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### Critical Legal Studies in Intellectual Property and Information Law Scholarship, (Symposium)

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PANEL I: CRITICAL LEGAL STUDIES IN  
INTELLECTUAL PROPERTY AND INFORMATION  
LAW SCHOLARSHIP

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SONIA K. KAYAL\*

REBECCA TUSHNET\*

**PETER GOODRICH:** I won't lead so much as follow but many thanks to Sarah and Agatha. One of the most remarkable features of today's event lies in the fact that it is entirely student led, student driven, student motivated, and student organized. So just a few words about Critical Legal Studies ("CLS"), because the only reason I'm here is that I am a relic.

I was around when critical legal studies was around, and I was at Cardozo briefly in the 1980's, when in 1985 there was a symposium on critical legal studies which was published as a special issue of the then youthful *Cardozo Law Review*. Volume 6, Issue 4 is a "Symposium on Critical Legal Studies" and states confidently, youthfully, in the introduction that the symposium shows "that CLS, however defined, is flourishing and thereby transforming the broader law school community." More than that, better yet, the "spirit of participation in the symposium itself is a tribute to CLS." And then, for the spirit of it, and in honor of the unnamed students, the corporate fiction that signs the introduction as *The Editorial Board*, "A law school is far from an ideal participatory community, but CLS has urged us to pursue exhaustively our capacity for human relations." The students are gone, Sarah and Agatha have taken their place and it also bears note that a number of the Cardozo faculty were involved in that symposium. Some have moved on. Some are still here, but they're not here today. And that leads me to one of the themes in the conference, which takes the form of the paradoxical aperçu that critical legal studies is dead and that it is resurgent in a new generation, in novel doctrinal spaces and in distinctive forms of practice.

Nietzsche comments somewhere, "beware of killing your enemy because you will thereby immortalize him." And I think that it's true to say that critical legal studies in various senses has been immortalized, or at least that despite its anathematization in the US legal academy, it has nonetheless come back, and come back, and come back but in different

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bodies of substantive analysis and in subtly distinctive guises. It hasn't carried any identity cards, it hasn't remained the same, in being in essence a movement, it took the opportunity, one can at least hypothesize, of moving on. Wasn't that the point?

Professor Ekstrand whose paper was one of the inspirations for the conference, cites Duncan Kennedy at one juncture as stating that critical legal studies is "dead, dead, dead." But Ekstrand doesn't note that Duncan is a Catholic who believes that if you deny something three times, you thereby affirm it; and it is that cryptic affirmation that constitutes the 'backface' of CLS, that marks in enigmatic form that it subsists, and that it will live on, even if, in an introduction to the 2003 reprint of *Legal Education and the Reproduction of Hierarchy*, Kennedy does wittily observe that "the conference turned out to be an idea whose time was then." He states that it failed, and there is a strong sense in which it gives every appearance of being dead, buried in the interstices of the institution and in the repressed memories of members of the movement. But the appearance of necrophilia transpires to be best understood as a strategy of discovery, of transmutation that has gone along with the movement, with the trajectory of the theory.

From its inception, CLS designated, amongst other substantive topics, the pact of withdrawn selves, the articulation of alienation, the expression of the unconscious, reverie, fantasy, and transmogrification into spiritual practices. The *anima legis* of CLS, the souls of the departed, the evidence of the repressed, are precisely the marks of what lives on, they are the index of a structure of revolt.

The latter point, the semiotics of the movement, the icons and other signs of a trans-historical mobility, and here I risk falling into my own idiosyncratic historical obsessions, are precisely what live on and what matter to the next generation. We are witness to a moment of potential extravagance and palpable enthusiasm. Something has been unearthed. The repression barrier momentarily lifted so as to glimpse the spirit of the movement, the energy of rebellion as it links to the smooth spaces and liquid sociality of the digital. CLS, IRL, in a virtual age.

So the question of defining what CLS *was* becomes the more radical inquiry into what CLS can and did do, and even perhaps, a specific instance, an infinite particular, what did it do at Cardozo? Agatha has already addressed this in part, in her opening today, literal and metaphorical, and has described affectionately and extravagantly the role that Derrida played at Cardozo, and less expectedly the part played by the Law School in radicalizing Derrida. It was after becoming a Fellow at Cardozo that he shifted to a more political trajectory and engaged with the fight to free Mandela and end apartheid. I think he would have been surprised to learn that Cardozo radicalized him but

why not? It was a two-way street, and recollecting the atmosphere and passions that circumambulated 55 Fifth Avenue back then, I think it is fair to say that Drucilla Cornell who was here at the time was a political powerhouse that few could avoid if they walked through the corridors where the faculty live.

