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Panel II: The Death or Rebirth of the Copyright?

Moderator: Hugh C. Hansen^{*}
Panelists: Diane Zimmerman[†]
Robert Kasunic[‡]
Brett Frischmann[§]

MR. HECHT: Good morning. My name is David Hecht. I'm the Managing Editor of the *Fordham Intellectual Property, Media & Entertainment Law Journal* ("IPLJ").

The *IPLJ* has been eagerly anticipating this conference, and we are very excited to have so many distinguished individuals come to Fordham to discuss cutting-edge issues in intellectual property law. The *IPLJ* is currently working on our eighteenth volume. We are proud to announce that our third book will be a special edition featuring articles by Mark Lemley, Dan Burk, and other titans in the intellectual property ("IP") field. Please stop by our table in the Atrium and have a look at our most recent books.

Now we will begin our second panel of the day. The panelists will discuss whether new business models driven by technology will be the end of copyright.

I have the pleasure of introducing our distinguished moderator for the panel, Professor Hugh Hansen. Professor Hansen teaches courses in copyright law, trademark law, European Community

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intellectual property law, advanced copyright law, and U.S. constitutional law at Fordham. He is the Founder and Director of the Intellectual Property Institute here at Fordham. He has had speaking tours in Japan and Australia and averages about ten presentations a year here and abroad. He has edited seven volumes on international intellectual property law and one on U.S. IP law and policy.

Professor Hansen.

PROF. HANSEN: Thank you very much, David. Congratulations to the *IPLJ* and Ryan and the staff for putting this together. I think you've done a great job.

We're happy to be here in the copyright session. We have three speakers, all very well-known. Their bios are in the materials. Diane Zimmerman from NYU and Robert Kasunic, Principal Legal Advisor, United States Copyright Office—and he is also a teacher at Georgetown University. Brett Frischmann is visiting here this year, and we're very happy to have him at Fordham both to teach and to participate on this panel. Brett teaches at Loyola University School of Law in Chicago.

In the course of this session we will try to focus somewhat on the on the jury verdict in the recent case in Minnesota brought by the Recording Industry Association of America (“RIAA”) against a woman in Duluth,¹ which should be a lot of fun to discuss.

The speakers have up to fifteen minutes. That should give us a lot of time for discussion.

Without further ado, Diane, please.

PROF. ZIMMERMAN: I always say I won't take fifteen minutes, but I always do.

I want to thank the organizers of the conference for inviting me. It's really wonderful to be here.

¹ See Complaint for Copyright Infringement, Capitol Records, Inc. v. Thomas, No. 06-CV-1497, 2006 WL 1431921 (D. Minn. Apr. 19, 2006); Special Verdict Form, *Thomas*, 2007 WL 2957532 (D. Minn. Oct. 4, 2007) (finding defendant Thomas guilty and awarding damages of \$22,000); see also Eric Bangeman, *RIAA Anti-P2P Campaign a Real Money Pit, According to Testimony*, ARS TECHNICA, Oct. 2, 2007, <http://arstechnica.com/news.ars/post/20071002-music-industry-exec-p2p-litigation-is-a-money-pit.html> (briefly describing the history of the case).

The question that we were asked today is whether current trends in intellectual property are the best way of keeping pace with technological advancement. But to answer the question, one has to decide what current trends and what advances to talk about. So I decided that, rather than trying to narrow it down, I would look at this problem from a meta-level and ask whether the ability to distribute copyrighted works on the Internet is being affected and how it is being affected.

But to describe the current trends is a little bit difficult because the only word that comes to mind is chaos. On the one hand, you've got the RIAA suing individual music fans for downloading music illegally²—and we are going to talk about that case, I assume, to some extent. On the other hand, you've got famous groups like Radiohead that are saying, "Come on to my site, download my music, pay me if you want to, and pay me what you want to."³

There are all sorts of things that are going on out there in the effort to figure out how to distribute content digitally. Some people are using watermarking to track their works.⁴ Some people are wrapping them up in digital rights management technologies.⁵ Some are offering to share their work as long as those who adapt or use it agree to offer it to others similarly unrestricted by copyright.⁶

² See, e.g., Complaint for Copyright Infringement, *Thomas*, 2007 WL 1431921, at *1; see also CNN.com, *12-year-old Settles Music Swap Lawsuit* (Feb. 18, 2004), <http://www.cnn.com/2003/TECH/internet/09/09/music.swap.settlement>.

³ See Melena Ryzik, *Radiohead Fans, Guided by Conscience (and Budget)*, N.Y. TIMES, Oct. 4, 2007, at E1, available at <http://www.nytimes.com/2007/10/04/arts/music/04radi.html>.

⁴ For example, the Digital Watermarking Alliance is a collection of organizations that promote the use of watermarking. See Digital Watermarking Alliance, <http://www.digitalwatermarkingalliance.org/about.asp> (last visited Apr. 18, 2008).

⁵ See, e.g., Christine Galbraith, *A Panoptic Approach to Information Policy: Utilizing a More Balanced Theory of Property in Order to Ensure the Existence of a Prodigious Public Domain*, 15 J. INTELL. PROP. 1, 21 (2007) (stating that "increasingly, content producers have turned to technological measures, such as digital rights management systems (DRMs), to strictly regulate access to their works").

⁶ See, e.g., Creative Commons License, <http://creativecommons.org/licenses/by-sa/3.0> (allowing users to license their works to others as long as others share derivative works—the "share alike" option).

My conclusion, to tell you at the outset where I am going, from looking at all of this ferment is really to say that to the extent that I can see, even if individual copyright owners still want to have copyright in their back pocket to rely on in a pinch, that if you look at what their strategies for dealing with distributing content online are, they really seem to have, more and more, less and less to do with copyright. It is that that I want to talk about.

I think that part of the problem is that they don't any longer believe that copyright really is a protection for them and is really realistic. I think there are a number of reasons for that that we need to think about.

The essence of copyright is the control over copying. That is a very difficult thing to effectuate in the context of the Internet, where virtually everything one wants to do with content requires making a copy of it in some way or another.

There are many kinds of things that people feel entitled to do. Let's leave out of it the 9 million people that we are told are file sharing music at any one time on peer-to-peer systems.⁷ Let's just think about people who happen to have some form of digital content on their hard drives that they would like to show to a friend. I think most people really do not believe that there is anything wrong with doing that. I think Jessica Litman is right that user sharing isn't stealing.⁸ They want to be able to copy their digital works onto other devices so that they can carry them around with them, so they can enjoy them on different kinds of equipment. So it is hard to convince fans, hard to convince users, that the proscriptions on copying are actually valid.

Now, recognizing of course that digitization also allows people to act much more easily and more effectively as genuine pirates, you can understand the problem from the copyright owners' point of view. You've got on the one hand people who really don't want

⁷ See Posting of David Kravets to Wired Threat Level Blog, Piracy Milestones Converge, Illegal Downloading Goes Unabated, <http://blog.wired.com/27bstroke6/2007/09/piracy-mileston.html> (Sept. 4, 2007, 19:11 EST) (reporting that there are "9 million so-called 'simultaneous' users are trading at the same time").

⁸ See Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 23-25 (2004) (stating that it is "counterintuitive" for a teacher to be able to share information, but not music with her students).

to break the law but who basically think that a lot of the fine points of copyright are annoyances best ignored whenever possible. Then, you've got another group of people who just simply say, "Gee, now we can do this. Why don't we?" They are trading all kinds of stuff, movies and so on, online.

In the face of that situation, it seems to me that what I am seeing emerging—and people may disagree with me vehemently—is not so much an attempt to continue to rely on copyright, but a development of a series of alternate strategies. Now, these are strategies that I have termed in an article that I have coming out soon "the strategy of the naysayer, the strategy of the locksmith, the strategy of the subverter, and the strategy of the explorer."⁹

Now, let me start with the strategy of the naysayer, because I think that, as a strategy, this one is probably not going to work very well, but it does have one aspect to it that I want to point out.

Naysayers are the ones who look around at the Internet and its distribution of content and say, "Hey, wait a second, guys. Copyright isn't going to do me any good here and I can't see any other way of protecting myself against having my intellectual property just out of my control. I'm not going to distribute it online."

I think that, although people like Ms. Rowling—who did not want to distribute *Harry Potter* online—try to prevent online distribution,¹⁰ other people wanted to do it, so it is there anyway. You still cannot get an official Beatles song online,¹¹ but I think there are quite a few of them out there. I think Naysayers basically have a dead-end strategy because, unfortunately for authors,

⁹ Diane Leenheer Zimmerman, *Living Without Copyright in a Digital World*, 70 ALB. L. REV. (forthcoming 2007) (NYU Law School, Public Law Research Paper No. 077-20), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026127.

¹⁰ *Id.* at 1379 n.11 (noting that J. K. Rowling has refused to distribute her books over the Internet).

¹¹ *Id.* at 1378 n.9 (noting that recently, a rumor circulated that the Beatles' albums would finally be released for digital distribution); see also Jonny Evans, *The Beatles Confirm Online Music Plans* (Apr. 13, 2006), <http://www.macworld.com/article/50361/2006/04/beatles.html>. However, negotiations between Apple and EMI (which distributes the Beatles) failed to generate an agreement to make the Beatles' music available. See CNN.com, *EMI, Apple Online Deal: Beatles Still Not for Sale* (Apr. 2, 2007), <http://edition.cnn.com/2007/SHOWBIZ/Music/04/02/emi.apple/index.html>.

composers, and so on, what you want is irrelevant if people can scan it in.

So I think it is not a very good strategy, although I think at the same time that there will remain—I don't believe in digital conversion. I think there really will remain analog markets and that copyright in the analog markets is likely, I would suspect, to continue to play very much the role it does now.

The second strategy is the locksmiths. These are the people who have decided that copyright doesn't work very well for them, so they are trying to put their faith in contract law and in technology—in watermarks,¹² in digital fingerprinting,¹³ in digital rights management,¹⁴ and in click-wrap and shrink-wrap licenses.¹⁵

These sorts of approaches have generated some user resistance because, after all, these kinds of devices may lock people into specific platforms or equipment, and users may not like that. There is also a lot of controversy over whether or not these “take it or leave it” contracts ought to be enforceable.¹⁶ But it is a strategy.

The subverters are the category of people who have attempted to take copyright and turn it on its head so that they can use it as a device to free up works rather than to control them more stringently.

The best example, I think, is the general public license for open source software,¹⁷ but many of the licenses under Creative

¹² See Patrick Turner, *Digital Video Copyright Protection With File-Based Content*, 16 MEDIA L. & POL'Y 165, 184 (2007) (describing digital watermarking).

¹³ *Id.* at 178–79 (describing digital fingerprinting).

¹⁴ See Beth A. Thomas, *Solutions are on Track, Digital File Sharing Spun in a Positive Light*, 6 VAND. J. ENT. L. & PRAC. 129, 132 (2003) (discussing digital rights management as a way to prevent file sharing).

