This is not surprising. The §§ 512(c) and (d) processes are for Web hosting and Internet search indexing, and the vast majority of infringements of music and movies are being done on peer-to-peer, which are § 512(a) processes. So they really don’t have a reason to use the §§ 512(c) and (d) provisions. They are sending mass numbers of notices, but they are not “takedown” notices.

Fourth, people who start sending notices keep on sending them, so half of the notices that we saw were from repeat senders.

Fifth, the procedural flaws in the notices were significant. Thirty-one percent of the notices presented significant procedural problems that rendered them technically unenforceable under the statute. In fact, we discovered later on that the numbers were actually considerably worse than that, because Google, who had told us they were submitting all of their notices, actually cleared out the very worst notices that presented the most substantive flaws before ever submitting them to Chilling Effects. So we never even got to see those because they just bounced them back.

We found a number of other areas that we just flagged as problems. People were sending notices for anti-circumvention

³¹ Urban & Quilter, *supra* note 24, at 651.

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claims, which for technical reasons really don't belong under the § 512 process.

The § 512(a) notices were kind of a mess. It turns out that some § 512(a) providers typically treat repeat allegations as repeat infringement. This turns out to be very problematic because the people who are sending all the § 512 notices make numerous errors.

Let me spend thirty seconds on the work I am doing now, which is talking to OSPs about what they are doing about this and how they are treating it. It turns out, not surprisingly, that people are very confused about these distinctions. If I have gone too fast for you in this meeting over the categories of service providers, imagine being a very small service provider or a small educational institution and trying to figure out what you do with these things. People do not know, and so they default to treating everything, the small providers, as a takedown process.

If they have a student who is using a peer-to-peer file-sharing program, then they just automatically treat that as a takedown. Now, they cannot take down content, because it is on the student's machine, so they disable Internet access. For me, this is a significant free expression concern—not because I do not take copyright infringement seriously, but because Internet access is used for significantly more things than merely infringing copyright. Internet access is used as perhaps the premier speech platform for millions—if not billions by now—people in the world, and cutting it off is a real problem.

I will make two more quick points about what I am finding now.

The counter-notice process is virtually never used, for various reasons.

And lastly, rights enforcement companies, this little set of businesses that have developed in the wake of the DMCA, are a real problem. They send massive numbers of notices, which a lot of OSPs describe as virtually like spam. They are worse than spam, because the OSPs actually have to spend time processing them, instead of just deleting them.

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And they do not respond to complaints. So if a rights enforcement company sends a notice to an OSP and the OSP says, “Hey, I actually don’t even own that IP address”—and this is not uncommon; OSPs report sometimes receiving forty or fifty such notices a day—“I do not have that IP address, it is not a server, it could not possibly hold files,” whatever the reason is, it is impossible to get back in touch with the companies, because they just have automatic machines sending those things out. And they might be staffed by a very small number of people who just do not bother checking their voicemail or their faxes, apparently.

In conclusion, I would say that copyright is an issue. How it is being worked out in § 512 is a matter for concern, not from the copyright perspective, so much as it is from the speech perspective. I do not think that the process is working very well for the entertainment industry as well.

Thank you.

PROFESSOR KATYAL: Thank you.

Our next speaker is David Carson from the Copyright Office.

MR. CARSON: I am probably going to spend most of my time talking about another part of the DMCA, § 1201,³² which has more or less taken over my life in the last few weeks, to the point where I am probably incapable of talking about anything other than that. But I will first start with a few general observations about fair use.

I am operating under a handicap, because I first studied copyright law in 1980, right after the enactment of the 1976 Copyright Act,³³ and we started by looking at the actual words of § 107,³⁴ which I think is an impediment if you want to understand what most people think fair use is all about.

It is, of course, a judge-made doctrine, not a statutory provision. But Congress at least thought that what it was doing in 1976 was codifying that judge-made doctrine.³⁵ Paul did what

³² 17 U.S.C. § 1201 (2000).

³³ Pub. L. No. 94-553, 90 Stat. 1541 (codified as amended at 17 U.S.C. §§ 101–803 (2000)).

³⁴ 17 U.S.C. § 107 (2000).

³⁵ H.R. REP. NO. 94-1476, 94th Cong. (1976) [hereinafter *1976 House Report*].

most people do when they looked at that statute—he jumped right to those four factors, which of course are very, very important.

But what most people seem to do is to ignore the first paragraph of § 107, which really, I think, sets the scene and sets the context for what fair use really has always been about. What it says is, to jump to the heart of it: “[F]air use . . . including such use by reproduction . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.”³⁶ Then it goes on to list those four factors.

Now, I was in private practice during the 1980s and a good deal of the 1990s and I encountered fair use quite a bit. I asserted fair use quite a bit. I have to say I think every time I encountered it, either as a proponent or opponent—usually as a proponent, as it turns out—it was in those contexts of criticism, comment, scholarship, and research. I would submit that that is really what the bulk of our history of fair use in this country, going back to *Folsom v. Marsh*,³⁷ is all about.

Somewhere along the line, though, between 1976 and today, at least in the popular conception—but I would submit not in the conception of the courts for the most part—fair use seems to have mutated. It has reached a point now where I think for most people fair use is defined as “anything I want to do with somebody else’s copyrighted work that I do not think I should be penalized for doing.”

Now, I may feel this way more than some people do, because I have for the last year been dealing with rulemaking, which I will be talking about in a few minutes, where people make arguments to us about the fair uses they have been unable to engage in and the reasons they should be able to engage in them and why technology is imposing impediments and why they should be permitted to overcome those technological impediments.

The vast majority of the so-called “fair uses” that I have seen people tell us that they ought to be able to engage in are uses that I

³⁶ 17 U.S.C. § 107 (2000).

³⁷ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

would call uses for purposes of private copying—"I bought a legitimate copy of this work. I want to make additional copies for myself. I want to be able to listen to the music in my car. I want to be able to see the movie at my vacation home or on my yacht." We can all sympathize with that, right? Or "I want to give it to a friend or a bunch of my friends—as a gift, of course; I am not going to get any money for it. So that's a fair use, right?"

Well, I would say no, no way, not even close. That has nothing to do with fair use, and fair use historically has never had anything to do with that.

Now, of course, the first thing you hear from folks, and the first thing I read in submissions from many folks about this is, "Well, wait a minute. That is what the Supreme Court told us in 1984, in the *Sony v. Universal* case, the *Betamax* case³⁸ that private copying is all right."

That is not what the Supreme Court told us, of course. What the Supreme Court told us was that time-shifting of on-the-air, publicly broadcast television programs, so that if you miss the show at eight o'clock you can watch it at nine o'clock or the next day or next Tuesday and then get rid of it, is fair use.³⁹ The Court expressly did not talk about making your own personal copy to keep.⁴⁰ I do not think any court has ever talked about that, and it certainly has not said it is fair use.

But that seems to be the popular conception, and that is something that I think needs to be dispelled. But it is in the air and it is hard to dispel. Fortunately, as I said, there is precious little legal authority for the proposition, but plenty of people seem to believe it.

Now, fair use is, of course, as the Supreme Court said, and as Congress said in its legislative history for the 1976 Act, an equitable rule of reason; it is not something you apply rigidly.⁴¹

³⁸ *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

³⁹ *Id.* at 455 (holding that "home time shifting is fair use").

⁴⁰ *Compare id.* at 458–59 (Blackmun, J., dissenting) (indicating that video library building is an issue), *with id.* at 421 (summarizing the majority analysis without mentioning library building).

⁴¹ See 1976 House Report, *supra* note 35; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–79 (1994).

You cannot read § 107 and say, “Okay, I know what it is. It is clearly outlined. We know what we can do. We know what we can’t do.” There is, I will grant, some degree of subjectivity. You get any two copyright lawyers together—experienced, reasonable copyright lawyers—and present them with a particular scenario, and there is a good chance that they will disagree with respect to whether what is happening is or is not fair use. I have those debates all the time.

One thing we hear in the debate over fair use is, “Is it a good thing or is it a bad thing that fair use isn’t a black-and-white matter?” As a lawyer, and as someone who finds copyright to be a really interesting area of law, I would submit it is a really good thing. To me it is the most fascinating part of copyright law, really getting your teeth into a fair use issue and trying to figure out whether a particular use is or isn’t fair, and going through all the arguments pro and con.

But the counterargument to that is: How do people out there in the real world who want to figure out “can I do this or can’t I do this?” govern themselves? They go to a copyright lawyer, and the copyright lawyer will tell them, “On the one hand, yes; on the other hand, no; and the answer is maybe.” That is a real problem, and I do not have the answer.

One answer that is proposed is let’s codify it in much more detail, which is what a lot of other systems, such as civil law systems, do.⁴² They tell you precisely what you can and cannot do, usually in a much less generous fashion than I think our courts have done when they have considered fair use on a case-by-case basis.

But I take the point that if you are not a copyright expert—and even if you are a copyright expert—you do not necessarily have assurance in a given case as to whether something is or is not fair use.

So that is the overview of where I come from when I look at fair use. But let’s talk about what I have been focusing on recently, and that is a rulemaking proceeding that the Digital

⁴² See, e.g., Code de la Propriété Intellectuelle [C. PROP. INT.] (FR.).

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Millennium Copyright Act delegated to the Register of Copyrights and the Librarian of Congress.

The rulemaking relates to the provision in § 1201(a)(1), which was added by the Digital Millennium Copyright Act.⁴³ The basic provision in § 1201 is: “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”⁴⁴

So, to take the most well-known access control, when you buy a DVD of a popular motion picture, it is going to have something called CSS, the Content Scrambling System, on it. CSS is an access control. It is an access control in that you can only play that DVD on a DVD player that has been licensed to play that DVD. The people who license the DVD players make sure that anyone who operates under that license cannot have a digital output from that machine that is playing the DVD, the whole notion being we want to prevent people from making unlawful copies. It is an access control in that it controls your access. You can only access the content on the DVD by putting it in an authorized player.

Access controls can be other things too. Password protection is an access control. If you are able to break through the password protection on, say, a Web site that is only open to subscribers, you are violating § 1201(a)(1).⁴⁵

But as the DMCA was going through Congress, the original version just had that prohibition, flat out; that was it. When it got to the Commerce Committee, which considered itself at that point the protector or champion of fair use—which is interesting, because the provision came out of the Judiciary Committee, which is typically considered the committee that thinks about copyright—the Commerce Committee said: “Wait a minute. Well and good, we understand why copyright owners need to do this. We understand the need to give them some legal teeth behind the technological measures that they are deploying. But what happens if everything gets locked up? What happens if people are not able to engage in what are clearly non-infringing activities because

⁴³ 17 U.S.C. § 1201 (2000).

⁴⁴ *Id.*

⁴⁵ *See id.*

there are these technological measures applied to their works and people can't do what in the old-fashioned hardcopy world they always could do? I can pick up a book from the library shelf and read it; I can't pick up a CD and read it."