And Derrida is why I arrived. I came because he was here. That was the spirit of the post-1960s as they lived in the 90s. I came to visit Cardozo because I had learned of the conference on *Deconstruction and the Possibility of Justice*, and because I met two Cardozo faculty, Michel Rosenfeld and Chuck Yablon at a conference on legal semiotics, and then I met Drucilla Cornell, when I gave a paper sometime later at Cardozo. So I came by chance, by accident, by coincidence and by volition. I came because of the movement, because of CLS, because I managed to slip through that rapidly closing window that the radicals had opened up to theory, to deconstruction, to the possibilities of the postmodern mind.

So critical legal studies, finally just a few words. I'm European. I was chair of the English Critical Legal Studies Conference for a period and I founded what was self-consciously supposed to be a critically motivated law school in the University of London, at Birkbeck College, a School that remains a critical legal enterprise in its fashion, in its parts, and mostly in some of its scholarly self-representations. So critical legal studies lives on elsewhere, it survived even in institutional terms as part of the identity of a number of European law schools, some way from the USA, and perhaps this is always the case, the center becomes the periphery, and then the periphery returns.

Critical legal studies grew out of the Marxist Study Group, and it was historical materialism that lay behind the 1977 Wisconsin Critical Legal Conference. It was historical materialism that provided the early theoretical and political structure of critical legal studies both in Europe and in the United States. It was a leftist movement and when we talk about leftism, I mean quite precisely that there is a historical and material basis to what law does, to what people do to one another, and that cases are actions by persons against other persons, whether dressed up as corporate fictions, as law or as individual and paradoxical real *personae*.

In the same sense that the left declined, I think that critical legal studies declined. But to decline is also to conjugate, to match tenses and to arrive at new constructions. That is at least how I interpret it. The decline that in his more melancholic moods is seen by Kennedy and others as a diagnosis, as a negative, a failure, is also an opportunity and, I think perhaps it is a prognosis that it is best interpreted and expanded. Viewed in the positive, as a productive failure, it is the decline that allowed for the reinvention and mirrors the new social movements, the

anti-globalization and “occupy” networks that have marked the transition of the left all the way from class struggle to rebel clown armies.

Consider the melancholic pall of Perry Anderson’s analysis in *Considerations on Western Marxism* where he articulates the inexorable trajectory of leftist movements in Europe from practice to melancholia to aesthetics. That’s the summary given by Anderson of what happened to the Western Leftist Movements and I think one could say that a similar sort of diagnosis can be offered of what happened within critical legal studies—that it moved from practice, from radical and rebellious lawyering, from confronting authority, to institutionalization, where a mixture of ennui, embarrassment and exit, marked the destiny of the CLS radicals within the legal academy. At the same time, however, they mostly remained, they taught, they published, they forged links with the outside of the law school and with its temporal other, the next generation of scholars and students. So we prepare our own exit, we prepare to be, as Derrida put it in *Specters of Marx*, no more one, more than one. It is in that pluralization, in a dispersal that is equally a dissemination, that we make links with the past, with the images of critique and of the movement, in which we become ourselves, bit by bit, ever more virtual.

The left moved from being a working class movement to being a force within the institution, a path into the universities, and then within the university a shift from materialist polemics to aesthetic politics. I have suggested a similar species of trajectory for CLS. In the late 1970s and 80s, CLS was engaged with the ‘Law and Society Association’, which is where the legal Marxists were originally located, and then the same move from practice to the melancholia of institutional inhabitation, time and passage. But this mix of nostalgia and benign senescence is also the most fertile of grounds for imagination. The melancholia is in the main personal, idiosyncratic, and individualistic. Duncan Kennedy is perhaps uneasy and unwilling to let go. I think that a number of the others, myself included, are equally unable to give up on our own earlier fate and with it the afterlife of the movement. The cause is as much the loss of our youth as it is the state of the world, as much a matter of existential style as of radical disengagement, and then there is the fact that the only color we have left is in our accouterments.

So CLS moves into the institution, into specialisms, splinter groups, and other spent spaces, but the third phase, the trinity that I would now suggest is happening, and that we see embodied in our panelists, if not in me, is the shift to aesthetics. Aesthetics is in large measure the study of images. It is thus, in origin and substance, the study of the virtual, of representation and depiction as such. The law relating to the image goes back to the extraordinary Roman case law on

painted tablets, where the big question was that of whether an artist who paints on my tablet becomes the owner of the tablet or whether the owner of the tablet comes to possess the image? And the answer given in classical Roman law was that the artist owned the tablet because spirituality has precedence over materiality, the imaginary over the quotidian and tellurian.