¹⁵ See Melissa Robertson, Comment, *Is Assent Still a Prerequisite for Contract Formation in Today's E-Economy?*, 78 WASH. L. REV. 265, 275–77 (2003) (describing clickwrap and shrink wrap agreements that do not require a consumer's express assent to the terms of the contract).

¹⁶ *Id.* at 276–77 (discussing the enforceability of clickwrap and shrink wrap licenses).

¹⁷ See Dennis M. Kennedy, *A Primer on Open Source Licensing Legal Issues: Copyright, Copyleft and Copyfuture*, 20 ST. LOUIS. U. PUB. L. REV. 345, 347–48 (2001) (explaining the idea behind open source software, how it works, and its evolution).

Commons licenses¹⁸ also take on characteristics of this kind. They are an attempt to get rid of some of the annoyances that relate to copyright and its traditional licensing techniques by essentially either giving away all those rights up front, or by giving them away and demanding that people who use the work also give them away as a condition of using the work.

Then, finally, there is the group that I would call the explorers. The explorers are those who have opened the back door of the copyright fold and have walked right straight out of it. They are either people, to make a broad generalization, who disdain copyright as a political matter—and there are certainly a number of those—or they may simply be pragmatists who have concluded that copyright is simply not terribly useful to them and that what they really need to find is a business model that will allow them to make a profit distributing their content, but at the same time doesn't get them messed up with a body of law that they don't think they really can use effectively.

Some of them think that really if they could find creative new methods of distributing their content without direct reliance on copyright, they might even do better than they currently do. As a result, what you are beginning to see are a number of sites that are springing up that offer content free of digital rights management technologies and other kinds of technologies that use strategies other than copyright to try to earn a living by essentially selling their content.¹⁹

I will make a radical prediction. That is that I think that we are approaching the crest of the wave of the locksmiths. I have a feeling that people are starting to give up on the idea that they can use technology effectively to do for themselves what copyright has done in the analog world. Digital rights management technologies (“DRMs”) are hackable. There is an enormous body of intellect

¹⁸ Association Litteraire et Artistique Internationale (ALAI), *Memorandum on Creative Commons Licenses*, 29 COLUM. J. L. & ARTS 261, 263 (2006).

¹⁹ E.g., eMusic, <http://www.emusic.com/about/index.html> (subscription-based digital download site); Audio Lunchbox, <http://www.audiolunchbox.com/about>; MagnaTunes, <http://www.magnatunes.com/info/licensing> (subscription-based digital download site); betterPropoganda, <http://betterpropaganda.com/about.aspx> (ad-supported digital download site).

out there trying to figure out how to get around virtually anything that copyright owners attach to their works in digital transmission.

I think that it is altogether possible and plausible that this trend will have worn itself out, instead of doing what we all thought a few years ago, which was that everybody was going to tie up everything with digital rights management and you would have to pay every time you wanted to look at a work, much less acquire a copy for your own use.

I think that things like the subverters, the General Public License (“GPL”) and Creative Commons licenses, are probably on the upswing; we haven’t seen their maximum use and benefit yet. We are seeing lots of new creative ways to try to use these forms of subversive licensing—such as Magnatune,²⁰ which I can talk about later if you want me to.

And then, there the people who, as I say, are just simply walking away from copyright altogether and who are looking for completely different ways to try to market their works.

This is not a surprise to some of the early visionaries of the Internet. People like Esther Dyson²¹ and John Perry Barlow²² said a long time ago that what the Internet was going to mean was that people were going to give away their content and find other ways to make money. Every once in a while that idea resurfaces—not very long ago in *The New York Times* Book Review Section. It tends to get a lot of people very excited when anyone suggests that that is a viable alternative to copyright protection online.

But in fact, in retrospect, I suspect that they were on to something. People say that what they really meant was that

²⁰ Magnatune, <http://www.magnatunes.com> (offering free streams of its artists’ albums and requiring only a minimum \$5 payment—with the option to pay more—for full album downloads). For an explanation see Kevin Maney, *Apple’s iTunes Might Not Be Only Answer to Ending Piracy*, U.S.A. TODAY, Jan. 20, 2004, at 3B, available at http://www.usatoday.com/tech/columnist/kevinmaney/2004-01-20-piracy_x.htm.

²¹ Esther Dyson, *Intellectual Value*, WIRED, July 1995 (predicting that content on the internet will one day be free and content producers will be compensated by other means), available at <http://www.wired.com/wired/archive/3.07/dyson.html>.

²² John Perry Barlow, *The Economy of Ideas*, WIRED, March 1994 (“We will need to develop an entirely new set of methods as befits this entirely new set of circumstances.”), available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html>.

information should be free. I don't think it was the "should" that was the emphasis. I think what they were saying is that it will be because as a practical matter it can be given away, and then you can sell complementary goods as your way of making money. In a way, it is a little bit like musicians who make most of their money from their concert tours rather than from what they get from their recordings.

There are many variations on these themes. People are mixing; they're matching. Everybody from Stephen King and Radiohead down to somewhat obscure science fiction writers are using varieties of methods. One is example is auctions—"the public pays me a certain amount of money, I will release my work to them, and then they can use it however they want to."²³ Another example is "pay what you want" schemes, the Radiohead's scheme—"download this for free and build me a fan base."²⁴

One of the things that I think is the most remarkable about what is going on in the distribution of content online is the sheer creativity of finding new ways to do it. It seems to me that what we ought to be doing and ought to be encouraging is exactly that kind of experimentation and not throwing roadblocks up to it. It is very important to let these experiments go forward. We ought to let them go forward and not intervene legislatively, unless we absolutely have to.

The DRMs that were supported by the Digital Millennium Copyright Act ("DMCA")²⁵ seem to me to be a classic example of what we ought not to do. DRMs could have been used without that legislation; they were being used without it. We ought to give the

²³ E.g., The Digital Art Auction, <http://tdaa.digitalproductions.co.uk> (bidders meeting or exceeding the author's later revealed retail price may pay that amount to receive a copy of the work); freinutz, <http://www.freinutz.net/en/urheber/index.html> (site collects money up to an amount specified by the author to publish work online); SellaBand, <http://www.sellaband.com/site/how-it-works.html> (requiring band "Believers" to sell 5,000 "Parts" at \$10 each to pay for recording costs); <http://www.fundable.com> (allowing a person to list a project, cause, or item that anyone can donate money towards).

²⁴ Melena Ryzik, *Radiohead Fans, Guided by Conscience (and Budget)*, N.Y. TIMES, Oct. 4, 2007, at E1, available at <http://www.nytimes.com/2007/10/04/arts/music/04radi.html>.

²⁵ Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 1186 (1998) (codified as amended in scattered sections of Title 17 of the U.S. Code).

market a chance to work itself out, see what's going to work, and only legislate where it is helpful to the market working it out.

For example, it seems to me that legislation that requires maximum transparency about digital rights management and other technologies is a perfectly useful adjunct to allowing competition in new forms of markets and would be very different from the Digital Millennium Copyright Act, for example.

So that is my take on where we are going. I'm sure everybody is going to tell me why I'm wrong.

PROF. HANSEN: Thank you, Diane.

We will have a little time for discussion after each speaker and then a general discussion at the end, all of which will hopefully include questions or comments from the audience. I will start off. Diane, do you think it is enough that because users want to use a work that they should the right to use it?

PROF. ZIMMERMAN: Hugh, I think that if users want it and they think it is fair, it is going to be increasingly difficult—we are seeing it now—to convince them otherwise. It seems to me that pragmatically one needs to deal with that. I think that actually, in some ways, when copyright owners have insisted on exercising their rights too fully, I think they have convinced people that they have no ethical claim to do that. That is a real problem.

If, for example, you buy a copy of a CD and you want to rip that CD onto your computer hard drive, I think it would be hard to find very many people who would say that there is anything wrong with doing that. If that is something that people really believe is fair and reasonable, how are you going to dissuade them from doing it?

I am not suggesting that there are no broad principles here. All I am saying is that the market is going to have to adjust to the realities. And it is doing it. If it weren't doing it, that would be one thing; but it is actually doing it. I think people are being realistic.

PROF. HANSEN: My second question is: Do you think technology advancements should only be for the benefit of users

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rather than the owners? This seems to be the thought of many, particularly those who are against DRM.

PROF. ZIMMERMAN: I'm not against DRM. I'm against the Digital Millennium Copyright Act. I am also against lack of transparency. I really do believe that if people are going to use this technology that they owe it to their consumers to tell them exactly what they have done.

But use it. Fine. That is part of what I think is the experiment that is going on. I suspect it isn't working so well.

PROF. HANSEN: All right. Any quick questions from the audience? Please give your name and affiliation.

QUESTION: Judy Peacock. I'm a Fordham student as well as one of the members of the Fordham Information Law Society.

It's more actually a statement. I agree with the majority of what you are saying. The one thing that I do have to say, though, is I do not really believe that the majority of people think that copyright should be abolished when it comes to music. But I agree that there needs to be a paradigm shift. It is just a matter of who changes. Does the notion of copyright change, or does the industry itself change? I think that you see, with the incredible success of Radiohead, that the big problem is that the consumer is willing to pay money, we're just not willing to pay \$20 for a CD anymore; we are not willing to pay \$9 for an album anymore. So how do you get to the point where the consumer is happy and the creator of the music is happy? You cut out the middleman.

I think that is where the paradigm shift is moving towards. I think that people very rarely talk about that because the industry is assiduously avoiding that notion, because it indicates the death of the middleman in the music industry.

PROF. ZIMMERMAN: Right, I think they are cutting out the middleman. But I also think that the people who want to go directly to the public have been willing to experiment with distribution methods that really require them as a practical matter not to rely on copyright.

You have to understand that I am not making an argument that there is anything wrong with copyright. My argument is that it just

isn't working terribly well in this new environment; that you can't really rely on it as a way to make a relationship between you and your users. People are actually, I think, acknowledging that in the way that they are voting with their feet, as opposed to whatever we might say on paper. That is really the point I am trying to make: that I think we see emerging new ways of dealing with the distribution of content that don't seem to have much to do with copyright.

PROF. HANSEN: There are plenty of hands which is good but we will have to address those questions or comments in the general discussion.

We will move on to Brett, please.

PROF. FRISCHMANN: I'm going to respond to some of the questions before I jump into my talk.

One of the thoughts I had—I'm not going to go too deeply into some reactions that I was having—but you've got to think about copyright in a sense as a body of law that evolves with technology and market conditions. It both creates property rights and, at the same time, copyright is regulatory in nature, which is different in a significant way than some standard bodies of property law. So, at least if you come at it from that view, I don't think it is as simple a question as do users decide what the scope of property rights is? They have a say, they have an impact, on how the law might evolve in a new context and environment; which brings me to my talk.