In particular, the Commerce Committee was concerned about fair use. Because of that, they tasked the Secretary of Commerce—but by the time it got out of Congress it was the Librarian of Congress, on the recommendation of the Register of Copyrights—who had the task of conducting a rulemaking proceeding every three years to determine whether there are any particular classes of works with respect to which the ability of users to engage in non-infringing uses is being adversely affected by the prohibition on circumvention of technological measures that control access.⁴⁶ None of you understand what I just said. If you do, you are very bright, because it took me a long time to digest it and figure out what it meant.

What it means basically is that if we find, based upon what is happening out there in the real world, that technological measures, access controls, are being deployed on works in a way that is actually preventing people from engaging in non-infringing uses, we may exempt the classes of works with respect to which those technological measures are being deployed.

With respect to DVDs for example, we can say, "Fine, motion pictures on DVDs are exempt. People who are engaging in non-infringing uses may break through CSS if we find that the facts warrant that." So far we haven't in two rulemakings. We are in our third now, and within the last twenty-four hours the Register of Copyrights has completed her recommendation, and the Librarian of Congress may well, as early as next week, make his final conclusion based upon those recommendations. You may see the announcement as early as the Monday after Thanksgiving.

What kinds of fair uses have we found? Well, I'll just mention a couple that we found, and I may talk about, if I have time, how

⁴⁶ See *id.* § 1201 (a)(1)(c); see also *The Register of Copyrights: Before the Committee on House Appropriations*, 2005 WL 1222535 (F.D.C.H.) (statement of MaryBeth Peters, Register of Copyrights).

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our approach may actually be changing this year in some interesting ways.

One of the things that we have done—we did it in 2000,⁴⁷ and we did it in 2003⁴⁸—related to situations having to do with software that you can put on your computer to prevent your children from going to sites on the Internet that you may not want them to go to. We exempted a class consisting of “compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites, or portions of websites.”⁴⁹ That’s the main thing. We teased it out a little bit with some details, but that’s the essential language of the exempted class.

We learned that filtering software that prevents you from going to websites that the people who sell that filtering software think are inappropriate for children, for example, has been subject to a lot of criticism. Critics, since it has first been deployed, have argued that it over-protects, it keeps you from going to websites that anyone should be able to go to. How can you critique that software if you do not know what it is that the software is preventing you from going to, because it is in a list that is encrypted? You’ve got to break through that encryption to get to it.

We considered this to be classic fair use. You should be able to get access to those lists if what you are doing is critiquing the software so you can tell whether it is doing the job well or poorly, advise consumers whether it is a good thing to buy or a bad thing to buy. If the only way to do that is to break through the encryption, then so be it, you can do that. So we found there was a fair use, we found the case had been made, and we issued the exemption.

My time is up, so maybe in the discussion, if people want to go there, I can talk a little bit more about this year’s rulemaking.

PROFESSOR KATYAL: Next we will hear from John Palfrey from The Berkman Center.

⁴⁷ 37 C.F.R. § 201.40 (2000).

⁴⁸ 37 C.F.R. § 201.40 (2003).

⁴⁹ *Id.* For the text of the current regulation, see 37 C.F.R. § 201.40 (2006).

MR. PALFREY: Sonia, thank you so much.

I am sorry to say I am going to use the crutch of digital technology here. Everybody else has so brilliantly avoided doing that. So brilliant, in fact, is my colleague Professor Hansen down there on the end, that he does not need a presentation, because he always puts himself at the end and then writes his presentation while others are talking, which is quite extraordinary. I have absolutely no hope of accomplishing that.

Thank you to Sonia and the student organizers. This is an extraordinary forum and I am delighted to have been invited.

[Slide] I come from a little research center at the Harvard Law School, called The Berkman Center for Internet and Society. It has been referred to relatively recently, once in *The New York Times Magazine*, as “the intellectual hub of the Copy Left.”⁵⁰ I also saw a blog post the other day that called us “The Berkman Center for Copyhate”⁵¹—that was a new one.

I am ordinarily in the pose of saying that fair use, a very strong sense of fair use, broad sense of fair use, is a great thing. In order just to be slightly provocative, and given that there is rethinking and redefining the boundaries as our title, I wanted to actually look a little bit at the extent to which there are limits to fair use, and to do so by kind of fast-forwarding into the world of Web 2.0, or the user-generated content space.

Everybody may have seen the transaction of Google buying YouTube for \$1.65 billion. Much of the discussion in the wake of that transaction, of course, was: Is there a copyright problem underlying YouTube; is Google buying itself a whole lot of lawsuits? We heard about the “tolerated use” line from Tim Wu,⁵² which is a great one. There are lots of rumors as to whether or not they reserved a whole bunch of money to pay off the copyright holders. Certainly, the first thing they did was to sign up deals

⁵⁰ Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES MAGAZINE, Jan. 25, 2004.

⁵¹ Christian L. Castle, *Anybody, anybody . . .*, MUSIC TECH. POLICY, Sept. 24, 2006, <http://music-tech-policy.blogspot.com/2006/09/anybody-anybody.html>.

⁵² See Wu, *supra* note 5.

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with Warner Music, and they are now going over to the movie industry.

But what I wanted to talk about actually is, what about the other stuff in the YouTube zone, or in the Web at large, that is created by users that might use some of this stuff, or be reused by other users in contexts, which don't touch on the rights that Warner in the music context or the movie industry might also have?

So I am thinking about the Web 2.0 stuff that you think of as truly user-generated content and the extent to which fair use is really important in this context. People reuse other people's stuff all the time, re-aggregating it, but do so in a way that is not particularly clearly described.

A big phenomenon. Everybody who has children in the age of zero to twenty or so understands this. But there is a sense of this generation being slightly different in the way that they use digital technologies. Think of it as digital natives, people who are born digital, as opposed to those of us who came to be digital.

[Slide] One of the huge things that digital natives do, of course, is participate in this citizen-generated media space.

How many people here blog? [Show of hands]

That's pretty good actually. Maybe twenty-five percent.

Any podcasters? Anybody create audio? [Show of hands]

People who create videos, who post to YouTube or anything like that? [Show of hands] A couple people.

So fewer going down the line, but I think it is clearly a trend in terms of people creating more and more their own content. I would stipulate that digital natives are doing this a lot.

Likewise, people are sharing and creating together, Wikipedia being the clearest example of this.⁵³ Wiki as a productivity tool of digital natives is well known.

And then, lots of people re-aggregating other people's content, so finding what is the best of the digital natives' content that they have created in the Web 2.0 space and then re-aggregating it.

⁵³ Wikipedia, <http://www.wikipedia.org>. "Wikipedia is an encyclopedia collaboratively written by many of its readers." <http://en.wikipedia.org/wiki/Wikipedia:Introduction>.

This ties, of course, very closely to the creation of digital identity. It is a problem that does not exactly bear on the copyright space, but think about a young person who is creating the way that they are found on the Web. For a lot of the time, it is the creativity that they are making, which is then sort of mashed up into a MySpace page or a Facebook page.⁵⁴

Of course, many of the things that are being used and commented on are digital media; they are things that have come out of the space that is copyright holders.

Critically important to this is the Web 2.0 technology layer. Think about the kind of creativity here that young people are doing. It is often a mash-up; it is often using technologies that let you mash lots of different bits of digital things. And think about sort of art as collage. This is a different way of thinking about what it means to create something. But it is something that also has in its way some problems in the copyright context.

One of the good parts of this, of course, is that there are new contexts and new meaning that are being created. Scholars like Jack Balkin at Yale,⁵⁵ Yochai Benckler also at Yale,⁵⁶ and Terry Fisher at Harvard,⁵⁷ have talked a lot about this creation of semiotic democracy, the ability to tell your own story, and to do so often in international contexts or cross-cultural contexts.

So I think that the dominant thrust here is consumers, young consumers, becoming creators in this space. So think about the world of authors, expanding substantially who is in fact an author, and creating these smaller works in digital form on the Web, but then with the mode of creativity in fact being to mash them up, but not having sort of a massive rights clearance layer there.

To me this presents an issue for copyright. That is what I would call the primary threat of this movement in the intellectual

⁵⁴ <http://www.myspace.com>; <http://www.facebook.com>. MySpace and Facebook are online communities in which users create their own "home pages."

⁵⁵ Jack Balkin, *Digital Speed and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

⁵⁶ Yochai Benckler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245 (2003).

⁵⁷ William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203 (1998).

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property zone. There are a bunch of arguments about this, why it might not be an issue.

One argument is people do not really want to get paid. People who put their works on YouTube, you presume they put it out there and then the people who created YouTube sold it for \$1 billion. You didn't ask for any money. Most bloggers don't ask for any money. But, increasingly, some bloggers are hoping to get some.

Argument number two—saying this is not a big problem—there is an implied license. You put it out on the Internet and somebody will reuse it in various ways, but you are implying that they can. In the really simple syndication space, which is the mode of aggregating Web blogs and replaying them, this is a dominant argument, which says: If you put something out there on a blog and you put it in an XML format that lets other people re-aggregate it, of course you are implying that they can use it. Now, I am not sure that is sustainable, but it is clearly one of the arguments.

The last one is that you go to fair use. You take the argument that says: It might be somebody else's copyright—of course it is; in digital space it is no different than in the offline space—but then fair use exempts all of these mash-ups.

But against that backdrop there is almost no licensing of user-generated content. The only licensing that goes on is Creative Commons licenses.⁵⁸ These are licenses that are created by a nonprofit organization that people put onto their user-generated content. There are 140 million objects with Creative Commons licenses on them. But these are licenses that are used on only a small fraction of what is out there in the user-generated content space.

[Slide] This is presenting issues. If I had access to the Internet, I would click on this page and show you a post from a venture capitalist who invests in this space. One of the things that many of the people putting capital into Web 2.0 are concerned about is that billions of dollars are going into building this layer of technologies, but it is on sand, and there is a copyright problem

⁵⁸ See Creative Commons, <http://www.creativecommons.org>.

lurking at the core of it, which are these rights problems that we have seen show up in YouTube. So the Silicon Valley people, who we do not have to worry about—they have lots of yachts and so forth—are putting money into an emerging and important space, trying to reach these digital natives, but they are going to lose it all because there is going to be a copyright train wreck at the end of it.

There is also, of course, the issue that copyright links up in this context frequently to trademark—people are inventing things that have trademarks.

But also, importantly, privacy. Go back to that digital identity concern, which is if you are wrapping into your user-generated creation, you might well in fact be taking what is increasingly the digital identity of people who initially posted it, but without any either compensation or licensing.

[Slide] So takeaways of this rapid tour through the world of digital natives:

The version of the Web that is called Web 2.0, or user-generated media and so forth, is about creativity at the edges. Stipulate that lots and lots of people are creating Web blogs and so forth—65 million by one count, 35 million in China, and growing very quickly around the world. So there is lots to be happy about in the user-generated content space.

But here are some problems.