The reason for the priority of the image is classically piety. The visual representation manifests the invisible more directly and affectively. The image, the contentment of sight, gives the picture a greater power than that of mere materiality. The image belongs to the spiritual order of being, to an imaginary world that subtends and structures that of presence. Such is not on its surface a particularly Marxist position, but the movement towards the virtual, the movement towards the image, is, I think, precisely what the Internet and the digitization of information is composing and representing. So if we talk about the movement to the virtual, remember what virtual means. It stems in canon and administrative law from donation ‘virtualiter’ meaning that the origin legitimizes and permanently confers authority through lineage of acquisition. Generically it is also useful to recollect that virtual has its etymological root in *vis*, power, and in *virtus*, meaning angel.

There is an element of the angelological in the politics of aesthetics. There's an element of the immaterial. And at the same time there is the movement to what cannot be materialized directly. Rebecca Tushnet, our first panelist is concerned precisely with the role of the image. And she has a fabulous piece in *Harvard Law Review* on the image being worth 1,000 words. Her concern is with the impact of the image and by extension, the impact of the imaginary on the regulation of virtual domains. How can the image be facilitated save by other images? And she will explain herself. I think performance is far more important than designation.

Sonia Katyal, our second panelist, is a powerhouse who, like Rebecca, lives in a world of the aesthetic and the mediatized in a fashion that I could only scarce imagine.

So I think we'll kick off with Rebecca and then move to Sonia. And the format is entirely of their invention.

**REBECCA TUSHNET:** Thank you all for coming, and I'm sorry that Barton Beebe couldn't be with us. I was hoping to talk a little bit about what I think of as my critical scholarship and its relationship to practice, so I am moving a little bit backwards along the chain that makes up the panels today.

I wanted to talk first about the First Amendment and copyright. I've written about transformative fair use and the way that the concept

of transformativeness, which is understood as putting new meaning or message into an existing work, can assist in shrinking conceptions of fair use insofar as fair use is understood to be a kind of reflection of the First Amendment.<sup>1</sup> If your paradigm of fair use in copyright is the little guy angrily speaking truth to power, that fits into a particular First Amendment narrative about the suppression of speech by a censor; but it doesn't speak to many of the spaces in copyright that historically have been important in protecting free speech in its broadest sense, the freedom to make private performances, various educational copying freedoms, including the freedom to make multiple copies for classroom use and so on.

My argument has been that pure copying can serve First Amendment purposes in access. When someone is distributing copies, even unauthorized copies have content and they still have value to the recipients. Copying can also assist in self-constitution, when we define ourselves by what we like, as you can see anytime you go on Facebook. And copying can assist us in communicating important messages to other people. So, for example, when someone hands out the Bible, it would be very odd to say that they were not saying something important just because they didn't write the Bible. They're saying something about what they value. They're making an argument. And they are also communicating the messages in the Bible.

I consider my work on fair use and the First Amendment critical because the ultimate message is that, because pure copying does serve free speech purposes, the conflict between copyright and the First Amendment can never be fully reconciled. We have a lot of theorists trying to tell us about how they can live in harmony and I don't essentially think that's true.

My work that Professor Goodrich spoke of, which is about copyright's treatment of images, is similarly diagnostic rather than prescriptive.<sup>2</sup> It looks at cases in which courts have confronted the various images and have been unable to deal with them as images. Trained in interpreting texts, courts tend to take various positions towards the image that deny its specificity. They say either "this image is completely transparent, we know exactly what it means, and therefore everyone would see it in the same way," or they say, "well, the image is opaque, who knows what it means?" It is imminent, non-understandable, angelic perhaps. And therefore, we have to treat it as if it could never be interpreted. Both of those positions actually work

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<sup>1</sup> Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535 (2004).

<sup>2</sup> Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 *HARV. L. REV.* 683 (2012).

against serious interpretation of the kind that you might find, say, in a classroom. Sometimes copyright disputes are disputes about meaning and you really do need to use the tools of aesthetics to figure out what's going on as well as an underlying theory of what counts, for example, as fair use.

But what I then wanted to talk about is my work as an activist with a group called the Organization for Transformative Works ("OTW"). Given what I've said about transformativeness and how I have my doubts about it, it might seem odd that I would help found a group called the Organization for Transformative Works. It is a group created to push back against the commercialization of what some people call user-generated content, which is to say creative works made by people who love existing works. What we call "fanworks" are not-for-profit, they're noncommercial and, in support of them, the organization incorporated as a nonprofit under U.S. law.

Why did we do this very bourgeois thing? Let me talk about some of the terms. First, we're an "organization." We are a legal entity, incorporated in Delaware. This gives us a certain kind of legitimacy, but at the same time it does not fully recognize the incredible diversity and non-organized status of actual fans. We speak for fans in certain contexts but of course fans are everywhere. Fans are making things everywhere. Most people who make fanworks even in English, even in the United States, have never heard of us, nor should they have to in order for us to say that what that they do is fine, is legitimate, is not infringing.