Many of the hottest debates in copyright, trademark, telecommunication, privacy, and other areas of information law are occurring because of technological and social changes associated with the Internet. While networks have been around and important for a long time, the digital networked environment that has emerged recently has had a significant impact on cultural, economic, and social systems, as well as, critically, on the laws that regulate those systems. As a result, these laws are hotly contested and rapidly evolving. They are works in progress.

At the core of many debates in these fields there seem to be First Amendment concerns lurking.²⁶ Sometimes the concerns involve formal First Amendment scrutiny, questions along those lines. Sometimes the concerns simply involve core First Amendment values without really triggering the First Amendment tripwire.

In my comments this morning, and actually later this afternoon on the trademark panel—I happen to have the advantage of being on two panels today—I am going to briefly touch on why some interesting First Amendment issues seem to be bubbling up to the surface in both copyright and trademark law, particularly in this new Internet environment, or the digital networked environment.

In large part, the issues arise because of the relatively new opportunities for people to use someone else's copyrights and trademarks to say something, to speak, to say something meaningful to the public or in a public way.

Of course, there have always been opportunities to use others' intellectual property without authorization, but before the rise of our digital networked environment the opportunities for individuals to use others' works was pretty limited in terms of the immediate commercial impact and their disruptive potential in a market setting, but also in terms of their communicative potential, in order to be able to communicate to the public. It is really commercial users and distributors, often competitors, or at least potential competitors, that make unauthorized use of others' intellectual property, and it was this set of users that copyright and trademark law has traditionally been designed to regulate.

Now, the rise of the digital networked environment, the Internet, has altered the landscape and sent tremendous ripples throughout copyright and trademark law in associated intellectual property driven markets. Many people have discussed this, some people here on the panel and some in the audience, so I am not

²⁶ Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 16–17, 19–21 (2004); Katherine A. Moerke, *Free Speech to a Machine? Encryption Software Source Code Is Not Constitutionally Protected "Speech" Under the First Amendment*, 84 MINN. L. REV. 1007, 1048 (2000).

going to discuss it at length. I think everyone here is well aware of the various challenges that the Internet has posed for copyright law.

Instead, I would like to focus our consideration on one dimension along which significant challenges have arisen, and may continue to arise, and that is specifically the intersection of the First Amendment and intellectual property laws, copyright and then later today trademark. Of course, this intersection is also a topic that others have discussed—Neil Netanel,²⁷ Yochai Benkler,²⁸ Diane,²⁹ for example—but I think there is still more to be done.

What I want to do is explain, first, why the First Amendment intersection matters; second, why the rise of the digital networked environment, the Internet, and the enabling technologies that surround it, affects this intersection; and then, third, how many of the difficult cases in copyright—and later today, in trademark—seem to test this issue and, I think, will continue to test this issue in the foreseeable future.

So, first, why do we care about the intersection of the First Amendment with copyright? Well, the simple answer is that the Supreme Court says so. The more complicated answer is that copyright is a body of law that regulates speech and, as such, this body of law can be understood structurally as a broad, systemic exception from the First Amendment.

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech,”³⁰ as you all know, and the Supreme Court has long recognized that copyright, as well as trademark, are forms of speech regulation. In *Eldred v. Ashcroft*,

²⁷ See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) [hereinafter Netanel, *Locating Copyright*]; Neil Weinstock Netanel, *Copyright and the First Amendment: What Eldred Misses—and Portends* (UCLA Public Law and Legal Theory Research Paper No. 04-21, 2005), available at <http://www.ssrn.com/abstract=614642> [hereinafter Netanel, *What Eldred Misses*].

²⁸ See, e.g., Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS. (Winter/Spring 2003), at 173.

²⁹ See, e.g., Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297 (2004).

³⁰ U.S. CONST. amend. I.

the recent Supreme Court decision, the Supreme Court recognized that copyright is compatible with the First Amendment for sure.³¹ The Court noted that copyright's purpose is to promote creation and publication and free expression, and it quoted its earlier decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,³² and other decisions as well, recognizing that the Framers intended copyright to be an engine of free expression.³³

But the Court also emphasized that copyright has built-in safeguards—"built-in First Amendment accommodations," as the Court called it—such as fair use and the idea/expression dichotomy, and perhaps others.³⁴ In the end, the Court concluded that "when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."³⁵

In a recent decision, *Golan v. Gonzales*,³⁶ the Tenth Circuit considered both a challenge to the Copyright Term Extension Act³⁷ and a First Amendment challenge to § 514 of the Uruguay Round Agreements Act.³⁸ The court found the plaintiffs' Copyright Term Extension Act claim foreclosed by the *Eldred* decision—not surprisingly—but it did consider the merits of the plaintiffs' claim that § 514's removal of works from the public domain interfered with their First Amendment rights.³⁹ Now, § 514 implements article 18 of the Berne Convention, which effectively required Congress to restore copyright protection for certain foreign works that had fallen into the public domain.⁴⁰

³¹ See 537 U.S. 186, 219 (2003) (identifying the proximity of the adoption of the Copyright Clause and the First Amendment as evidence of their compatibility according to the Framers).

³² 471 U.S. 539 (1985).

³³ *Eldred*, 537 U.S. at 219 (quoting *Harper & Row*, 471 U.S. at 558).

³⁴ See *id.* at 219–20.

³⁵ *Id.* at 221 (citing *Harper & Row*, 471 U.S. at 560).

³⁶ 501 F.3d 1179 (10th Cir. 2007).

³⁷ Pub. L. No. 105-298, §§ 101–06, 112 Stat. 2827 (1998) (amending scattered sections of Title 17 of the U.S. Code).

³⁸ Uruguay Round Agreements Act § 514, 17 U.S.C. §§ 104A, 109(a) (2000).

³⁹ See *Golan*, 501 F.3d at 1182.

⁴⁰ See 17 U.S.C. § 104A(h)(6); Berne Convention for the Protection of Literary and Artistic Works art. 18, July 24, 1971, S. Treaty Doc. No. 99-27, 1886 WL 13983.

In evaluating whether the further First Amendment scrutiny was warranted, the Tenth Circuit needed to determine whether Congress had altered the traditional contours of copyright protection. Now, keep in mind that the Supreme Court in *Eldred* did not define what the “traditional contours of copyright protection” were, other than by reference to the “built-in safeguards.”⁴¹ This is a phrase that could be interpreted in various ways.

Traditionally, it at least evokes historical consideration. But of what exactly? What are the relevant contours? I would argue that the contours of the legal system mediate the intersection, or relationship, between the First Amendment and copyright law, those functional and structural contours that determine the relationship between markets in copyright-protected works and the amorphous marketplace of ideas. We can dive into other First Amendment values if we wish.

In *Golan*, the Tenth Circuit proceeded to analyze the intersection of copyright and the First Amendment, the importance of the public domain at this intersection—although not as much as I would have liked to see the court dive into that importance—and the principle that once a work enters the public domain, no individual, not even the creator, may copyright it.⁴² Now, I don’t have time to go over the details of the court’s reasoning. Maybe we will talk about that in the Q&A.

The really interesting conclusions, I think, reached by the court are: first, that § 514 has altered the traditional contours of copyright protection from both a functional and a historical perspective, and thus warrants further First Amendment scrutiny;⁴³ second, that the public, meaning anyone, has a First Amendment interest in using works in the public domain, including a non-exclusive, unrestrained right to use the works and to create derivative works, and imposing a cost on that use is something that would butt up against the First Amendment interests that matter;⁴⁴

⁴¹ See *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003).

⁴² See *Golan*, 501 F.3d at 1187–92.

⁴³ *Id.* at 1187, 1192.

⁴⁴ *Id.* at 1192–93.

and third, the court said that the built-in safeguards of idea, expression, and fair use were insufficient to protect those interests.⁴⁵ So the court remands back to the district court to apply First Amendment review, determine the level of scrutiny, and so on. Now, it seems to me that this is one aspect of the First Amendment/copyright intersection that future litigation will test, in part, because the contours of copyright protection themselves continue to evolve, and also, in part, because the digital networked environment makes the intersection ever more salient.

Second point: Why has the rise of the digital networked environment, the Internet and its enabling technologies, affected the First Amendment/copyright intersection? I think there are two reasons.

First, in responding to the disruption that the Internet has caused in intellectual property-driven markets, lawmakers, responding in turn to pressures of powerful lobbyists, have changed the contours of the law. As I mentioned before, this is something that many people have noticed and evaluated. That is, many have applauded and many have critiqued the fact that the copyright system has grown much more inclusive and both the core exclusive rights granted by the copyright system, as well as the supplemental rights granted by the DMCA⁴⁶ and attainable via contract, for example, have grown stronger. While many have considered these changes to copyright, only a few have really considered deeply how the changes affect the First Amendment/copyright intersection. Some certainly have, including Diane to my right, but not many. I think this is an area that should be developed.

But let me turn to my second reason, more of a bottom-up explanation. Much of the data that travels on the Internet is speech, communications between and among many different people from many different cultures for many different purposes. The striking feature of the digital networked environment is its enabling features — its speech-enabling features. It offers a wide

⁴⁵ *Id.* at 1194–95.

⁴⁶ Digital Millennium Copyright Act (“DMCA”), Pub. L. No. 105-304, 112 Stat. 1186 (1998) (codified as amended in scattered sections of Title 17 of the U.S. Code).

range of opportunities for individuals to participate productively in political, intellectual, and cultural activities through the use of various Internet-enabled communications technologies, including simple things like e-mail and blog software, but also many, many other things, moving into things like YouTube and so on, and social networking things as well.

These general-purpose, content-neutral, and easy-to-use technologies facilitate participation in various discussions in various communities—communities that now span the globe. Yochai Benkler describes this very well in his recent book, *The Wealth of Networks*.⁴⁷

But, of course, as we know, much of the raw material in our everyday communications derives from cultural sources that we encounter daily. Our use of such materials has not always implicated copyright law. But increasingly we find potential conflicts bubbling up, conflicts that arguably test the boundaries of the First Amendment and copyright.

Many of the most contentious debates in copyright implicate core First Amendment concerns and perhaps force us to consider, or maybe reconsider, how well the existing built-in safeguards function in the online environment. People are not simply passive consumers of content. As Benkler puts it, as Diane just put it, we have shifted in a sense from being consumers to users.⁴⁸

Many of the cases and news stories that the student editors provided us in advance of the conference to consider for discussion concern this very shift:

- Gripe sites:⁴⁹ we are going to talk about these later this afternoon.
- Fan sites:⁵⁰ one example is the battle that Prince is waging with various fan Web sites.
- Fan fiction:⁵¹ the Internet is filled with both authorized and unauthorized works of fan fiction, certainly,

⁴⁷ YOCHAI BENKLER, *THE WEALTH OF NETWORKS*, *passim* (2006).

⁴⁸ *See id.* at 29–30, 126–27.

⁴⁹ Gripe sites are websites devoted to complaints about products or services. *See* 2 ANNE GILSON LALONDE & JEROME GILSON, *GILSON ON TRADEMARK* § 7A.10 (2007).