One problem is it is complicated for traditional media companies, traditional authors and creators, to participate in this because there is not a whole lot of a sense of “Okay, if I go out into this wild world of user-generated content and try to bring it into, say, *thewashingtonpost.com*, which they do very effectively,⁵⁹ do you pay the author whose stuff you brought in? If you are a large media company that is trying to get hip to what people are saying and to build it into the videos and so forth that you are posting on the Web, do you go clear those rights? How do you participate in

⁵⁹ Registered users of *thewashingtonpost.com* can submit comments on site articles, blogs, and reviews. See *washingtonpost.com* Discussion Guidelines, <http://www.washingtonpost.com/wp-srv/liveonline/delphi/delphirules.htm>. In addition, *The Washington Post*'s rewards program awards points for posting user content online. See *The Washington Post* PostPoints, <http://www.washingtonpost.com/wp-srv/registration/postpoints/marketing.html>.

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this world, which is extremely informal, and with creative comments licenses, at best?”

One of the key ways that this content is shared is through syndication. Again, sort of a longer story, but there are technologies, RSS⁶⁰ being the key one, that have the ability to syndicate little bits of content across the Web and then re-aggregate them. I think there is a looming crisis in the mode of syndication because of the lack of clarity that is there.

I think substantially fair use is a part of the answer here. It is critically important that I not suggest that fair use ought to be curtailed or that fair use is insufficient in its ability to protect much of this use. But I do not think it does solve this extremely informal process of reusing and creating entirely.

So what are some answers to it?

One is to say if everybody used a Creative Commons license, or some other license, when they were a user, creating one of these millions and millions and millions of digital things, and then you were to have a system where we all recognize those rights and reuse them accordingly—maybe technology in a DRM-style way, in fact, would recognize these licenses and allow you to recreate them or not—that is one possibility.

Perhaps you could also put a layer on top of it. Imagine the Copyright Clearance Center, but one that, in fact, is done for user-generated content in a micro-payment way.

Another possibility that some scholars have suggested in this zone is, of course, compulsory licensing, which is to say could we set up a system for all this informal stuff that is on the Web, consider it compulsorily licensed out to the world? How would you manage the payment? I think that is a complicated issue.

Another variant of that could be, of course, that you just clear all of this stuff to be in some sort of a public domain. I think that is relatively farfetched.

Another example would be one that Laura and others have worked on extensively, which is what are the best practices here

⁶⁰ Really Simple Syndication, a file format for web feeds.

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for doing it, and try to get a better user understanding of what, in fact, are the best practices for reusing somebody else's content, and, through education and better understanding, hope that that, in fact, may help to solve the problem.

With forty-five seconds left here, I might cede, but say that fair use is hugely helpful in this crisis, may in fact help avert much of it, but may not be the entire answer.

Thank you.

PROFESSOR KATYAL: Thank you.

Last, Hugh Hansen.

PROFESSOR HANSEN: John, that was a trade secret, by the way.

MR. PALFREY: Sorry about that. It is on the record. It will be in the *Journal*.

PROFESSOR HANSEN: Yes, it will be in the *Journal*.

MR. PALFREY: They will put the "brilliant" part in there too, though, I think.

PROFESSOR HANSEN: Thank you. Well, I usually insert that anyway.

We are addressing the role of fair use.⁶¹ To understand that role, I think we have to examine what role copyright plays.

It is common to say that copyright is a monopoly or limited monopoly. Paul Aiken is, of course, right to challenge that language. But I would not even concede that it is a weak monopoly. A monopoly is driven by market share and entails the ability to restrict output or control prices.⁶² Some say that it is a "legal monopoly," distinguishing it from an economic monopoly. I do not understand this use of "monopoly" other than to avoid saying that copyright is a property right.

⁶¹ See 17 U.S.C. § 107 (2000).

⁶² See BLACK'S LAW DICTIONARY (8th ed. 2004) (definition of "monopoly"). The legal protection that copyright law provides does not accomplish anything in the market place other than the prevention of copying. Copyright is a nothing more than a property right, and a limited property right at that.

Some say that copyright law is a liability or a regulatory scheme in an effort, I assume, to avoid the consequences of having to defend the taking someone else's property. But, the courts and Congress have consistently treated copyright as property—a bundle of rights protecting some thing or a “res,” to use the Latin.

To understand what courts and Congress have done it is helpful to look at Locke and his so-called labor theory of property: Under that theory, as we all know, one's effort creates a natural law property right.⁶³ Locke is not in fashion today to say the least. He is viewed as too extreme. But, Locke did recognize limits to the theory. If there is not enough raw material around, effort with regard to the limited raw material does not give any one person a property right. This recognition of the need in certain circumstances to share or limit property interests also takes place in copyright law. We see it with regard to, inter alia, the idea-expression dichotomy, the exceptions to bundle of rights contained in § 106, and, of course, fair use. This balancing to date, however, has normally occurred with the thumb down on the property side of the scale.

If you do not think of copyright in the above-stated property sense, you are going to scratch your head and wonder why we get the results we get both in Congress and the courts. It might be that in the future this approach will change to something closer to what the Copy Left desire and advocate. But right now, anyway, most courts, jurors and the legislatures, treat copyright as it is a property right with some limited balancing.

So with the current role of copyright in mind, what role does fair use have? Historically, it has been a method to sort out the equities when the defendant's use does not threaten the mainstream revenue stream of the copyright owner. It focuses on a particular copyright owner and a particular user or copier. It is an ad hoc or micro approach. As Justice Souter stated in *Acuff-Rose*, the “task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”⁶⁴ Even the minimalist bright-line rule that fair use is an affirmative defense,

⁶³ See JOHN LOCKE, SECOND TREATISE ON GOVERNMENT ch. V (1690).

⁶⁴ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994).

while often stated in the doctrinal introduction in the beginning of an opinion, is ignored in the reasoning that follows later. Likewise the Copy Left view of fair use as a right carries no weight to date in courts' very ad hoc determinations.

John Palfrey earlier walked us through alternatives to fair use that might be coming with regard to specific factual scenarios. I agree with John that we must find a way to allow user-generated creativity to flourish and to make it widely available. Actually, I think John was quite balanced in his appraisal and suggestions. He invariably is. Wherever people put the the Berkman Center on the Copyright-Copy Left spectrum, John is too balanced and reasonable to be considered hard-core Copy Left.

In short, fair use is best viewed historically as a tool on a case by case basis to decide in close cases who should win. Courts have been careful to produce no sweeping generalizations. Nor do courts look to previous results in their analysis. While a court might cite doctrinal statements on fair use from past cases, the particular applications of the doctrine cited as applied to the facts in those past cases are neither analyzed nor applied to produce the results in the current case. It is similar in that regard to determining "substantial similarity" or "likelihood of confusion" in trademark cases. Courts have desired flexibility in intellectual property cases, and these doctrines have been created to provide that flexibility.

Nevertheless, there are some patterns one can look to in determining whether there is a fair use or not. Of the four fair use factors, the second ("the nature of the copyrighted work") plays no real part today. The third factor ("amount and substantiality of the portion used in relation to the copyrighted work as a whole") was once important but has much less impact since the reprography revolution. The first factor ("the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes") is important as it looks at the conduct of the defendant. Not much weight is placed on whether or not the work is commercial and if the work is nonprofit, it does not matter much whether it is for educational purposes or not. There is still some weight given to how much of the defendant's work consists of simply copying the plaintiff's work. What

percentage of the defendant's work was simply copied from the plaintiff's? That question still has some importance today. Courts often mistakenly place this analysis into the third factor, which is designed to focus only on what percentage of the *plaintiff's* work was taken, not how it was used.⁶⁵ Also, transformative uses come into play here.

The fourth factor ("the effect of the use upon the potential market for or value of the copyrighted work")⁶⁶ is the most important.⁶⁷ Justice Souter stated in *Acuff-Rose* "[m]arket harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors."⁶⁸ I think the reality is that a demonstration of harm makes it very difficult, if not impossible, to find fair use, as Souter had indicated earlier in the opinion in *Acuff-Rose*.⁶⁹ Where there is only potential harm to a market, fair use might have a chance if the first factor is strong in defendant's favor, but where there is demonstrated actual harm, there is currently no chance. This, of course, is consistent with a property right analysis.

Even if fair use were just more sophisticated way to judge who is the good guy or bad guy, it clearly demonstrates that defendants do not always lose. In fact, sometimes it is so clear that a defendant should prevail that courts do not even take the time to go through a fair use analysis and simply use the de minimis doctrine. Another indication of the courts' increasing view that plaintiffs' copyright actions might be without merit is the expanded use of summary judgment for defendants. This is in the face of strong language by Judge Jerome Frank in *Arnstein v. Porter* back in 1946 that summary judgment in a copyright case is not generally appropriate because of the ability of plaintiff's case to develop at trial with cross-examination of the defendant, etc. Frank, with

⁶⁵ See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

⁶⁶ 17 U.S.C. § 107(4) (2000).

⁶⁷ See, e.g., *Harper & Row, Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (noting that the "last factor is undoubtedly the single most important element of fair use").

⁶⁸ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 591 n.21 (1994).

⁶⁹ *Id.* at 591 (defendant "would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets").

Judge Learned Hand concurring, strongly reaffirmed Second Circuit language that summary judgment should not be granted where “there is the slightest doubt about the facts.”⁷⁰ Courts today, particularly the Second Circuit, recognizing the waste of judicial resources and unfairness to defendants today follow the more sympathetic view of summary judgment of Judge Clark’s in dissent in that case.⁷¹

So where is fair use going in the future? I am firm believer in the value of copyright but also in the need for proper fair use analysis. To make sure fair use has a role to play at three things are necessary: (1) policy not doctrine controls cases; (2) users need to resist copyright industries’ culture of requiring licenses for every use including fair uses; and (3) resources need to be made available to users to resist that culture wherever it is found.

1) Policy, Not Doctrine, Controls Cases

I need not to go into a whole legal realist spiel here. It is enough to remember that fair use was made out of whole cloth by the courts beginning with Justice Story in *Folsom*.⁷² Fair use is simply a doctrinal vehicle for courts to do what they want in a particular case. By emphasizing the ad hoc nature of fair use courts have demonstrated their lack of concern for precedents. But even if that were not the case, courts have written opinions that would not bind them to any particular result in the future. This is true, for instance, of Justice Souter’s opinion in *Acuff-Rose* which makes comments on both sides of each fair use issue it analyzes. It is also true of his opinion in *Grokster*. When you take into account all the issues that have been reserved and the dicta, the Court is pretty much free to do anything it wants in the next P2P case. Despite my best efforts, many people thought that the result in *Grokster* was going to be controlled by *Sony*. (Many of them owe

⁷⁰ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir 1946).

⁷¹ *Id.* at 480 (copyright “suits are not excepted from F.R. 56; and often that seems the most useful and direct procedure”). *See also* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986) (rejecting an argument that “defendant should seldom if ever be granted summary judgment” and requiring that “plaintiff must present affirmative evidence in order to defeat a properly supported motion of summary judgment”).