⁵⁰ Fan sites are websites run by consumers who enjoy or collect a given product. *See id.*

arguably, derivative works that test fair use, and test those traditional safeguards.

- Sampling:⁵² this involves the verbatim copying and remixing of digital snippets, the use of copyrighted works as raw materials, as speech, testing the nature of de minimis copying,⁵³ testing fair use,⁵⁴ testing idea/expression,⁵⁵ and testing other doctrines in copyright law.
- YouTube:⁵⁶ this refers not to the uploading of someone else's content directly, but to the slew of videos where snippets of songs, videos, and other people's works are in the background; or even where fans are making their own music videos. These activities—again, speech activities—test the built-in safeguards.
- Wikipedia,⁵⁷ blogs, and many other examples we could talk about.

Many of the difficult cases in copyright, and later today trademark, seem to test this issue. So a couple of questions: What are the traditional contours? How are they defined historically, functionally and, I would argue, in relationship to the First Amendment? Can this inquiry arise as an applied challenge, or must there be formal change in the contours due to explicit congressional action—in other words, must Congress step in and change fair use in order for us to ask whether fair use is an adequate safeguard in a given context? Or might the contours

⁵¹ See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 655 (1997) (defining fan fiction as “any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing”).

⁵² See *Bridgeport Music, Inc. v. Diamond Time, Ltd.*, 371 F.3d 883, 886 (6th Cir. 2004) (defining sampling as “making a digital copy from a master sound recording and using a piece in the making of a new work”).

⁵³ See 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.01[G] (2007) (contrasting de minimis copying with substantial similarity that would sustain a claim of copyright infringement) [hereinafter *NIMMER ON COPYRIGHT*].

⁵⁴ See 17 U.S.C. § 107 (2006).

⁵⁵ See 1 *NIMMER ON COPYRIGHT*, *supra* note 53, at § 2.03[D] (discussing the extension of copyright protection to the expression of an idea, rather than an idea itself).

⁵⁶ YouTube, <http://www.youtube.com> (last visited Mar. 2, 2008).

⁵⁷ See Wikipedia, <http://www.wikipedia.org> (last visited Mar. 2, 2008).

functionally defined be tested as a result of changes in the underlying environment?

Specific doctrines that I think may give rise to these kinds of challenges—I've mentioned a few already—are:

- The idea/expression,⁵⁸ merger,⁵⁹ and related doctrines;⁶⁰
- The fair use,⁶¹ especially noncommercial, transformative uses, as both parodies and non-parodies. Commenting on something other than the work is still a speech activity that people engage in frequently online, using other people's work to comment on a social phenomenon. Courts have traditionally, in the offline world, found that to be unacceptable, not a fair use, and to be infringing.⁶² I believe, at least in the Internet context, we may see more testing of that boundary again;
- De minimis copying⁶³ I mentioned before;
- Derivative works.⁶⁴

⁵⁸ See *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (“Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”).

⁵⁹ See *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986) (“Under the copyright law doctrine of merger . . . copyright protection will be denied to even some *expressions* of ideas if the idea behind the expression is such that it can be expressed only in a very limited number of ways.”).

⁶⁰ The *scenes a faire* doctrine, for example, “refers to ‘incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.’” *Atari, Inc. v. N. Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982) (quoting *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)). These “stock literary devices are not protected by copyright.” *Id.* (citing *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976)).

⁶¹ See 17 U.S.C. § 107 (2006) (laying out a four factor test for fair use); see generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (discussing the history and application of the fair use doctrine).

⁶² See, e.g., *Walt Disney Prod. v. Air Pirates*, 381 F.2d 751, 758 (9th Cir. 1978) (holding that the copying of Disney characters in adult “counter-culture” comic books for the purpose of social commentary was not a fair use and infringed upon Disney’s copyright).

⁶³ See *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74–75 (2d Cir. 1997) (explaining the de minimus concept in the context of copyright law).

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There are plenty of areas. I can wrap up and stop here. There is plenty of fertile ground to test those various internal doctrines that mediate the relationship between copyright and First Amendment.

People are speaking, and they are speaking using each other's copyrighted content. And don't forget that copyright covers virtually everything now. Because we have done away with formalities, when expression is fixed, there is copyright. So, you've got to think about all of the everyday speech communications you engage in and ask yourself how often you are remixing other people's copyrighted content. There is plenty of fodder to test this boundary, I think. I will stop there.

PROF. HANSEN: Thank you.

Brett, would you say that if there was not a limited times provision in the Copyright Clause⁶⁵ that the First Amendment would require limited times for copyright?

PROF. FRISCHMANN: That's a good question. If there wasn't a limited times provision, would the First Amendment require one? I don't think so. My off-the-cuff answer is I don't think so, although it would certainly put more pressure on the other safeguards within copyright to ensure that people were able to use speech; although it is hard to say whether duration would be the thing that you would necessarily focus on. You could have infinite copyrights that are incredibly thin in terms of the scope of their protection, I suppose, and that might still be First Amendment compatible. But that's a good question.

PROF. HANSEN: My second question is: in the Tenth Circuit, which of course is known for its First Amendment jurisprudence, what do you think is going to happen on remand?

PROF. FRISCHMANN: I think the first question is what level of scrutiny they are going to apply. At this point I'm not sure. I

⁶⁴ See 17 U.S.C. § 101 (defining "derivative work" as "a work based upon one or more preexisting works . . ."); *id.* § 106(2) (granting copyright owners the exclusive right to prepare derivative works based on their copyrighted works).

⁶⁵ U.S. CONST. art. 1, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts *by securing for limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries") (emphasis added).

think the fact that the Court of Appeals remanded the case and didn't give the lower court a sense of what to do in terms of evaluation indicates that it is sort of an open question as to what level of scrutiny should/will be applied. Other than that, I'm not sure.

I think the key issue that arose was whether or not even First Amendment scrutiny is going to happen. So I think, regardless of what they end up finding, if they find it is content-neutral, and therefore the level of scrutiny is more of a rational-based or intermediate scrutiny, then maybe it passes muster.

The key point I want to emphasize is that the court certainly makes clear that the door is open to scrutinizing changes in copyright law from a First Amendment perspective—there is an open door to doing that. This is the first step, I think, along a line of inquiry that will happen.

PROF. HANSEN: So you see this as a trend?

PROF. FRISCHMANN: Potentially, yes. I think it's a first baby step.

PROF. HANSEN: It's a trend which certainly wasn't followed in *Eldred* or any other case.

PROF. FRISCHMANN: I think it's an example of good common-law lawyering. As you read *Eldred* you find the traditional "contours" notion, and then you work with it. I think *Golan* is the first case to really work with it. It may be a trend that never really happens, that sputters out. My contention is that that is not going to happen given how much speech relies on copyrighted material and given how many different kinds of material there are.

PROF. HANSEN: Any quick questions from the audience before we move on? We will obviously come back to this. Prof.

QUESTION: Susan Scafidi. Good morning.

In the patent session I made a reference to copyright. Now let me do the opposite.

This is a question specifically for Brett: an analogy. That is to say, you have set up an opposition—and it is a common opposition and an unexamined opposition most of the time—between speech

and copyright. I want to suggest that maybe we ought to examine that a little bit more, because I don't think copyright is anti-speech. In the patent context, the tradeoff is you reveal your invention in exchange for a property right. In copyright, I think it is even more automatic: every time you create a protected expression, the idea associated with that expression, to the extent that it is your new idea, goes immediately into the public domain and enriches that public domain, enabling more speech.

So if you believe in a utilitarian conception of copyright, then the more copyright there is, the more you are going to incentivize new expressions and the more you are going to, at the exact same time, enrich your public domain. So don't you have to, before you start trying to protect the First Amendment from the evils of copyright, think about how much copyright enables speech?

PROF. FRISCHMANN: I don't think about copyright and the First Amendment in binary terms or in black-and-white terms, and I certainly do not think copyright is either evil or antithetical to the First Amendment. In my view, the Supreme Court got it right when it said copyright is an "engine of free expression."⁶⁶ Copyright certainly enables speakers and incentivizes people to engage in certain types of speech—but *certain* types of speech, not all speech—and so there are certain types of speech that copyright does regulate and restrict and impose costs on. The question is, as always in intellectual property, striking a balance. Things aren't black and white. You are in the middle and you are analyzing different sets of tradeoffs.

I think some of the tradeoffs that are involved in the First Amendment/copyright intersection certainly do not take you down the road where absolute protection of works would be sufficient, because we'd just get more, and the incentives keep going up. I have written much on the utilitarian balancing that takes place in copyright and the notion of spillovers. The spillovers paper would be the good paper to point to in terms of an article that talks about

⁶⁶ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (“[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression.”).

where you end up, how you try to draw certain lines and where there are conflicting sets of values that are at stake.

QUESTIONER [Prof. Scafidi]: I just wanted to know how you view primary and secondary.

PROF. HANSEN: Susan, we can continue later on with this. I think it's great, the discussion, but this question period was just for things that people might forget if we moved on. We can come back to this in the general discussion.

Robert, please proceed

MR. KASUNIC: What I am going to talk about is really a combination of the two previous speakers' topics, and try to address some of the basic questions that were asked about whether new business models driven by technologies will be the end of copyright. I will discuss business models because that was the topic of an article I wrote a little while ago dealing with iTunes⁶⁷ and competing with "free."

So, will these new business models be the end of copyright? I don't think so because I think that copyright and technology have always had a stormy relationship, but it is a symbiotic relationship. The two have always existed together, and in fact copyright resulted from the development of technology—from the printing press.⁶⁸ Where we are now is becoming much more complex, but still we are working through a number of different issues, and very difficult issues, that do not very easily fit with some of our traditional notions of copyright protection or copies specifically.

But there is a benefit as well to this tension—that technology causes change. Now, that sometimes leads people who have created copyrighted works to be fearful. Because there is a lot of uncertainty involved, this upsets established business relationships

⁶⁷ See Robert Kasunic, *Solving the P2P "Problem"—An Innovative Marketplace Solution*, Stanford University Libraries: Copyright and Fair Use, http://fairuse.stanford.edu/commentary_and_analysis/2004_03_kasunic.html (discussing the iTunes model for distribution of authorized digital music).

⁶⁸ See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 & n.11 (1984) (“[I]t was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection.”).

and markets that have become established, or some may say entrenched.

It often also raises very difficult legal questions. There are issues that are coming up now, some of which are involved in the *Capitol Records, Inc. v. Thomas*⁶⁹ case dealing with peer-to-peer file sharing,⁷⁰ that are difficult questions to apply to the current state of the statute. I think we will be talking about that a little more later.