⁷² *Folsom v. Marsh*, 9 F. Cas. 342 (C.C. Mass. 1841).

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me dinner now, by the way.) Justice Scalia during the oral argument in *Grokster* commented to Grokster's attorney, "[t]his Court is certainly not going to decide this case on the basis of stare decisis, you know, whatever else is true."⁷³ I imagine Grokster's attorney was taken aback by that statement.

MR. PALFREY: Is it a joke?

PROFESSOR HANSEN: No, he was serious.

And as David Carson said, the actual words of § 107 have not really controlled outcomes.⁷⁴ So doctrine by way of precedents or statutory language is not controlling. The key, therefore, is to make convincing policy arguments as to what should be done without forgetting the basic importance of gut instinct, good guy/bad guy conclusions. So do not look at the Supreme Court's words, most of which were written by clerks and not by the Justices themselves, in any case, or statutory language. Do not parse their opinions or those of any other courts as if they came down like the Ten Commandments, because the courts are not going to do that.

So what is a concrete example of what should be done in a fair use case? Let's take the real world example of the Google book library project.⁷⁵ Google needs to emphasize its opt-out provision and not back away from it in litigation. Critics of the book project say that copyright has never embraced an opt-out approach. My answer is, "So what?" An incredible project that perhaps only Google could attempt with great public benefit will be thwarted because publishers insist that Google say, "Pretty please, may I?" Critics say that it will set a bad precedent. Well, as we have discussed fair use is ad hoc and no court need allow opt-outs in other cases based upon the result in this case. The facts in Google make it sui generis ab initio. But Google might go beyond that and argue that opt-out, at least in some

⁷³ Transcript of Record at 41, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 125 S. Ct. 2764 (2005) (No. 480).

⁷⁴ See *supra* notes 36–38 and accompanying text (Carson comments).

⁷⁵ For a full description of the Google Book Project, see Melanie Costantino, Note, *Fairly Used: Why Google's Book Project Should Prevail under the Fair Use Defense*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 235 (2006).

circumstances, in not a bad thing but sometimes can easily and properly balance the interests of those involved. I have been told by lawyers on Google side that the opt-out provision is “nice” but not legally relevant in a fair use analysis. That type of statement make me, a legal realist, cringe. Everything is relevant in all cases if it can influence the court, especially in the judge-made rule-of-reason, fair use. Moreover, there is doctrine right on point. Opt-out is part of the first factor, “the nature and character of [defendant’s] use of [plaintiff’s work].”

What about the good guy/bad guy analysis?

This case reeks of good guy/bad guy arguments. For the publishers, Google is the capitalist spawn of satan, not caring about anyone or the law, running roughshod over publishers who scratch out a living working for the public good. In fact, Google better watch how it acts and is perceived. Whatever the merits of its copyright law arguments, if courts buy into even some of this characterization, it will make it much harder if not impossible to win.

What can Google do on the factual aspects of the good guy/bad guy issue? First, do not think it is irrelevant to the case. Second, try hard to demonstrate it is a good copyright citizen in other contexts. For instance, do not just announce a licensing program for YouTube, but be reasonable and try hard to make it happen. Try donating to charitable organizations rather than just looking for nonprofit investment opportunities. Sponsoring the Fordham Annual Conference on International Intellectual Property Law & Policy would be a very good start.

What can Google do with policy/legal analyses concerning the claim that it is a bad guy? It should, while denying the factual truth of the allegations, of course, make use of the bad guy characterizations as a reflection on the merits of the case. Google is being singled out not because of the copyright merits, but because of publishers views about Google and perhaps free market capitalism. What the publishers fear is changes in the status quo over which they have no control. (Not an unusual human perspective.) But rather than opt out to gain control or find other ways to deal with those fears, they choose instead to kill a project that will help many if not all in their industry: publishers and

authors alike; not to mention the public. Publishers are interested in their own power, which frankly has been misused to the disadvantage of many authors over the years. That they are not acting upon the copyright merits is illustrated by their failure to sue the libraries involved in the Google book project, without whom the project would fail. Why do they not sue them? Because the libraries are good guys. If the Library of Congress had come up with this project, there would have been praise not a lawsuit. The public is going to lose a wonderful project because the publishers are going after an outsider who is actually helping them but who has not shown proper respect and deference, and who frightens them.

On the publishers' side, they could do worse than address what really frightens them, and others as well. Google, I think, frightens people because it is not subject to the same constraints as other people and organizations. This is true in part because of its overwhelming market success, resulting commercial power, continuing ability to innovate and succeed, lack of concern for the views of others or need to consider the views of others, and the digital zeitgeist, religion, or philosophy it embraces. In a sentence, Google's philosophy might be described as "today the book project, tomorrow the world."

Back to Google's arguments. What about arguments concerning the very important fair use fourth factor: harm to markets and potential markets?⁷⁶ The claim that the book project will harm the publishers seems like a manufactured argument. It is not clear how Google's project will hurt the publishers other than they will not get royalties from Google's use. But lack of royalties from fair use claimants is true with regard to every fair use claim. What about harm to the publishers' competing databases? That also seems contrived. The reality is that there will be no competing databases. All other book databases will be niche submarkets that should be helped by Google's all inclusive database market. Moreover, if there is harm, all they have to do to stop it is to write a letter to Google opting out. If writing a letter is too much effort, there cannot be much harm.

⁷⁶ 17 U.S.C. § 107(4) (2000).

Most of the above analysis and arguments are non-doctrinal. It is the non-doctrinal policy and good guy/bad guy arguments, however, that convince or at least influence courts. If you think doctrine and stare decisis control, speak with Justice Scalia. Fair use advocates and opponents need to make these types of arguments. If you stick to doctrine, the Courts will go on by themselves to figure out the correct policies, or worse, will do so with the help of your opponents.

2) *User Must Resist Copyright Industries' Culture of Requiring Licenses for Every Use Including Fair Uses*

The first problem with this culture is that the industry is overreaching and claiming protection where it does not exist. Laura Quilter has demonstrated this to be the case as well in the DMCA context.⁷⁷ The second problem is that in the commercial context it produces people who pay fees rather than fighting in court to demonstrate fair use. This is a perfectly reasonable position for businesses as it is much easier and cheaper to pay than to former. Nevertheless, it needs to be resisted because when courts find an industry culture of payments, they will more easily conclude that defendants' non-authorized uses cause economic harm, the lack of customary fees for use. I think this influenced Judge Newman in *Ringgold*, a case, if fees had not been paid to the plaintiff for the same types of use, that probably would have gone the other way.⁷⁸ It also influenced Justice O'Connor's definition of commercial use in *Harper & Row*.⁷⁹

3) *Resources Need to Be Made Available to Users to Resist Industry Cultures of Requiring Licenses for All Uses Including Fair Use*

We need resources to be made available to enable users to resist these demands. Perhaps one or two test litigations on behalf of documentary filmmakers, for instance, would do the trick.

⁷⁷ See *supra* notes 25–29 and accompanying text (Quilter comments).

⁷⁸ *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997).

⁷⁹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 606 (1985).

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I think fair use, the law, is okay for the most part, and I think it can work. The problem is that people cannot avail themselves of its protection.

What did we do when people could not afford to take advantage of criminal defenses or protections such as the Fourth Amendment? We provided them with lawyers. We also provided lawyers in civil contexts. We have to think about supplying lawyers for people stuck in a user position in which they have a legitimate fair use defense but cannot afford to litigate it.

Now Fordham is thinking of having an IP clinic. It costs a lot of money. I am going to ask you to contribute at the end of this session. In fact, the doors are locked, so don't try to escape.

The key, I do not think, is changing the law. I think the key is giving economic power to the other side so the full aspects of fair use can be litigated.

Thank you.

PROFESSOR KATYAL: Thank you. As always, the diamond in the crown of Fordham Law School.

Before we actually start—and we have a fair amount of time to talk about questions—I just want to ask the panelists whether they want to take a minute or so to respond to some of the things that have been said, and then we will go directly to questions. Does anyone want to respond?

MS. QUILTER: I will jump in with a quick comment.

The informality that John was discussing, which may be leading us to a copyright train wreck, I actually want to hold that out as a positive, because it has enabled a tremendous amount of free expression. People really do not want to have to go see a lawyer; they do not want to have to think about licensing; they really just want to put their content out in the world, they really want to communicate, they really want to talk and share information. That has created the Internet. The Internet was not created by a bunch of lawyers who were saying, "Well, before you start posting this, you really want to make sure you've got your IP rights worked out," and da da da.

I think it is actually proving to be a tremendous boon for creators in every walk of life, including new creators who we never envisioned before. There are definitely a lot of problems as we are working our way through that, and adjustments as people are negotiating values from one media and trying to work out how they exchange information in the other media.

But while we are looking at the potential train wrecks, I would actually like to put in a voice for informality and not lawyering-up in every aspect of life. I think that is a positive, affirmative value. To the extent that fair use helps us keep things informal and flexible and loose, then I think that is a really useful role for fair use. If we do not have fair use to do it, maybe *de minimis*, maybe something else. But I think it is an incredibly valuable thing.

PROFESSOR HANSEN: I agree.

PROFESSOR KATYAL: Anyone else?

MR. AIKEN: I would like to comment on a couple things.

Regarding the Web 2.0 issues that John brought up,⁸⁰ a lot of this can be handled through implied license. An implied license is how most search engines work. When you put something on the Internet and you know there are search engines out there and you do not put the blocking tag on, there is, in my view, an implied license to make it available in these search engines. I think that has a big role.

I think also the Creative Commons license is a great thing. As long as people are fully aware of what rights they are giving up and they realize it is a real license, in many cases irrevocable, as long as they know what they are doing, it's a powerful tool and should be used by people who are interested in participating in various mash-ups and collages online.

Regarding Professor Hansen's talk,⁸¹ I would agree with a lot of what he said, with one big exception. I think that fair use basically works. The problem is there often are not enough legal resources on the side of the creator who wants to make fair use.

⁸⁰ See *supra* notes 50–60 and accompanying text (Palfrey comments).

⁸¹ See *supra* notes 61–79 and accompanying text (Hansen comments).

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Authors all the time want to make fair use of things. They come to our offices asking what is allowed, what is permitted. All we can tell them is what the industry practice is and say, “This is no guarantee. You will have to give it your best shot and we will stand behind you the best way we can if this is ever litigated.” But we are a nonprofit, and there are limits to how much we can stand behind someone.

PROFESSOR KATYAL: Great, thank you.

Let’s actually take a few questions. We have microphones in the back. If you would just identify yourself before you ask. Otherwise I will start calling on people.

QUESTION: Hi. Susan Scafidi, visiting here at Fordham Law School and ordinarily at SMU in Dallas.⁸²

I wanted to thank the panel. It was fabulous.

I would like to turn the panel’s attention a little bit back to the question or the concern that Laura raised, the concern about cease-and-desist letters being overused, essentially. I have two questions.

The micro question, Laura, is one of methodology. That is to say, David and Hugh both pointed out that it is really tough to determine whether or not something is fair use, and we see that flip-flopping in the courts.⁸³ So when we have twenty-one percent or thirty percent of cases that you all determine are either weak copyright cases, weak infringement cases, or strong fair use defenses,⁸⁴ how exactly do you go about determining that, given the uncertainty of the doctrine? I know you have a wonderful methodology. I would just like to hear it unpacked a little bit more.

The meta question, again going to the panel, is how to solve this. It is frightening to get a cease-and-desist letter. I am certainly not a digital native. I speak with an accent. I am terrified

⁸² See Justin Hughes et. al, *Panel II: That’s a Fine Chablis You’re Not Drinking: The Proper Place for Geographical Indications in Trademark Law*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 933 (2007) (Susan Scafidi presentation).

⁸³ See *supra* notes 32–49 and accompanying text (Carson comments); *supra* notes 61–79 and accompanying text (Hansen comments).

⁸⁴ See *supra* notes 25–29 and accompanying text (Quilter comments).

when I get them. I usually bare my teeth and send back a nasty letter. I have always, in the few cases it has been, gotten an “Oh sorry, professor”—in one case, exactly those two words. But it is still nerve-wracking to get that.

So how do you solve it, and especially given David’s point that other countries do have clearer systems, do have the equivalent of fair use codified, ordinarily do it in a more narrow fashion, and the negotiation process that leads to codifying anything tends to favor those who do not favor broad fair use conceptions?⁸⁵ So I will leave it there for the panel to answer.

PROFESSOR HANSEN: Susan, what have you been doing that you are getting cease-and-desist letters?

QUESTIONER [Professor Scafidi]: I will say nothing.

MS. QUILTER: Okay. Well, I will jump in very quickly on the methodology. The first question was, what was the methodology by which we determined fair use or substantive problems with the underlying claim, those kinds of questions.

There were actually two studies.⁸⁶ I cannot speak as intimately to the first study, although my colleague did it. But they basically broke it down into five categories, which included a strong underlying rights claim, whether it be trademark or copyright; a weak underlying rights claim; a strong fair use or free expression defense; a pretty good fair use or free expression defense; and an ambiguous, not very well known. Within those, they basically just went through the straightforward analyses that are applicable in trademark and in fair use and looked at whether there was a market effect, whether the work was significantly transformative. For them, if there was a competitor involved, they considered that to be a market effect, and so against fair use. They weighed transformative very high. They looked at questions in terms of the underlying claim.

They looked at questions of copyrightability of subject matter, which turns out to be a big problem, because people are confused about what copyrights cover, as you guys have pointed out. I mean

⁸⁵ See *supra* notes 32–49 and accompanying text (Carson comments).

⁸⁶ See *supra* note 24.

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they do not cover ideas; they do not cover necessarily very short phrases or titles.⁸⁷ So people get really confused about what copyright covers and they make a lot of very broad claims.

In our study, we also had to deal with the fair use analysis and basically go through that. For all of these things, we tried to take a fairly conservative approach, because you really do not want someone to go back and look at that and say, “What are you talking about?” and really start attacking our data that way.

But I think it is reasonable actually to say twenty to thirty percent, because people just dash these letters and these notices off. It is very easy for them to do that. So, it is not really surprising to me that they are doing that.

In fact, I am not sure that it is necessarily a big problem in the § 512 context if there is a remedy to deal with it, if people are aware of their counter-notice rights and have some way to respond to it effectively, or if there is a good judicial remedy. The problem with the § 512 process is that there really is no good judicial remedy.⁸⁸ The standard for going into court and saying, “Well, they did this and they were trying to intimidate me” is incredibly high. It has to be an intentional misrepresentation,⁸⁹ which is not going to get at the blustery language that many lawyers use when they are trying to get someone to remove something that affronts them.

It is not going to get at people’s just honest confusion about the fact that “you are posting this photograph of my daughter online and that really upsets me. But actually you are the photographer and you are the copyright holder, so I really cannot send a DMCA notice after you, but you are violating my privacy rights.” So people are misusing the law to get at all these very legitimate interests, and that is not going to be taken care of in any way.

I feel that it actually ends up giving short shrift to the rights that we need to be addressing. I mean there are lots of privacy

⁸⁷ 17 U.S.C. § 102(b) (2000); *see also* *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (citing U.S. COPYRIGHT OFFICE, PUBL’N NO. 46, (1958)).

⁸⁸ 17 U.S.C. § 512(g) (2000).

⁸⁹ *Id.* § 512(f).

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rights that we should be addressing and dealing with, and we are not, because people are just dashing off § 512 notices.

That is a quick answer for the methodology—basically you just have to kind of go through fair use analyses. I think both studies privileged transformative uses and looked at copyrightable subject matter and took a fairly strict line in terms of competition, competitive commercial uses.

PROFESSOR KATYAL: The second question, I think, turns more on the question of normative approaches to cease-and-desist letters, which is: Is it better to move towards a world where we have more enumeration of different rights, or do we want to retain the kind of flexibility and the malleability that fair use has at its core.

David, did you want to answer?

MR. CARSON: I am not sure if I am going to answer that question specifically. My first response would be “have a backbone.”

PROFESSOR HANSEN: Have a what?

MR. CARSON: A backbone, when you get one of those things. I have been in government since 1997, so I really have not had to deal with cease-and-desist letters.

PROFESSOR HANSEN: It is easy for you to say, then, isn't it?

MR. CARSON: It is easier for me to say. But I have received plenty of them as counsel for corporate clients back in the mostly pre-Internet age. I will grant the volume, I am sure, is much different now, and just the magnitude of it alters the nature of the problem.

But I would say, going back many, many years now, easily fifty percent of the cease-and-desist letters I saw were just plain frivolous. Let's face it, if there is anything almost as bad as a blatant infringer it is an overzealous copyright owner. But the fact of the matter is that copyright owners feel overly protective of their works and of their rights, and if they think they've got a leg to stand on, and often if they don't think they have a leg to stand on,

they are going to assert infringement because they know a lawyer's letter is enough to scare most people off.

So, in principle, the answer is do not be scared by it. In principle, the answer is find yourself someone who knows copyright law, a copyright lawyer who knows copyright law, and let them write a nasty letter back. My experience tells me that when that nasty letter does go back, it goes away.

Now, that's easy to say, harder to do. Maybe part of the answer to that is contribute to Hugh's clinic,⁹⁰ because we all know access to legal resources is incredibly difficult. When I was in private practice, I knew that if I ever got in trouble and got sued, I could not afford myself. And that is true of most people.

So it is a big problem. You do need to think hard about ways to give the right resources to people who find themselves in the situation—both authors who have claims who cannot afford to present them, and people who find themselves at the receiving end of one of these letters and have no one to turn to and no one to speak for them.

Last year, in the context of the orphan works study that the Copyright Office did and the legislative proposal, which went fairly far through Congress, one of the issues that was raised by authors, photographers, and so on was: Look, you are whittling away at our rights at a time when we cannot enforce the rights we have because we cannot afford to play the game of litigation in the federal courts.

There were proposals, which Congress started thinking about, and I think will continue to think about, of alternative means for copyright owners to assert small claims that do not get them sucked into the federal judicial system, where if your claim is not worth tens and tens and tens of thousands of dollars at a minimum, it is just not worth pursuing it.

We heard some things—not enough, but some complaints—by people on the other side: “I got a cease-and-desist letter;” “I got sued for copyright infringement;” “I did not think I was doing

⁹⁰ See *supra* notes 61–79 and accompanying text (Hansen comments).

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anything wrong, but I had to buckle under because I could not afford a lawyer.”

Thought needs to be given to how you give people the means of access to resources to defend themselves as well. We need to think hard about alternative fora, alternative means, where you can perhaps even force some of these claims, those below a certain value anyway, into another forum where it is easier to find a resolution.

The law is fine. It is the resources basically and what people do with the law that’s the problem.

MS. QUILTER: Let me just add on to that. I would actually tinker with the law. I think the law is not entirely fine.

PROFESSOR HANSEN: Hold on, hold on. John hasn’t spoken yet.

MR. PALFREY: That’s okay, Hugh. I cede.

MS. QUILTER: Okay. Just really quickly to add on, I think that educating consumers and getting consumers resources to deal with this will help build a backbone. We are also going to try to work on developing best practices for OSPs so that they know to educate consumers when they get that information. I will leave it at that.

PROFESSOR KATYAL: John?

MR. PALFREY: I would just empathize slightly and say, in fact, go as far as the § 512(f) provision more frequently. I think that one of the matters—we were one of many clinics defending people—was when Diebold asserted its rights over certain copyrighted materials and so forth in the context of security concerns over voting machines⁹¹—I do not know whether people followed this case. There were a bunch of Swarthmore students, Harvard students, and others. The Harvard student we defended in this exact context was one of several. He is now an advocate at EFF, as it turns out. But some of these cases were brought to the court, and Diebold was found to be liable and having overreached.

⁹¹ See *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

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So, I think that there are many more cases in which firmer pushback would, in fact, be better. I think that may go to Hugh's point, which is the more that we can get the law elucidated by virtue of bringing cases that do define these limits in such a way and take advantage of what is fully there,⁹² I think that is a huge part of the answer.

PROFESSOR HANSEN: One other thing. James Boyle down at Duke, with Jennifer Jenkins and Keith Aoki, produced this cartoon book of what documentary filmmakers can and cannot do.⁹³ Best practices guides like this give users a lot of guidance and support. That is a tremendous value. If we could do that in more industries, it gives the moral backbone to somebody to resist and say, "I have this on my side."

I think in most of these cases—I think David is right—overreaching copyright industry representatives will ultimately back down.⁹⁴ I am not sure *when* they will back down.

And that is important because they can kill a project if you cannot initially clear the rights either to the satisfaction of insurance company to obtain backers, just because of that letter. So, you really need, not just backbone, but you need something more on your side.

MR. PALFREY: Comic books.

PROFESSOR KATYAL: Okay, great.

Next question?

QUESTION: My name is Devrim Elci. I am a second-year law student here at Fordham, so obviously I am no expert on copyright. But I notice you guys were talking about educating people as to the effects of the counter-notice letters.

You mentioned, Professor Hansen, that summary judgment is becoming more common in this context.⁹⁵ I am wondering—we

⁹² See *supra* notes 61–79 and accompanying text (Hansen comments).

⁹³ James Boyle, Jennifer Jenkins & Keith Aoki, *BOUND BY LAW* (Duke Center for the Study of the Public Domain 2006), available at <http://www.law.duke.edu/cspd/comics/zoomcomic.html>.

⁹⁴ See *supra* note 90 and accompanying text (Carson comments).