And also, technology is always ahead of the law. It is always developing and pushing the law as well as changes to the law. So that while it seems like it is completely undermining the law and doing away with it, I think what we have always seen is that gradually we have a period of upheaval and then we have a period where things start to sort themselves out—a point where business relationships begin to form, where we get development in the case law and decisions in certain areas, where the law becomes more settled, and that leads to a certain stability as to that new technology. But then, of course, we have to face the next variation of the technology.

So this is a constant state of change. It is now moving and changing much more quickly, which I think is part of the difficulty that copyright owners are facing: they are afraid to make certain decisions now because they do not know what the implications of those decisions are going to be with the next generation of technology. So that fear is very real and is part of what is making it more difficult to get some resolution in some of the issues.

But these legal issues do get resolved. We find that in many cases new business models then begin to form. We get variations and different alternatives and competition between different

⁶⁹ The complaint, judgment, and related court documents for *Capitol Records, Inc. v. Thomas*, No. 06-CV-1497 (D. Minn. 2007) are available at <http://news.justia.com/cases/featured/minnesota/mndce/0:2006cv01497/82850>. Selected documents are also available on Westlaw.

⁷⁰ Peer-to-peer networks use “diverse connectivity between participants in a network and the cumulative bandwidth of network participants rather than conventional centralized resources where a relatively low number of servers provide the core value to a service or application.” Peer-to-peer, Wikipedia, <http://en.wikipedia.org/wiki/Peer-to-peer> (last visited Mar. 5, 2008).

alternatives based on those new business models. Change is, I think, fundamentally and eventually a good thing for everyone, and having technology cause these changes is good for both authors and the public in many ways.

One of the things that we have seen is that peer-to-peer file-sharing technology has caused changes in the music industry and the way works are distributed to the public. So while record companies might have eventually moved toward the agreements that they are making now with companies like Apple and RealNetworks and others who distribute music,⁷¹ it probably would have taken a lot longer. The technology forced this issue. It is still causing problems in terms of how to deal with people who are not the good actors, the people who are simply not willing to pay for copyrighted works. I think one of the commenters previously stated that everybody is willing to pay but they are not willing to pay for certain things. Well, I think one thing we have seen is that this assumed fact is not true. Some people are not willing to pay. Some people want to get their works for free.

The Radiohead situation is, I think, an interesting example of that reality. For those of you who don't know, Radiohead distributed music and allowed users to choose what they wanted to pay for the work.⁷² So they put the work up on the Internet and allowed people to download and to pay what they wanted to pay. Based on the latest reported results of that experiment, it appears that sixty-seven percent of the people who did download it decided they wanted to pay nothing.⁷³ So that gives some indication that at least there is some percentage of people who do not want to pay

⁷¹ See generally, EMI Music Launches DRM-free Superior Sound Quality Downloads Across Its Entire Digital Repertoire (Apr. 2, 2007), <http://www.emigroup.com/Press/2007/press18.htm> (announcing that EMI and iTunes have agreed to allow iTunes to distribute EMI recordings) (last visited Feb. 15, 2008); Universal Music Group and RealNetworks Form Strategic Alliance (Jan. 7, 2000), <http://new.umusic.com/News.aspx?NewsId=60> (announcing that Universal and RealNetworks will work together to distribute Universal's entire music collection) (last visited Mar. 4, 2008).

⁷² Jon Pareles, *Pay What You Want for This Article*, N.Y. TIMES, Dec. 9, 2007, at 21.

⁷³ *Id.* (“[O]nline survey company ComScore [stated] that during October [2007] about three-fifths of worldwide downloaders took the album free.”).

anything for works. That is part of the reason why we continue to see RIAA suits against individuals.⁷⁴

So, technological change is good for the public. It is also good for creators, because it tends to open up new business models and new markets and forces copyright owners to think about changes that they might not have been willing to consider before.

It is also good for new businesses. We have new businesses emerging as a result of technological change. We have new technologies developing as a result of that change as well.

While the Internet and digital technology has certainly caused a lot of problems, and we are experiencing many of the growing pains as a result of that, one thing I think we have to step back and realize is that we now have probably more creativity as a result of copyright—what copyright has encouraged—and we also have more ways in which to access copyrighted material. Even despite some of the concerns that arose with the enactment of the Digital Millennium Copyright Act and the potential ability to lock up works, one thing we are seeing is—and whether there is a causal effect I'll put aside; I can't say that is the case—but at least after the DMCA, one thing that we have seen with digital distribution is that we have more ways than have ever been possible before in which to obtain or access copyrighted works, whether it's downloads or streaming or on-demand viewing of programming, pay-per-view programming, traditional hardcopy formats, e-books, audio books, Web sites, blogs, or user-generated content. All of these new business models are increasing some of the ways in which we can access material.

And, as Brett mentioned, it is also increasing the ways that we can think about things and talk about things. We have new forms of speech that are arising that we really have to start to think about. Some of the preconceived concepts about speech I think are changing. We are starting to look at the use of musical or video or visual arts in different contexts—as a new form of speech that is developing in terms of combining works in user-generated content—YouTube-like situations. It presents a lot of interesting questions.

⁷⁴ Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, Oct. 5, 2007, at C1.

Getting back for a minute to what are some of the problems with these business models, I think that one thing that Diane raised, at least in one of the business models, is some of the ways people are looking at what is going on. We have heard over the years, particularly with the recording industry, of people stealing works or being “pirates” or, on the other hand, that users are “sharing” copyrighted works. Most of these terms come down to rhetoric. Part of what we are trying to deal with, I think, is some of the more practical distinctions of how we make these business models work, how we encourage people not to take things for free—maybe not in a speech context, but where it is just the wholesale taking of other people’s speech.

I think one thing we found in the *Eldred* case was that the First Amendment really is not about allowing people to make other people’s speech; it is about making people make their own speech.

So we do have the RIAA suits. I think that, while this is a judgment call of whether this is a good thing or not—and some may see it certainly as a bad public relations move—it certainly has a purpose as well. When we have maybe sixty percent—and I’m not sure what the numbers exactly are—of people in the Radiohead situation, or however many people are still on illicit file-sharing systems and using those rather than the legitimate systems for obtaining digital downloads, there is a need for some education and some encouragement to get people into the lawful system.

I think the example that I have always thought of is how many people would pay taxes if there weren’t, in the end, some reason or incentive for them to do so. I think part of the goal of the RIAA’s approach in many of the lawsuits is to push people into the legitimate models which are giving people options.

But as Diane said, in one of the other business models mentioned, complete control is probably no longer possible. I think that is one thing that we are realizing, that copyright owners do have to compete with free and they have to give users more of what they want within a legitimate business model. I think that those are the kinds of things that we are seeing in the marketplace,

for example with iTunes. iTunes uses digital rights management, but it does so in a largely transparent way.⁷⁵ Most people do not feel like they are being imposed upon by the DRM that is employed. So effectively competing with free is something that I think we will see more of. We will see new developments.

I think also, following up with one other point that Diane made about ripping and issues like that, we do need to see the law start to conform a little more with what is accepted social practices. We have had the recording industry say, at least in some contexts before the Supreme Court in the *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*⁷⁶ case and in other contexts, that ripping is okay, but they seem to have changed their mind in some respects. The public needs to understand the distinctions to know what they can and cannot do.

We may have to give some security so that we can have business models developed based on exemptions. Exemptions can be very good for business models. They can be good for copyright owners. I think we have to start thinking about that a little more.

I am not going to have time to get to my First Amendment points, but we can talk about that a little more.

PROF. HANSEN: We can do that in the discussion.

I have a true/false question, Robert: Record companies are the scum of the earth.

MR. KASUNIC: Are you asking for the Office's position or my personal opinion?

PROF. HANSEN: All right, we can see some dissonance within Robert on this issue.

Second, the follow-up to that true/false question is: Would copyright owners be in a better place today if (1) the record company wasn't the front-line creator/content provider; and (2) if it had not been a technophobe and afraid of technology, but if it also had not been perceived to mistreat consumers, their own people, and everything else? How much did that actually play, or

⁷⁵ Randall Stross, *Want an iPhone? Beware the iHandcuffs*, N.Y. TIMES, Jan. 14, 2007, at 33.

⁷⁶ 545 U.S. 913 (2005).

would people just want free stuff and we would be right where we are even if they were the best people on earth?

MR. KASUNIC: I think it is probably a combination of all of those theories. I think one of the reasons why we did see music first was just the reality that these were smaller files—we had lower bandwidth at the time; there were a lot of issues. But there was also a concern that people did not want to be fed a disc that they felt was overpriced and that they wanted to have different ways of obtaining individual works. That was something that I think probably, had we seen the recording industry move more quickly in that regard, we may not have seen as much of the buy-in to the illicit systems as we eventually got.

But I think, going back to the first part of what you asked, Hugh, in terms of would it be better if the record company wasn't in the way, one thing we are seeing now is the opportunity for creators to choose different directions. They don't have to go with the record companies.

One point that was made in the *Grokster* case was about the band Wilco, who had put their stuff up on peer-to-peer in order to increase their market.⁷⁷ The interesting thing is once they did increase their market, they went back and got a record deal. I don't know what that means. I think it does mean that there is some benefit in the record companies' role in the music business.

But I think we also need to start drawing some distinctions, for copyright purposes, between copyright owners and creators, because copyright's purpose is not to expand the profits of copyright owners. Copyright's purpose is to encourage creativity. So we may have to start to think about that a little more. In the next paper I am going to be writing about fair use, I am going to try and deal with that distinction.

PROF. HANSEN: Thank you, Robert.

Any quick questions for Robert? Then any panel member who wants to speak to what someone else said, and then we will go into the open discussion.

⁷⁷ *Id.* at 945 (Ginsberg, J., concurring).

QUESTION: Andrea Pacelli of the *IPLJ*, and I also work as a patent agent at King & Spalding.

I have a question regarding incentives to the public. You asked how do we get people to pay taxes; nobody would pay taxes; nobody wants to pay taxes. Well, we don't get people to pay taxes by suing a few people in federal court. Probably the first thing that happens if you don't pay taxes is you get a phone call from the IRS, or whatever. So I was wondering, do you have any ideas about levels of enforcement that would get people to pay for works that are below just a lawsuit from the RIAA—for example, get a phone call from the Copyright Office?

MR. KASUNIC: People don't listen to us about anything. Congress doesn't listen to the Copyright Office half the time. So I don't know that that is going to really work. And it doesn't seem to be really working even when you have \$222,000 damage awards.⁷⁸ We still have people on peer-to-peer networks.

So I don't know what the answer is. I think probably the best way of encouraging lawful behavior is making it easier for people to get what they are interested in for a reasonable price. That is, I think, largely what we are seeing is that with iTunes it is easy to go online and to download for ninety-nine cents.⁷⁹ You know you're not going to get any viruses on your computer when you are going through that system. Or why do you need to make copies of certain videos or programming if you can go to your Comcast cable company—that's a carrier in Washington—and be able to watch television shows whenever you want? In many cases, people don't even need to time-shift anymore. A lot of works are now available whenever you want. I think that is probably the best way, just make it easier for people to lawfully get what they desire.