⁹⁵ See *supra* notes 61–79 and accompanying text (Hansen comments).

have heard things in places like medical malpractice, the idea of setting up a separate sort of expert advisory panel that filters through frivolous claims. Are there rationales for or against something like that in the copyright context, where you get so many of these claims that are frivolous, and maybe we ought to have somebody whose only job is to get rid of them?

PROFESSOR KATYAL: The question is: Do we want some sort of administrative kind of ad-hoc agency that is specially charged—

QUESTIONER [Mr. Elci]: To clarify or define, so that we cut down on the amount of overreaching.

MR. CARSON: If you gave us the resources, we would love to do it.

When I was in private practice, most of my time was spent defending copyrights, and most of the cases were prime for summary judgment because they were simply silly. People made outrageous claims of copyright infringement. So, I am preconditioned to look at most copyright infringement claims with a healthy skepticism, apart from cases where people are actually taking an entire work and redistributing it or something, which is a whole different situation.

I do not know about the volume, whether the volume of specious claims is so high—although, from Laura’s study, perhaps it is⁹⁶—where you really need to set up a mechanism like that. But it certainly is something that has occurred to me, that if there was some way to screen those out, whether it is an administrative mechanism or something else, it would be a great idea. For too many claims, just to get to summary judgment is going to cost you tens of thousands of dollars. Who can afford that?

PROFESSOR HANSEN: Well, first of all, you might have a Seventh Amendment problem if you have screening out of things before they are allowed to bring it.⁹⁷ What you might do is add \$10 to the registration fee and create a fund.

⁹⁶ See *supra* notes 29–31 and accompanying text (Quilter Comments).

⁹⁷ See U.S. CONST. amend. VII.

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MR. CARSON: Everybody liked it when we increased the fee this year, so that is a great idea.

PROFESSOR HANSEN: Who is "they?"

MR. CARSON: Everyone.

MR. AIKEN: Authors are really big fans of registration fees.

PROFESSOR HANSEN: And did you care one whit? No. So increase it \$10 more for a good cause and create a fund. Maybe some of that money can go to people who cannot afford to litigate. At least try it. You know, you are big on this fighting back. Let's see some action.

MR. CARSON: All right. How about a fee shifting? We've got a fee-shifting provision right now which gives the court discretion. I am thinking out loud here. How about we have some kind of mechanism where it is prescreened by some agency, expert panel, whatever? If that panel says it is not a meritorious claim and it proceeds to court, unless you win as the plaintiff in court, you do pay the attorney's fees; and it is full attorney's fees, the court has no discretion. That is not bad. It may not be enough, but it is a step in the right direction.

PROFESSOR HANSEN: If you win.

MR. CARSON: I am the defendant. The expert said I should not even be sued. The plaintiff takes me to court anyway. Somehow I find the means to fight, maybe because I've got a lawyer who is convinced it is a frivolous claim, knowing that if at the end of the day if the court agrees that it should never have been brought, I get every dime I spent and then some. Not a bad idea.

PROFESSOR HANSEN: That's not bad.

PROFESSOR KATYAL: Well, we heard it here first.

Let's actually go on to another question. Go ahead.

QUESTION: Thank you. William Tennant, Fordham LL.M. student.

My question is to the entire panel. Would you address the intersection of contract law with this fair use? Particularly, couldn't a Web site put up something about arbitration or something to maybe contract away liability, in a sense?

PROFESSOR KATYAL: A question about contract interfaces with copyright and its impact on fair use.

MS. QUILTER: Well, I guess there are several pieces to that. One is Web sites are putting up things like this all the time when they are doing creative commons licensing or they are doing licensing agreements, so they are just sort of unilaterally licensing out material under particular terms.

The second thing is, in terms of—I am not quite sure I am envisioning what you are proposing, but something along the lines of, say, some sort of click-wrap, “click here to agree that if you read my content you will subject yourselves to arbitration in the state of Utah”—I would personally find that problematic from a free expression point of view. I think I am going to let it go to my other panelists.

MR. PALFREY: Just on that narrow point, if that were where you were going—no, not that way. All right. I won’t go that way then. There happens to be case law on that.

PROFESSOR KATYAL: Okay. Another question?

QUESTION: I am Joe Teague. I am a student here at Fordham.

Mr. Palfrey, you were talking about mash-ups before.⁹⁸ At the beginning of the Symposium, there was some discussion of sampling, although digital sampling did not really come up. The whole question of fair use with sampling versus mash-ups seemed to be taking different approaches. Sampling seems to have become a real licensing regime but mash-ups, not. But they seem to be sort of different flavors of the same sort of thing. I am wondering why there are two different routes for those two similar sorts of uses.

PROFESSOR KATYAL: A question about mash-ups and whether or not they are treated differently under copyright law.

John, do you want to take that?

MR. PALFREY: Sure. I do not think that they necessarily are, but I think you are hitting exactly the point that I was trying to get at in some ways, which is I am all for informality of the sort that

⁹⁸ See *supra* notes 54–57 and accompanying text (Palfrey comments).

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Laura has suggested.⁹⁹ I think it is great. I am all for creative comments licenses and implied licenses and some of these various other ways of arranging for allowing somebody else to reuse your material in a mash-up kind of context.

But I do not think that the law is any different in the traditional sampling context than in the mash-up context. But I do think that somehow, in the way that people conceive what they are doing, it is being conceived of differently. I guess my fear is only that, without elucidating best practices or without this informality somehow being worked into a sustainable system, as more money flows into the mash-up world effectively, more people have more capital engaged in it, and more people are making more money off of advertising, and search on top of it, the problem that you raise is going to result in a whole lot of litigation.

PROFESSOR KATYAL: Okay, great. Question—go ahead.

QUESTION: Thank you. I am a Fordham student.

I wanted to ask Mr. Carson in particular, and the rest of the panel also, what you think about addressing the problem of copyright protection devices that preclude the possibility of your even reaching the point of whether or not infringement was frivolous.

MR. CARSON: Can you elaborate? I am not sure I know where you are going.

QUESTIONER: What I mean is that in a digitally protected device you do not anymore have the opportunity to infringe, even if you would have a fair use defense. Therefore, the default has become that there is no possibility of using it for fair use.

MR. CARSON: I think the question has to do with copyright protection devices that are deployed that might prevent you from doing anything so that anyone could even make a determination of whether it is infringing or not, I gather.

All I can tell you is what has been presented to us in the year 2000, in the year 2003, and now this year. The whole point of the rulemaking we are engaging in is to take a look at what is

⁹⁹ See *supra* note 24 and accompanying text (Quilter comments).

happening currently out there in the marketplace, and determine to what extent access controls—and this deals only with access controls; things that prevent copying, and so on, are outside our purview—are actually being used in ways that prevent people from engaging in non-infringing uses.

It is a pretty passive operation on our part. We take in comments, we hold hearings so people can come testify, and they present to us the information they have and the arguments they have and so on. The conclusions we have drawn are that, with a few exceptions—and those exemptions have been reflected in two exemptions in 2000, four exemptions in 2003; this year, if you follow the math, you might be able to make a prediction of how many exemptions there will be, but who knows.

In any event, what we found is, by and large, we are not at a point yet—and we may never be, because it is not in copyright owners' interests probably to get to that point; that would be my position—but at least we are not at a point now, with some exceptions, where works are put out there in ways that there is no way to make non-infringing uses of them.

Now, I will give you one example that was a real easy one, although it is a harder one to necessarily make now. In the year 2000, there was all sorts of talk about movies on DVDs and how you cannot break through the encryption. Well, it was real easy for us to say, "Yeah, but they are all out on VHS tapes too, so you really can make the kind of use you want to make by going to that alternative format." That's a lot harder to say now. How many movies are released on VHS anymore? So, it gets a little different.

But I will have to say the cases that were made to us on movies on DVDs, with perhaps an exception—we will have to wait and see—were not persuasive to us that there really is a problem, in the sense that people are not able to find a way to do what they feel they need to do, in a way that we felt was a non-infringing use in any event.

So, the risk is there, and there are some areas where it has been a problem. To take one example, I mentioned the one with filtering software that was a problem.

Another one was the blind, e-books for the blind—you are blind, you get an e-book. E-books have a read-aloud function so you can listen to it. And there is something even more sophisticated in the read-aloud function, called a screen reader, which actually, as I understand it, allows you to navigate through the book—take you to the table of contents, maybe even to an index, listen to the table of contents and say, “I want to go to Chapter 7; that is what I want to hear.”

Most e-books, I think, now—we don’t really have statistics—have those functions enabled. Some do not. When they do not have that enabled and you are blind, you buy that e-book and you cannot get to it. Why not? No one has really been able to explain to us why not.

We issued an exemption three years ago.¹⁰⁰ One is before us this year again. It does not sound to us from everything we have heard as though copyright owners intentionally were disabling that function. It is just that they clicked the wrong box and it is out there, and therefore it is not enabled.

What we concluded three years ago was that this is an area where the system does not seem to be working. Whether intentionally or not—we made no evaluation—there was over-protection in a way that had prevented people from engaging in non-infringing uses, and there is really no other satisfactory way for them to be able to do what they need to do. We said, “Fine, that is an area where people should be able to do that.”

So, I am not saying that the rulemaking is perfect, and I am not saying that the way we have done it in the past has necessarily been the right way. What I guess I am saying is if you look at how we do it this year, you might see a change in approach. But it is one way of looking at it.

To the extent that it brings in information—which anyone can look at and make their own evaluation of, which may differ from ours—what it tells me is that so far it has not been a major problem, with some relatively minor exceptions.

¹⁰⁰ 37 C.F.R. § 201.40 (2003).

MR. AIKEN: I would like to address that for a minute. I think there is a fundamental misconception here, that fair use somehow implies a right to free access. That has never been the case. To make fair use of a movie pre-digital age, someone has to have bought a legitimate copy. Maybe it is a library, a university, whatever, but someone has to have bought the legitimate copy that you would the make fair use of, or someone has to have bought a legitimate copy of the book that you would make fair use of. You cannot say, "Because there is fair use I get to look at something for free."

Also, fair use does not say that you have to make it technologically easy to copy something. Just because you cannot make a digital copy of the DVD does not mean you cannot display the movie on a nice flat-panel screen, use a digital camera to capture that, and then put it on your own DVD or videotape. Fair use does not say it has to be easy.

For a book, it has traditionally been you have had to type in what you want to make fair use of to include it in your manuscript. No matter what protection you put on an e-book reading device, you can always re-key it into your own work as long as you have access to a legitimate copy.

PROFESSOR KATYAL: John, do you want to respond, and then Laura?

MR. PALFREY: Just very, briefly. It is a great question. I think if you take the frame of it to say how often can DRM¹⁰¹ trump fair use—and setting aside the § 1201 situation,¹⁰² because I think there are situations in which people do not have the technical ability to do the hacking in order to exercise this fair use—there is a policy argument as to whether or not you should be able to do that.