Opening up business models that allow people, in varieties, to get what they want, is also important. I don't think we are ever going to see everybody wanting one thing. There was a time when people talked about, "Oh, the celestial jukebox will come around and people will be able to get everything whenever they want from this source and you'll never even have to sell things anymore."

⁷⁸ Leeds, *supra* note 74 at C1.

⁷⁹ iTunes Store, Apple, <http://www.apple.com/itunes/store> (last visited Feb. 28, 2008).

I still like to download from iTunes. I have a streaming Rhapsody⁸⁰ account as well, so I have access to that entire music catalog that is available for on-demand streaming. But I also like to purchase copies of songs that I like.

I think that we see people wanting to do things in a lot of different ways. If we can lower the prices to do that, then that is a good way to encourage people to opt-in to lawful activity.

But then, consumers have to be willing to accept that if they are buying something under certain conditions that does not mean that they can do everything that they want with it. So it is not like when you have just purchased a copy and then you are allowed certain other rights as a result of that ownership of the copy. If you are buying something or buying access to something on a limited basis, you have to stick to the deal you made for that cheaper price. You can't then turn around and turn that into a first-sale doctrine,⁸¹ to give that away, and to replay it on every type of device imaginable.

I never was able to use my phonorecords, my vinyl albums, and play them in the toaster. So I think there are limits on interoperability.

PROF. HANSEN: Any comments from the group? Brett has said he wants to take on the scum. What do you want to say?

PROF. FRISCHMANN: The scum question, right. You asked Rob whether he thought the recording industry was the scum of the earth. I think there's a simple answer, and the answer is no.

But I think it is interesting the way it was asked. We sort of dodge around the question. I almost wish the debates about this industry, these issues in copyright, weren't so laden with rhetoric. They are rational actors seeking to sustain their business model and their market facing competition and also competing with free, much of which is piracy. So I think labeling, from one side or the other or those in between, largely misdirects people from actually

⁸⁰ See Get to Know Rhapsody, http://www.rhapsody.com/rhapsody_faqs (last visited Feb. 28, 2008).

⁸¹ See, e.g., *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998) (extending first sale doctrine of 17 U.S.C. § 109(a) (2006) to imported copies).

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thinking about the more careful issues and trying to think about things.

What I am saying is the simple answer is no, they're not the scum of the earth. I don't agree with most of their positions on many things, but they are pursuing rational choices, although some might question the rationality of their choices.

PROF. HANSEN: So even if they were completely wonderful people, you would still want to screw them over?

PROF. FRISCHMANN: It's not personal.

PROF. ZIMMERMAN: Speaking of rhetoric.

PROF. HANSEN: Okay. All right. Diane, do you have anything to add?

PROF. ZIMMERMAN: No. I'll hold for the time being.

PROF. HANSEN: So let's go to the general audience discussion and then we will end up with a discussion of the Minnesota case.

QUESTION: Ray Beckerman from Vandenberg & Feliu.

I just have a question. One question that I am frequently asked is whether it is a violation of copyright law to rip a copy from your personal CD onto your computer for backup purposes or to play it from the computer or to put it on an MP3 player. I really don't have an answer for them. I think that a court would say it is a fair use. People question my ability as a lawyer because I can't answer it. So I thought if I could get the opinion of this distinguished panel, I'd feel much better and sleep a lot better about this question.

PROF. HANSEN: Okay, good. Who wants to address that?

PROF. ZIMMERMAN: I don't think you should pull your pillow out anytime too soon, because I think as long as the record industry has changed its position on that subject, from thinking that it was a per se copyright violation⁸² to finally saying in *Grokster*

⁸² See, e.g., Robert A. Starrett, *Copying Music to CD: The Right, the Wrong, and the Law*, EMEDIA PROF., Feb. 1998 ("According to Cary Sherman, the senior executive vice president and general counsel, the RIAA takes the position that any copying of music to

that no, they no longer took that position,⁸³ and now giving some indication that maybe they are going to take that position again,⁸⁴ I think it is little wonder you can't answer it. If you want a good night's sleep, you are going to have to look for another line of work.

PROF. HANSEN: Anyone else?

MR. KASUNIC: There isn't any easy answer. Very likely, in certain situations, you would want it to be a fair use. It just doesn't fit real well within the four-factor analysis.⁸⁵ Typically, fair use is seen in a First Amendment sense, which most of the terms in the Preamble of § 107⁸⁶ deal with, so it is just not a comfortable fit. As a technological use, like *Sony*⁸⁷ or *Sega*,⁸⁸ then maybe so. But at least in some circumstances, like through iTunes and others, it would seem that there is some implied authority. But if the record companies are now changing their mind, it still leaves an open question for something that society seems to have settled. That is not a good thing.

PROF. FRISCHMANN: It's sort of like a reasonable custom/implied license kind of question, where for a while that

CD that you perform on your computer is copyright infringement."), *available at* http://findarticles.com/p/articles/mi_m0FXG/is_n2_v11/ai_20179371.

⁸³ Oral Argument at 14, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) ("The record companies, my clients, have said, for some time now, and it's been on their Website for some time now, that it's perfectly lawful to take a CD that you've purchased, [and] upload it onto your computer.") (No. 04-480), 2005 WL 832356; *see also*, RIAA, *For Students Doing Reports*, <http://riaa.com/faq.php> ("Record companies have never objected to someone making a copy of a CD for their own personal use.") (last visited Feb. 28, 2008).

⁸⁴ Plaintiff's Supplemental Brief at 15, *Atl. Recording Corp. v. Howell*, No. CV06-02076-PHX-NVW (D. Ariz. Aug. 20, 2007), 2007 WL 2409549 ("Once Defendant converted Plaintiffs' recording into the compressed .mp3 format and they are in his shared folder, they are no longer the authorized copies distributed by Plaintiffs."); *see also* MusicUnited.org, *The Law*, http://www.musicunited.org/2_thelaw.html (link followed from RIAA website, <http://riaa.com/faq.php>) ("If you make unauthorized copies of copyrighted music recordings, you're stealing.") (last visited Feb. 28, 2008).

⁸⁵ 17 U.S.C. § 107 (2006).

⁸⁶ *Id.* ("[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.")

⁸⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁸⁸ *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

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kind of use everyone assumed was either fair or de minimis or outside the boundaries of the kind of act that you would consider infringing. The record companies haven't really stepped up and said much until just the last couple of years, when they sort of chimed in and said, "Now we don't think it is."

So there is the question of, practically speaking, how would you advise clients who are thinking about it? Yes, there is risk of liability exposure because they could sue and you could push and try to figure it out. And then there is the normative question of whether it ought to be a fair or noninfringing use, and I am happy to say that yes, I think that is the right answer. But those are two different answers.

PROF. HANSEN: You're happy to say what?

PROF. FRISCHMANN: Happy to say that yes, I would think it should be fair use. But I am agreeing with Rob that I think it doesn't fit perfectly well into the fair use factors. It is hard to know what de minimis is.

MR. KASUNIC: If it helps, I have ripped all my CDs to my iPod.

PROF. FRISCHMANN: It's common practice.

PROF. ZIMMERMAN: I think this fits into a larger problem, though, and that is that we do not have a well-worked-out attitude or understanding of the importance, whether it's for good or for bad, of personal copying for personal use.

If you look in Chapter 10 of the Copyright Law, there is a provision that exempts the individual from liability from making certain kinds of copies of music.⁸⁹ I think one of the things that happens is as the technology changes and the law keeps on getting written to catch up with that technology, we end up with very inconsistent positions on what really as a practical matter turns out to be the same thing. So that is also a complicating factor, I think.

⁸⁹ 17 U.S.C. § 1008 ("No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.").

PROF. HANSEN: I think one of the things is what people think they should be able to do. I think instant gratification is the rule—”If this fits into my instant gratification it is a fair use and not a copyright violation”—and they convince themselves. Present company, I should add, are very reasonable on this.

This type of thinking and talk has an impact. If you look at it as a business model, there are two different uses which are of value to the person, so it is not really clear why there shouldn't be payment for two different uses that have two different values. In the old analog world, certainly, I don't think fair use would have come up in the context of space shifting. People would have simply had to pay for both uses.

But I think the record companies are going to fight on this issue. If they ignore it or say that's okay and they can get some good will points.

But allowing this type of activity, I think it puts a court in a difficult position that makes it more for the record companies because the court will assume that these uses are legal and move on from that.. I think it is better for the record companies to challenge these in some way.

But as practical result, I would doubt it is going to be challenged.

Any other questions?

QUESTION: Anthony Rizzo. I'm a staff member of the *IPLJ*.

This is more directed towards Rob, but I guess anyone can answer it. I am going to use, for example, two digital distribution services, Electronic Arts⁹⁰ and the Steam distribution service by the Valve Corporation.⁹¹ Through those a user can purchase a

⁹⁰ Electronic Arts, an interactive entertainment software company, announced the launch of its online digital distribution service, EA Link (now known as EA Store) in November 2005. See Posting of Daniel Terdiman to Cnet News Blog, Electronic Arts Launches Digital Distribution System, http://www.news.com/8301-10784_3-6132327-7.html (Nov. 3, 2005, 12:31 EST). The digital distribution service delivers full games, demos, game trailers, and existing game updates to PC gamers worldwide. See EA Store, <http://eastore.ea.com> (last visited Apr. 7, 2008).

⁹¹ The Valve Corporation, another interactive entertainment software company, announced its Steam content delivery system in 2002. Steam (content delivery), Wikipedia, http://en.wikipedia.org/wiki/Steam_%28content_delivery%29 (last visited

piece of software, download it to their computer, but then to access that software the user has to have an active Internet connection and constantly register it with their servers. I address this to you, Rob, because you were mentioning that if a user is going to use digital distribution, they should be okay with a more limited use. Do you think that it goes too far? If I were to take my computer on an airplane or to an area without Internet service, I wouldn't be able to access the software that I paid for.

MR. KASUNIC: Whether I think it is too far I don't think really matters. I think it is a business decision. I think many consumers would think it goes too far and would think it is one of those situations where DRM is just imposing too much of a burden on people. In the computer software industry, I think there were many models like that, even preceding the DMCA, but most of the software companies have, I think, started to realize that you lose users when you make things too difficult. So finding the right balance is part of the key. Having competition in that field helps, because if you have a similar game or software that is available from someone else with less onerous conditions, the market should direct them to those companies. I think then you would see a market-based change in a company.

PROF. ZIMMERMAN: I think we are seeing that right now, for example, in music distribution, where you have at least got two major record companies that have been willing to experiment with distributing non-DRM-protected music through iTunes and through Amazon⁹² and other outlets. Whatever you can say about

Apr. 7, 2008). Steam is a leading platform for the delivery and management of PC games and digital content. *Id.* With over 13 million active accounts and more than 250 games, plus hundreds of movie files and game demos available, Steam has become a frequent destination for millions of gamers around the world. Posting to GameGuru, Steam Registers 13 Million Active User Accounts, <http://www.gameguru.in/pc/2007/24/steam-registers-13-million-active-accounts> (May 24, 2007, 8:12 EST).

⁹² Amazon offers an extensive DRM-free digital music store, with major labels such as Warner Music Group, EMI, and Universal Music Group joining some 33,000 independent labels in selling songs from their digital catalogs on the site. *See* Amazon.com MP3 Downloads, http://www.amazon.com/exec/obidos/tg/browse/-/163856011/ref=topnav_storetab_dmusic/104-7026614-8013566 (last visited Apr. 7, 2008). Amazon's total digital music catalog is up to 4.5 million songs. Jefferson Graham, *Competition Sneaks Up on iTunes*, U.S.A. TODAY, Mar. 26, 2008, available at

whether or not consumers and what they think is right should drive the law, it is driving what people are doing as a business matter.

PROF. HANSEN: Let me just throw out one question about all of these issues. No one has ever discussed the treaty obligations. For instance, certainly the Tenth Circuit didn't mention treaty obligations as having any importance. Obviously, our Constitution trumps a treaty; a treaty cannot violate a constitutional provision.⁹³ But there was not even a mention of it. I'm not even sure they are aware of it in that sense. It just seems like the three-step test in Berne⁹⁴ and the whole idea of moral rights⁹⁵ are just pushed aside. Why is that? There also doesn't seem to be much about them in the discussions and articles in the academic community and bar or anywhere else. Am I wrong?

PROF. FRISCHMANN: I can jump in a little bit, I think.

One, I think the Tenth Circuit does have a lengthy footnote on the treaty power and suggests that treaty power arguments were raised, but they didn't influence the First Amendment analysis.⁹⁶ I think what that ends up meaning is that—you asked me before what will happen when it goes back down to the district court. I've been thinking about it a little bit. I think it is likely to be found to be a content-neutral restriction, and then it ends up being found basically legitimate, because we've got a substantial governmental interest in complying with the treaty obligations, and it is the least-restrictive means for complying, and it is a relatively narrowly tailored provision. Although I think that's debatable. I don't know for sure, but I think that might be. And the fact that you've got a treaty obligation certainly colors the analysis. When you get into the First Amendment, you apply the scrutiny and work your way

<http://www.ecommercetimes.com/rsstory/62304.html>. Apple's iTunes, in contrast, sells more than 6 millions tracks, but offers DRM-free songs only from EMI. *Id.*

⁹³ *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

⁹⁴ Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 [hereinafter Berne Convention] (entered into force with respect to the United States on March 1, 1989).

⁹⁵ *See id.* art. 6bis.

⁹⁶ *See Golan v. Gonzales*, 501 F.3d 1179, 1198 n.5 (10th Cir. 2007) (suggesting that although Congress may have authority under its treaty power to enact § 514 of the Uruguay Round Agreements Act, the First Amendment analysis of § 514 examining whether the restriction is content-specific or content-neutral remains unaffected).

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through the test, in terms of understanding what the government's interest is. So I think treaty issues come in. It's just a matter of where and how they come into the analysis.

But I think you are right, people do not pay enough attention to the treaty power, and just the nature of different treaties and how they bind what the United States can do.

PROF. ZIMMERMAN: I think the United States didn't pay enough attention to what it was doing when it made certain decisions about how to treat intellectual property under treaties. Hugh, I think that we did this as a trade matter and we had very strong trade interests, and I don't think the people who were negotiating for us, for example, in the World Trade Organization ("WTO") and putting the TRIPs Agreement⁹⁷ in were paying much attention to the problems that it might create within intellectual property if we had conflicts between the Constitution, for example, and some provision that we were agreeing to that seemed advantageous from a trade perspective. So I think we didn't think before we jumped in.

MR. KASUNIC: I think there is a fundamental dissonance between the American copyright system and international harmony. Other countries do not have a First Amendment.⁹⁸ Many other countries do not have the same utilitarian basis for copyright protection that we do.⁹⁹ I think that when it comes down to it, our domestic policy—I'm in the domestic side of the Copyright Office, so I do not speak for Policy and International Affairs—but my personal opinion is that the domestic constitutional issues and First Amendment issues trump the international harmonization issues.

PROF. HANSEN: Of course, except that the First Amendment discussion today has nothing whatsoever to do with what the Framers thought on free speech. "Free speech" was a term of art

⁹⁷ Agreement of Trade-Related Aspects of Intellectual Property Rights, art. 14(4), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1125 [hereinafter TRIPs].

⁹⁸ Australia, for example, does not have a bill or declaration of rights.

⁹⁹ An alternative basis for copyright protection lies in the concept of an author's natural rights in his or her work. *See* *Stein v. Mazer*, 347 U.S. 201, 219 (1954).

back then for no prior restraints, but you could actually be criminally prosecuted after you spoke or wrote. It wasn't until the early 1900s, with Justice Holmes, that we moved away, and that turned out to have more bark than bite.¹⁰⁰ Now the first amendment in current discussion has become just a vessel for whatever policy decisions we want to make. Policy decisions that we want to constitutionalize and remove the power of Congress and state legislature or courts even deal with it.

Certainly a First Amendment view that "I have a First Amendment right to use someone else's work" trumps a lot of things in copyright law, case law, and treaties. Of course, the reality is much narrower. As Justice Ginsburg said, really the core First Amendment value is your own speech.¹⁰¹ This use of the First Amendment may be to enforce good policy choices or not, but I don't think it is backed by core First Amendment values that historically have developed, at least to date.

MR. KASUNIC: I should add too that the government and I personally do not agree with the Tenth Circuit in the *Golan* decision; my comments about First Amendment were addressed to true First Amendment values that should be protected. I don't think that is the case in *Golan*, and I don't think *Golan* is consistent with what the Supreme Court was saying in *Eldred* about the traditional contours. If you look at that language, that one phrase within that opinion, it comes after many pages that are dealing with two free speech safeguards, fair use and the idea/expression dichotomy. I think that it was a mistake even to use that term "traditional," because now we are looking at "traditional" in terms of historical changes, and that is just not the right approach.

PROF. HANSEN: So let me ask you, Rob, and also Diane, because Brett has already given an answer, what do you think will happen ultimately in that Tenth Circuit. On remand, back in the Tenth Circuit, before the Supreme Court?

¹⁰⁰ See *Schenck v. United States*, 249 U.S. 47 (1919).

¹⁰¹ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

MR. KASUNIC: One thing to remember is that we also have a petition in *Kahle*¹⁰² pending before the Supreme Court. *Kahle* is another challenge based on the *Eldred* language of “traditional contours,” which really is asking for the entire 1976 Act and the doing away with formalities to be—

PROF. HANSEN: Tell the audience a little bit about that case.

MR. KASUNIC: *Kahle* is about a challenge to the changes in copyright law that eliminated the notice requirements, provided for automatic renewal, and a number of other features in the 1976 Act such as protection upon fixation rather than publication or registration. Based on the language in *Eldred*, the Petitioners in *Kahle*—which included many of the same attorneys involved in the *Golan* case and were involved in the *Eldred* litigation, so these are all tied together—claim that the changes to the law impose a limitation on speech because it was essentially taking things out of the public domain or making it less certain about what was protected, but mostly keeping things out of the public domain. They argue that the law was changed from an opt-in system to an opt-out system and that this alters the traditional contours of copyright protection. I think it is pretty clear that the *Kahle* case would lose.

Golan presents a more difficult situation, because this idea of restoration and removal from the public domain just strikes people as being a different type of situation. The very simple logic of the Tenth Circuit, that what goes into the public domain should stay there, rings true. But it is more complicated than that, because “the public domain” means a lot of different things. Congress has withdrawn from “the public domain” in many different ways, for instance by designating new subject matter, or expanding the scope of protection for works.

To answer your question, the government is weighing the option of petitioning for en banc rehearing in the Tenth Circuit, and then, depending on what happens there, we’ll see what happens.

¹⁰² *Kahle v. Mukasey*, 487 F.3d 697 (9th Cir. 2007), cert. denied, 76 U.S.L.W. 3066 (U.S. Jan. 7, 2008) (No. 07-189).

QUESTION: Samantha Vaughan [phonetic], Class of 1996 and IP Corporate Counsel at Selective Insurance Group.

I just wanted to actually offer something in support of what the panel has been saying about the market kind of correcting itself and the development of new business models for music distribution. Right about the same time we found out only thirty-something percent of Radiohead fans were willing to pay for the music, Trent Reznor of Nine Inch Nails, which is a band of, I would say, roughly comparable size and intensity of the fan base to Radiohead, announced that right now he is doing a side collaborative project and will directly distribute that for five dollars for the album.¹⁰³ He said, "I don't want to do the Radiohead scenario, but I think this is less than iTunes, which may lock you in for a full album for the eleven dollars, even if you only want a couple of songs." He is either close to or just about through his contractual obligations for Nine Inch Nails, so it may be coming up soon. Depending on how this model works out, you may see major bands starting to follow this and determining their own price. He said he thought maybe the equivalent of two cups of coffee for his album was fair.

PROF. HANSEN: Gene Simmons, who's the lead singer in Kiss, just came out and said basically that all downloaders should be "sued off the face of the earth."¹⁰⁴

PROF. ZIMMERMAN: It's wearing that makeup all those years.

PROF. HANSEN: He is very upset with the RIAA that they have been so mild and gentle. So I guess there are different opinions and different models for this.

Any others?

QUESTION: Craig Rosenthal.

¹⁰³ Trent Reznor produced Saul Williams' album entitled "The Inevitable Rise and Liberation of NiggyTardust!" distributing low quality digital versions for free and high quality versions for five dollars. Cortney Harding, *The Billboard Q&A: Trent Reznor & Saul Williams*, BILLBOARD, Nov. 10, 2007, available at http://www.billboard.com/bbcom/feature/article_display.jsp?vnu_content_id=1003669686.

¹⁰⁴ Anthony Bruno, *Passionate Kisses: Gene Simmons and NGTV.COM*, BILLBOARD, Nov. 24, 2007.

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I was wondering about the application of state tort laws as defenses for copyright infringement. Have any of you on the panel seen any creative applications of those, for example, in rights to publicity, false light, etc.?

PROF. HANSEN: Could you repeat the question?

QUESTIONER [Mr. Rosenthal]: I was wondering if anyone on the panel has seen any creative uses of state tort laws as a defense to copyright infringement. For example, Indiana has a law on the books which I believe gives the right to publicity for a hundred years after a person's death.¹⁰⁵ Now, granted these are state tort laws, and of course I realize [there may be federal] preemption, but still you have the possibility of certain state laws interacting here with copyright law as a defense. I was just wondering—I have vaguely heard it referred to before—if anyone on the panel has heard about it.