But I think it might link up to what the gentleman in the blue shirt, the LL.M. student, was talking about perhaps, of contract trumping fair use as well, can you use contract as a means to trump it. I think it goes right back to Sonia's initial framing of it—which

¹⁰¹ Digital Rights Management. Wikipedia, http://en.wikipedia.org/wiki/Digital_Rights_Management (last visited Apr. 19, 2007).

¹⁰² 17 U.S.C. § 1201 (2000).

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is: is this a defense; is it a right; how do you conceive of what fair use is?—and then say, “Okay, you should not be able to use contract to trump it” or “you should not be able to use DRM to do it,” or “you should, but then there are exceptions and so forth.” But I think that is an area where the law is not all that clear, frankly.

PROFESSOR KATYAL: Laura?

MS. QUILTER: Let me just add another point to this, putting on my librarian hat for a moment, because I was a librarian before I became an attorney. That is, that we are in really a tremendously tumultuous moment, where we are not just dealing with old rights that have already existed simply in different forms. We are dealing with new abilities to manipulate content, new types of content, new forms of art, and we have to really come to grips with the fact that actually there may not be good metaphors in the old ways for doing these things. We just have to apply our principles to come up with the new answers.

The thing that I am thinking of, in particular, is that most forms of DRM actually do not expire. As a librarian and an archivist, by inclination, if not by profession, this is a problem. So, you can look at the Library of Congress’ fabulous works, and the Library of Congress for a number of years has been designating a few select works of film every year as like really great works of film that we should preserve for all time. But that has left us with thousands and millions of films that are decaying, that are basically being lost to history, because there simply are not enough resources to preserve them.

DRM is basically creating such a situation for us when we do not have the opportunity to circumvent it, and we may not be able to, even after copyright expires, if we end up in a situation where we cannot preserve things. I’m thinking not just of the typical works of film or whatever, but look at these DVDs.

I was looking at a CD the other day from the mid-1990s and it was a work of art. It had menuing, it had this whole interface. This is a work of art that actually is not going to exist really ever again, because CDs as ways of distributing content are kind of passé. We use them to quickly back stuff up, but we are not going

to create these elaborate menuing structures, with folding-out things and fabulous graphics. That in itself is a work of art. I will be surprised if we do not in ten years see a real market of memorabilia in CD-ROMs from the mid-1990s and early-1990s.

What are librarians supposed to do with that? I am telling you that in a hundred years CD players are going to be nonexistent in libraries. Librarians and archivists who want to collect and take this material need to be able to get access to it; they need to be able to circumvent it. We can come up with individual circumventions in particular situations, but that is going to be a problem for us. If you have to circumvent every single type, it is just a big problem.

So, that is just one tiny example of the kinds of problems that this can create when you are bringing in technical protection measures. You have contract on top of that and you have the law dealing with all of this. I think it can create real muddles that are not going to adequately protect all of the interests and rights at stake with new forms of media and new uses.

PROFESSOR KATYAL: Okay, great.

Next question?

QUESTION: Thank you. My name is David Rigney. I am an attorney in private practice in New York.

I would like to address a general question to the panel. That is, your views, your experience, in the application of fair use in the context of the rights of photographers. My premise is that the issues involved in the reproduction, the transmission of an entire work—for example, a photograph—may have a different context and flavor from excerpting or otherwise copying from printed works.

Then, as a follow-up to David Carson, if you would comment on your views on the status of the orphan rights proposal,¹⁰³ which, as I think you know, is of great concern to photographers generally.

¹⁰³ Orphan Works Act, H.R. 5439, 109th Cong. (2006).

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PROFESSOR KATYAL: So the questions are, is photography different than other types of media and what is the status of the orphan works legislation.

QUESTIONER [Mr. Rigney]: And the application of fair use principles.

PROFESSOR HANSEN: I think that generally photographers are screwed royally. That's just life. Some people, I don't know. It's a tough life.

But no, of course it is not a fair use to take the whole thing commercially. The real thing about photographers is they are in a situation where they do not have a lot of money. They are one of these groups that actually, on the other side, really need help to protect their rights. But if you look at the Internet, it is ninety-five percent a copyright-free zone, of which five percent of people are concerned and doing something about it. That five percent, though, is where the money is made.

So, photographers have to get into a situation where they can protect their rights in that five percent. If they have the resources, then I think the law will protect them. The question is they are small individuals, usually, with a million photographs. They do not even know who is using it half the time. It is a tough life. Maybe they should teach.

MR. AIKEN: Photographers were big backers of the proposal that was floated last year in the spring for a small claims court for copyright, and they should be, because their stuff is taken over and over again. The hurdle of getting into federal court is way too high for individual photographers, as it is for authors. We are backers of that as well.

We did a survey of our members about whether they would favor a small claims court for copyright. They are strongly in favor of it.

I think we have to come up with some sort of tribunal that can handle these very clear cases of copyright infringement. Not where there is some colorable fair use defense—that should be pulled out of such a tribunal—but where there is no colorable fair use defense and it is plain infringement, there has to be an easy

way for photographers, graphic artists, and individual authors to get into court.

It may be that that sort of tribunal is the place to handle these frivolous cease-and-desist letters as well. I think that might be an interesting confluence of interests on both sides of the copyright aisle.

PROFESSOR KATYAL: David, did you want to respond to the question on the status of the orphan works?

MR. CARSON: Right. Well, first of all, current status, I guess, was part of your question; is that right?

QUESTIONER: If that is available.

MR. CARSON: The current status is it made its way through the House Judicial Subcommittee on Courts, the Internet, and Intellectual Property. It made its way almost to consideration by the full Committee, until Chairman Smith of the Subcommittee pulled it, literally at the hearing where he was going to move it forward.

Some people think perhaps he pulled it because he did not think it was going to get through the Committee. That is not what he said. I think what he said is more along the lines this was the very end of the Congress; even if it got through this Committee, it was not going to get its way all through Congress this year; and he knew it was going to require a lot of people to take a tough position, because folks like photographers were certainly pushing very hard not to enact it.

It will come back next year. Is it going to get enacted? I do not know. But I am reasonably certain that it will be high on the agenda of folks in Congress who can make it—not necessarily make it happen, but make it get early consideration.

The photographers have probably been the most vocal opponents. It is easy to understand why. I may be the last remaining person on earth who really liked the 1909 Copyright Act.¹⁰⁴ I think it was a wonderful law. I think the notion of

¹⁰⁴ The Copyright Act of 1909, Pub. L. No. 349, 35 Stat. 1075 (1909) (amended 1976).

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requiring copyright notice was great. I think a relatively short term, renewable if you wanted it renewed, was wonderful.

We do not have that anymore. As a result, you are a copyright owner for your life plus seventy years, whether you want to be or not. That is a problem.

Because the law has been so generous to copyright owners, now you can publish your work without worrying about putting a copyright notice on it; you can make your work available and put it out there without doing anything to make yourself locatable. I think the copyright owners who find themselves in this situation bear some of the responsibility for the problem by not really making it easy to find them. "I want to use this work. I don't know who wrote it. I don't know who took the photograph. Or, even if I do, I have no way of finding them now."

QUESTIONER: Could I just make a brief response to that?

MR. CARSON: Of course.

QUESTIONER: I understand that. But given the effect of digital technology, it is a Catch-22, that if your image is misappropriated, if the copyright notice that the photographer and his digital archive have placed on it is erased, and then the conclusion is reached, "Oh, you were somehow at fault in not giving notice," I think that is a completely illogical and invalid conclusion.

MR. CARSON: I couldn't agree more. But nevertheless there are things that copyright owners and photographers can do. It is much easier to think about that going forward than it is to think about it going backwards, although there are ways to deal with it going backwards too.

One of the things we have been pressing on the representatives of photographers is that they need to figure out how you can create databases whereby photographers can put their photos up in ways that someone who wants to find out who owns the rights to this photograph can find out by going to a database, or one of a number of databases, searching for it.

We are told, although I don't know the facts, that there are technologies that actually can allow you to search for images. I am sure that will get better over time.

The more photographers do, presumably through their own organizations, which may have more resources than any individual photographer clearly would have, perhaps people will even find that this could be a profit-making activity. If there are places one can go when one wants to know who is the owner of the copyright in this particular photograph or this particular work, and you can go there and you find the owner, then that solves the orphan work problem.

So there are things that can be done, at least in theory. I am not saying it is necessarily easy. But I know that representatives of photographers are seriously looking at it. That is one of the things that we are trying to encourage.

The idea is not primarily to allow people to use works when they cannot find the copyright owner. If nothing else succeeds, okay. But the idea is to help people find the copyright owner and then strike the deal.

PROFESSOR KATYAL: Okay. So Laura, Paul, and then John can respond.

MS. QUILTER: Two quick comments.

One is photographers are in a pickle if their work subsists only in a printed form. So the photographer from 1930 who has a print photograph, it can be very difficult to track that. I actually think electronic files can really help solve this, because formats can have metadata which can include that. Yes, the metadata can be erased, but if somebody signed their name, that can be cropped as well. So I actually think electronic photography can be very helpful to photographers in terms of keeping their material out there.

On the arbitrage or alternative dispute resolution, actually I want to put in a pitch for § 512.¹⁰⁵ I think that it works pretty well for small rights holders. With the § 512(c) provision,¹⁰⁶ it is very efficient—too efficient—for rights holders in terms of getting their

¹⁰⁵ 17 U.S.C. § 512 (2000).

¹⁰⁶ *Id.* § 512(c).

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material off of the Internet. Where I find a problem is that rights holders are overbroad and that there is no really effective way to respond to that. But I do think that, in terms of Internet distributions, § 512 becomes a cheap and efficient way for rights holders to deal with distributions of their content.¹⁰⁷

MR. AIKEN: On orphan works, authors are on both sides of the issue. They've got their works, copyrighted works, that they do not want being deemed orphan because someone cannot locate the author at the moment they are looking. But they also want to make use of stuff that is out there, particularly old letters, diaries, things of historic interest. They want to be able to use that stuff, incorporate that into their own works.

We were not big fans of the orphan works proposal because we think it should have made more distinctions between works that were clearly created to exploit the commercial value, when you've got a manuscript or a book that someone was creating to exploit the commercial value; as opposed to letters, diaries, notes, where there is not that sort of intent. There should be a distinction in the law made between those and how "orphan-able" such works are.

For photographers, it is a particular problem, because how do you distinguish by looking at a photograph whether someone intended to commercially exploit it or not? I do not know how often people need to make fair use of a photograph where they cannot find the rights holder. I do not know how often it comes up.

One thing I think that has not been looked at with these orphan works proposals is that it essentially creates a duty of availability on the copyright holder; it says you have to be available. It is not a problem for the corporate copyright holders. Big publishers, the Hollywood industry, they are going to be available and people will find them. It is a problem for individuals, however, being available.

And it is not just available to people in the United States, because our law is intended to incorporate also foreign works.¹⁰⁸

¹⁰⁷ See *id.* § 512.

¹⁰⁸ See, e.g., *id.* § 104 (2000).