PROF. ZIMMERMAN: Usually it comes up not as a defense but as a conflict, because there are numbers of cases where copyright owners have asserted their rights to make use of their own works and to exploit them, and people have come in and said, "Wait a second. I have a right of publicity and it is my face or my voice or something else that is in your copyrighted work." I'm not sure I even quite know, but maybe somebody else can enlighten me, how it would be an auxiliary defense to infringement.

QUESTIONER [Mr. Rosenthal]: I just meant as an auxiliary defense in terms of removing one aspect of it. So in other words, yes, for example, the writing or the creation would still remain in the public domain, but you might be able to remove another aspect of it by using a state tort law, which would have a backdoor effect on the copyright.

PROF. HANSEN: I would think that tort law is preempted actually.

PROF. ZIMMERMAN: Actually, I think, the *Dastar*¹⁰⁶ case. I think the Supreme Court would be very concerned about using

¹⁰⁵ See IND. CODE ANN. § 32-36-1-8 (2007).

¹⁰⁶ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

other bodies of law to extend a copyright beyond the terms that Congress has given.

PROF. HANSEN: Let me do this Minnesota case.¹⁰⁷

How many people are aware of this jury case? Raise your hands. How many people are not aware of it? Okay.

The RIAA, through I guess individual composers, sued Jammie Thomas, who is a single mother of two, a Native American, in Minnesota, who apparently had been downloading a large amount and putting it on a peer-to-peer system connected to her computer. They brought an action and they picked out twenty-four tracks. She claimed it wasn't her, that she had not been downloading them. I think the evidence was fairly strong that she had been. She also looked like she lied about when she switched the hard drive of her computer, which was right after she got some letters, and she said it was before.

The jury came in with a verdict. They could have awarded up to \$150,000 per work as willful infringement, \$30,000 for regular infringement. They came up with \$9,250 for each of the twenty-four tracks, coming to \$222,000 for the whole deal. She now is, I think, going to appeal.

I have some views about it, but what are the views of the panel?

Basically, the two issues are statutory damages—is there some sort of constitutional thing that this is too much? The other is the making available jury instruction—is that consistent with copyright law?

PROF. FRISCHMANN: I don't think the damages are—I think as a policy matter, maybe it suggests that we think about statutory damages. But I don't think it creates a significant legal issue. I don't think it raises a significant problem. It could have been much worse. She got off okay in terms of where the damages could have gone.

¹⁰⁷ Complaint for Copyright Infringement, *Capitol Records, Inc. v. Thomas*, No. 06-CV-1497, 2006 WL 1431921 (D. Minn. Apr. 19, 2006); Special Verdict Form, *Thomas*, No. 06-CV-1497, 2007 WL 2957532 (D. Minn. Oct. 4, 2007). Additional court documents are available at <http://news.justia.com/cases/featured/minnesota/mndce/0:2006cv01497/82850>.

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PROF. HANSEN: The blogs that my students have posted on my class website have indicated that some jurors were willing to require a lot more in the way of damages.

PROF. FRISCHMANN: Right. So she made out okay given where it could have gone. I don't think the excessive damages raises a legal issue that she is going to get out from under. At the same time, I think on many of the issues it was a good case for the RIAA, because they had a lot of evidence to support identifying her and what she had done.

You had some thoughts. Rob and I were talking earlier about the making available piece.

MR. KASUNIC: This is a perfect situation in response to the question about international treaty obligations. TRIPs does require us to provide protection for the making available right.¹⁰⁸ The Copyright Office and the Register of Copyrights, Marybeth Peters, did send a letter to Representative Howard Berman that was raised in the *Thomas* case.¹⁰⁹

The letter said that the panoply of U.S law, including the distribution right does cover making available and does fulfill our treaty obligations.¹¹⁰ So that's the basic position. It is supported by cases going back to the *Hotaling*¹¹¹ decision, where putting a book in a library and having it there where someone could take it constituted distribution.

¹⁰⁸ TRIPs, *supra* note 97, at 1197.

¹⁰⁹ Plaintiffs' Response in Opposition to Defendants' Motion for Judgment on the Pleadings at 6, *Atl. Recording Corp. v. Njuguna*, No. 4:06-CV-02341-CWH (D.S.C. Nov. 15, 2007), *available at* http://www.ilrweb.com/viewILRPDFfull.asp?filename=atlantic_njuguna_071115MotDisComplaintOppos. The letter was written in response to a question by Representative Berman about an assertion made in written testimony by Gigi Sohn, on behalf of Public Knowledge, for the Subcommittee on Internet, Courts and Intellectual Property's hearing on "Piracy of Intellectual Property on Peer-to-Peer Networks." That testimony stated that U.S. copyright law does not give copyright owners a separate exclusive right of "making available."

¹¹⁰ Letter from Marybeth Peters to Rep. Howard L. Berman (Sept. 25, 2002).

¹¹¹ *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997).

But it poses a lot of interesting statutory construction questions, I think. There are a number of cases out there, *Elektra*¹¹² and a number of others, where this issue is coming up, and we don't have a lot of case law on it.

One of the things to think of is what occurs on a peer-to-peer network. If you have a copy being uploaded by someone and someone accepts that offer, then you have that work being transmitted to another person and a reproduction of that being made on the other end.

Historically, the distribution right was seen as having a physical copy go from one person into the hands of someone else. That's why the first-sale doctrine covers physical distribution. If you are the owner of a copy, you can give that to someone else—you no longer have the copy; the other person has the copy. It is a little different when we are thinking about the online environment and transmission.

PROF. HANSEN: Does anyone on panel think she should not have been found liable in this case?

What about predictions on this case on appeal?

PROF. ZIMMERMAN: It seems to me that this is a very hard case. I can't imagine how she could win this case on appeal, frankly.

But I do think that it gets back to the practical issue that I mentioned earlier, which is how often do you want to do this kind of thing, go after a user? It is expensive. Its deterrent effect is, I think, at least open to question. There have been some reports by entities that purport to monitor or to measure activity on peer-to-peer networks that since the RIAA brought its first case against an individual, that file sharing on peer-to-peer has about tripled. So there are a lot of practical questions about this as a strategy, I think.

That is really the point I was trying to make, is that you can say all you want to about copyright and it will be there, but I don't think it is what people are going to end up using. They are going

¹¹² *Elektra Ent. Group, Inc., v. Barker*, Case No. 05-CV-7340 (KMK), 2008 WL 857527 (S.D.N.Y. 2008).

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to make their decisions based upon what is realistic, what is practical, what their audiences will tolerate.

PROF. HANSEN: She downloaded or uploaded something like 1,000. At least this might stop people who are in that category of downloading.

PROF. ZIMMERMAN: It might. It might not either. I don't know. That's the problem. I don't think anybody does.

PROF. HANSEN: Any views in the audience about this?

PARTICIPANT: Erich Carey. I'm with the *Fordham IPLJ*, a staff member.

One of the things about this case is how odd the juxtaposition is when you compare it to the fact that Radiohead, in the same week this decision came down, gave their album out for free. So when you get to the question of damages, on the one hand the RIAA is seeking a quarter-million dollars from this lady. On the other hand, you have Radiohead who is giving their album away for basically potentially zero profit.

But even in forecasting that, I think one of the interesting things about Radiohead, about that whole scenario, is isn't there a freeloader kind of issue invoked? In fact, Radiohead didn't just roll out of bed one morning and decide to put an album online on the Internet and just have the sales go up exponentially and millions of people actually want to download their album. Anyone who has tried to put music on the Internet and have people download it knows that that doesn't just happen overnight. In other words, that happened with significant help from the record labels themselves. I think the record labels have traditionally played a very important signaling function within the music industry—"We're on a record label. This is going to help sell our product."

So I am just curious to know whether there is a position, how things could evolve from this, whether there will always be a need for a middleman. Obviously, the two sides couldn't be more disparate, with one seeking such outrageous damages and the other being willing to give away their thing for free. But doesn't one really need the other?

PROF. HANSEN: I am actually interested in what people think about this case and whether it was right to bring it and whether she should have been held liable or not.

Why don't we just take a show of hands? You've heard the facts. How many people think Ms. Thomas should have been liable in this case? Raise your hands. How many people think she shouldn't have been held liable in this case? Okay.

You raised your hand before. Why shouldn't she be held liable?

PARTICIPANT: The amount of songs was not thousands. There were only twenty-four songs proven. For downloading the damages—

PROF. HANSEN: Assuming there were 1,000, because that's what there were.

PARTICIPANT: No, there were twenty-four.

PROF. HANSEN: No. No judge is ever going to let you go through the proof of 1,000. It's a practical matter, it's case management, it makes no sense. So you're never going to get 1,000 proven. Assuming that she did 1,000, should it have been brought? That's what they claim and I think that's what the jurors thought.

PARTICIPANT: The jury was given an instruction—if it was 1,000, then the damages would have been in the neighborhood of \$300 [sic]. So the amount still would have been excessive.

As far as the underlying liability, the jury was given an improper instruction on distribution liability. The statute says that a distribution under the Copyright Act § 106(3) requires “a dissemination of copies or phonorecords to the public by sale or other transfer of ownership or by license, lease, or lending.”¹¹³ The judge had a perfectly proper jury instruction, and then, under pressure from the RIAA, withdrew it and put in an instruction in which he instructed the jurors as to none of the elements of the distribution. He specifically instructed them that they did not have to find that any copies were transmitted to anybody; all they had to

¹¹³ 17 U.S.C. § 106(3) (2006).

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find was that the copies were on her computer. That was a flagrantly improper instruction. That's why I think that.

PROF. HANSEN: You're not the "New York County [sic] Lawyer" who has been blogging a lot on this case, are you?

PARTICIPANT: "New York Country Lawyer,"¹¹⁴ that's me.

PROF. HANSEN: I guess what I'm saying is, even if you are technically correct, should she be liable Do you think she is the bad guy that obviously the RIIA thinks she is?

PARTICIPANT: I went to law school because I believe in the rule of law. I believe in applying the law, not making it up as we go along because we find it more convenient.

MR. KASUNIC: But there is a point that if you have a bad case, bad cases can make bad law. Because this is clearly about a bad actor, there is at least some reasonable question of whether you should stretch the law too far.

But there may also be other ways, besides "making available," to potentially deal with such bad actors. One thing that I have been thinking a lot about is that in the reproduction context we have used evidentiary means to get where we want to end up. So we generally prove infringement of the reproduction right through circumstantial evidence. What we are dealing with here a big problem—people putting things up and making them available to the world. Should there be some way of being able to prove that it is more likely than not that what was intended was distribution and that this is probably occurring? I don't know. It's harder than in the reproduction context, but it is interesting.

PROF. HANSEN: It is interesting.

I have been told that we're supposed to stop at 1:15. It's 1:20.

I want to thank the audience for your good comments and the panel for yours.

¹¹⁴ See Recording Industry vs. The People, <http://recordingindustryvspeople.blogspot.com> (last visited Apr. 7, 2008).