Foreign works can be orphaned as well. Other countries are looking at us and seeing what we are doing. So now we have Australia looking at what the United States is doing. If we pass an orphan works law, we can be sure that Australia, England, South Africa, India, and China will pass similar laws. And, since you can put stuff on the Internet as a result of these orphan works processes, we will have a global duty to be available; and, if you are not available, the penalty is your work is put in this quasi-public domain and you may lose all the value of it. So I think there are a lot of problems with the law as it was proposed.

PROFESSOR KATYAL: John?

MR. PALFREY: Just since it is important that every member of the panel speak on these good questions, of course.

To your first point, about where is fair use in the context of reproduction of photographs, I totally agree with you that there is no issue with respect to service standard photographs. But the heat, I think, to follow on Laura's insight about § 512(d),¹⁰⁹ is in the search engine space.

So the two cases, or sort of chain of cases, are *Kelly v. Ariba Soft*¹¹⁰ and then more recently the *Perfect 10* case,¹¹¹ which call into question some of what was in that context.

So I think if you are looking to where is the interesting fair use question, it is not so much the standard direct liability; it is actually in the direct and secondary liability for intermediaries, who are increasingly in this sort of money-making posture, clearly, but then also where more pressure is being placed on them. Joel Reidenberg has written about this as well in the Internet law context.¹¹²

PROFESSOR HANSEN: That is an area where I thought the courts did a pretty good job. The *Perfect 10* case was also Solomonic in its attempt to give something to each side based on

¹⁰⁹ See *supra* notes 30–31 and accompanying text (Quilter comments)

¹¹⁰ 336 F.3d 811 (9th Cir. 2003).

¹¹¹ *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

¹¹² Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules through Technology*, 76 TEX. L. REV. 553, 583–85 (1998).

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close factual analysis.¹¹³ So I think the courts have basically done a good job on fair use when they are actually presented with it. It goes back to the problem of how do we get some of these things before them.

PROFESSOR KATYAL: Next question?

QUESTION: Most of the panelists have expressed concern about the chilling effect of various things like notices that may be against people doing legitimate fair use and the like. To what extent do you think that the uncertainty in the law in some of these areas effectively acts as a chilling effect?

To pick a real example, an author I know is concerned about something that she wanted to do that maybe was a transformative use. Now that the Second Circuit has come down with its opinion,¹¹⁴ I still have no idea whether it is a transformative use or not. That uncertainty is causing her not to produce the work that she was going to produce. I would be interested in the panelists' views on that.

PROFESSOR KATYAL: The future of transformative use under copyright. Go ahead.

PROFESSOR HANSEN: I will say something about transformative use. Transformative use is a derivative work, for which there is a right. So the idea that "if it is transformative, you are okay" is crazy. All that the courts are really trying to talk about is transformative in the context of a fair use between something that is intrinsic. The normal use of something that is transformative is that there is a thumb down on the scale on the transformative.

There is no case that says if it is transformative it is fair use. In *Acuff-Rose*, they said, "No, it can be a parody, and it can be news reporting, or it can be all these other things that maybe do things

¹¹³ *Perfect 10*, 416 F. Supp. 2d at 831 ("The Court now concludes that Google's creation and public display of 'thumbnails' likely do directly infringe [Perfect 10]'s copyrights. The Court also concludes, however, that [Perfect 10] is not likely to succeed on its vicarious and contributory liability theories.").

¹¹⁴ See, e.g., *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

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with things.”¹¹⁵ But that does not mean they are fair use. You still have to go through the complete four-factor analysis.

But what it has morphed into now is “if it is transformative it is okay.” No, it is not okay. You still have to go through the normal fair use analysis. So just your statement, “it’s transformative but she’s not sure she can do it”—of course she shouldn’t be sure that she can do it. You have to look at it very fact-specific in a situation. That is just the way it is.

MR. CARSON: I think the more accurate statement is if it is not transformative, the odds that it is a fair use are relatively low. If it is transformative, you may have leapt over one hurdle but you’ve still got some other tests to meet.

MS. QUILTER: I would add that I believe that the chilling effect in terms of practice is quite high from the uncertainty. Publishers, for instance, are very reluctant to step into situations where they have to rely on fair use. Documentary filmmakers, as has been well documented, have a lot of difficulty getting material distributed because their distributors, their film festivals, all want insurance coverage.¹¹⁶ The insurers are really leery of fair use. I think this story goes on in really almost any form of media.

I think that anybody who is the gatekeeper, who has some sort of role in distributing material, but is not wedded to the material and treating it as the child of their heart and their last three years of work, does not really have that much of a vested interest in getting it out there if there is some risk of liability. So I think that the chilling effect from gatekeepers’ roles is quite significant.

MR. CARSON: And it is not just people who do not have the resources to fight. Keep in mind most copyright owners are also copyright users. You look at what they do in Hollywood, it is nuts. They will pay for anything just to avoid a possible claim. They pay for rights to use things that anyone looking at would say, “Of course that is a fair use” or “it is not even infringement in the first place.”

¹¹⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

¹¹⁶ *See, e.g.*, Boyle et al., *supra* note 93.

But there is this culture where if I can just pay whoever might have a claim against me, then I do not have to worry about it down the road. The cost/benefit analysis may or may not make sense, but the result is that you do not have the precedent out there, whether it is legal or just precedent in terms of what is actually going on in the world, that any rational person looking at how copyright law really operates would imagine you ought to have.

Again, it is largely, I think, because of the cost of vindicating your rights in our system.

MR. AIKEN: There definitely is a chilling effect. That is something else we have surveyed our members on. When faced with something where they could not get permission, there is—I cannot remember the percentage now—there is a certain percentage who just avoid it entirely or paraphrase. But, a larger percentage take a smaller chunk and declare it for themselves to be fair use.

PROFESSOR KATYAL: In the back?

QUESTION: My name is Britton Payne. I am with the *Fordham Intellectual Property, Media & Entertainment Law Journal*.

I wanted to ask a question about the fourth factor, the effect on the marketplace, and direct it particularly to Professor Palfrey, but I am certainly curious to hear what everybody has to say.

Professor Hansen, in talking about the interplay between *Arriba Soft* and *Perfect 10*, discussed how the court goes into an analysis of the market impact of the use of thumbnails in search engines.¹¹⁷ It says that because you can use a thumbnail-size photograph on a cell phone and there is a potential market for that, it is an inappropriate use under the fourth-factor analysis of fair use.¹¹⁸

But what, really, is the marketplace that we should be looking at in terms of temporality? Soon enough your cell phone image is

¹¹⁷ Compare *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821–22 (9th Cir. 2003), with *Perfect 10*, 416 F. Supp. 2d 828, 850–51; see also Britton Payne, Comment, *Imperfect 10: Digital Advances and Market Impact in Fair Use Analysis*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 279 (2006).

¹¹⁸ *Perfect 10*, 416 F. Supp. 2d at 851.

going to be far more complex than the thumbnail image that you would see in a Google image search. When we look at the *Grokster* concurrences, we have Breyer saying, “look to forever in the future.”¹¹⁹

PROFESSOR HANSEN: Forget about Breyer.

QUESTIONER [Mr. Payne]: And we have Ginsburg saying, “Look to right now and the present uses.”¹²⁰ So really what is the appropriate limitation in the marketplace that we are looking at in terms of temporality?

PROFESSOR HANSEN: I think it depends on whether you are someone who is basically property based, and then the effect on the market is going to be very strong; and if you are someone who is not property-based, it is not going to be very strong, because you are for redistribution of wealth probably in many areas, including copyright. I mean you scratch any of the Copy Left—they are left. That is why they are called Copy Left. The irony, of course, is that the Copy Right are also left. So there is this weird thing where most people in the copyright industry outside of copyright are for redistribution of wealth. There is just almost a tribal split between them when one side is trying to redistribute the other’s wealth.

But if you want to know the truth, forget Breyer and Stevens. If you are looking at what the future holds, they aren’t the future. What they say is nice or not nice, but it almost has no effect.

Breyer, or at least his clerks, seems to want Breyer to be the “Copy Left Hero.” His concurrence in *Grokster* had all the earmarks of a typically clerk-written opinion. But, in any case, I do not think he has influence, in the area of IP, on the other justices of the Court.

So if you want to look at the Court, look at Ginsburg, who is probably the one that you should pay the most attention to. We will see what the new Justices do.

¹¹⁹ Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 952–54 (2005) (Breyer, J., concurring).

¹²⁰ *Id.* at 945–48 (Ginsburg, J., concurring).

Another example of the strong concern for market harm is clear in *Acuff-Rose*.¹²¹ Everybody thinks *Acuff-Rose* was a win for Luther Campbell, finding fair use for his “parody.” It was not a win for Luther Campbell at all. The Court remanded for consideration of the effect of Campbell’s use of the song on the potential licensing of “Pretty Woman” to the hip-hop market.¹²² That is an incredible concern. The idea that the song was going to be licensed to the hip-hop market is almost ridiculous, but that was the remand. That is how concerned the Court was with the impact on a potential market for “Pretty Woman.”

I think potentially the fourth factor—I think O’Connor was right in *Harper & Row*,¹²³ even though to some extent Souter pooh-poohed it in *Acuff-Rose*¹²⁴—that fourth factor is the killer factor. As soon as there is competition, someone is using the work to compete with you, which is really what the fourth factor is: I think you are almost always going to lose in fair use.

PROFESSOR KATYAL: John, do you want to comment?

MR. PALFREY: Sure. There is good reason that you are in charge of the *Journal*, and it is a great question.

I think that there is no doubt but that the heat here is on the fourth factor and no doubt that much of the uncertainty in the application of fair use—which cynics call the right to hire a lawyer, of course—is in how do you define the market? I think it is analogous to the antitrust base, where the first thing you have to look at and ask is, “What’s the market we are talking about for this monopoly?” It is really hard to do. I think the courts are all over the place.

The thing that makes me uncomfortable with the *Perfect 10* Solomonic opinion is just what you note, which is sometimes in the digital space—I guess always in the digital space—you have to

¹²¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹²² *Id.* at 594.

¹²³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (“[The fair use fourth factor of market impact] is undoubtedly the single most important element of fair use”).

¹²⁴ *Campbell*, 510 U.S. at 572.

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freeze a moment in time and look at a technology as it stands right now.¹²⁵

I think we are in a time of enormous transformation. This notion of the image as it applies on the cell phone, clearly we have convergence of accessing digital space from all these different devices. I think it is very hard to rely on that as the way to think about the market. But I do not have a good answer. It is an excellent question, and maybe there is a note or a journal article or something in it.¹²⁶

PROFESSOR HANSEN: Just leave Breyer out of it.¹²⁷

PROFESSOR KATYAL: It looks like our time is up. Thanks so much to everyone. For those of you who didn't get a chance to ask questions, there will be a reception outside so you can follow up.

¹²⁵ Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006). *See also* Payne, *supra* note 117, at 290–91.

¹²⁶ *See* Payne, *supra* note 117.

¹²⁷ *See contra id.*