Second, in terms of "transformative," we adopt the legal language of fair use. This concept sets up the authorial claims of people who are making transformative works as equal or not subordinate to the claims of other authors. If you're a fan and you write a new story about the adventures of Kirk and Spock, you are doing something that copyright law recognizes as worthwhile even though you're not making millions of dollars off of it.

The third key term in the Organization for Transformative Works is "works." The organization is set up to highlight works, not workers, even though the conditions of production in the communities of practice out of which fanworks come are vital to the actual creation of fanworks. People don't tend to create in a vacuum. They put it on YouTube or on Tumblr so they can share it with other people who might like it, too.

We chose "works" because the legal arguments that we make are framed in terms of what is produced, even though the producers are vital and even though we are actually in some ways more interested in protecting the producers than the things that they produce. But copyright law looks at the work, not at the producer. Moreover, the idea of the "work," instead of the more specific "story" or "movie," has



important consequences for how creating activity is understood as implicated in but also apart from the so-called ordinary operations of the economy. We make chairs. We make cars. We make movies. What does it mean to see those as related?

“Work” in this context, I think, gives dignity to the fans who are making things, who are often culturally disadvantaged people who are regularly mocked for consuming the very things that have been produced so that people will like them and consume them. And of course consumption here means intellectual activity: watching and listening, thinking, creating new things in response. We are trying to appeal to the dignity of work, which is, I hope, not entirely lost.

In practice, what do we end up doing? I’m going to call back now to the importance of the image. When I started writing law review articles, people were mainly interested in fan fiction. Is it legitimate to write a new Harry Potter story and post it online? In some senses I consider that battle completely won. In 1994, people debated whether this was an infringing derivative work or not. For a variety of reasons, some which Tim Wu talks about as tolerated use,<sup>3</sup> this debate is over. Essentially no one sends cease and desist letters over fan fiction. Copyright owners recognize, at the very least, that it’s not worth it to go after fan fiction in court.

The frontier is video—the moving image and music. Part of that is also technology based. One can scan for copies of songs and copies of film clips in a way that it’s very hard to scan for a story about Harry Potter as opposed to a book report about Harry Potter.<sup>4</sup> Thus, the OTW’s legal focus is now on video. We went to the Digital Millennium Copyright Act (“DMCA”) anti-circumvention exception hearings trying to get an exemption from the Librarian of Congress for circumventing encryption technology in order to make clips for use in remix video.

We participated in order to explain what fans do. Fans who make remix video often call themselves “vidders.” Vidders take video clips, usually set them to music, and tell a new story with the existing clips. What happened in these hearings is that we ended up having to make claims about authorial genius: that people who do this are just like authors that the Copyright Office recognized already, and should be given that kind of individual dignity even though they really emerge from a community of production which is very different than the concept of the isolated authorial genius.

An example that proved very persuasive, quite interestingly, was

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<sup>3</sup> Tim Wu, *Tolerated Uses*, 31 COLUM. J.L. & ARTS 617 (2008).

<sup>4</sup> And technologies are not developed in a vacuum; copyright owners have invested in some and not others, even though, perhaps, an algorithm could be devised to distinguish the book report from the self-published sequel.

a vid called *Closer*, using the Nine Inch Nails song, set to clips from the original *Star Trek*. It went viral some years back. It tells the story: what if Spock had not made it to Vulcan in time for his Pon Farr and had instead sexually assaulted Captain Kirk? Here's the thing: some in the audience are laughing. It's not *for* you, except for those of you who might be Star Trek fans. It actually participated in the then forty-year history of Pon Farr stories made by Star Trek fans, some of which posited very similar things. Finally we were able to tell a story in video, so the vidders did. Then somebody saw *Closer*, who was not part of the community, put it up on YouTube without the vidder's consent, and it became a viral hit. It was not understood as participating in this fannish conversation, but rather as a weird artifact like the cat videos and David After Dentist—the YouTube flotsam that floats around.<sup>5</sup>

And that's fine. Nobody's telling you you have to interpret a video the way it was meant to be interpreted. But the story of the circulation and recirculation of *Closer* illustrates the struggle of identifying an aesthetic practice that a decision maker may not share and saying that the decision maker nonetheless needs to recognize the practice as fair use. Because of the way that the DMCA is now constituted, we have to come and say we are worthy. If the Copyright Office doesn't understand the use, we don't get our exemption, and then what we do in order to acquire the footage is illegal.

As a result, as a matter of strategy, we needed to identify works that were intelligible to outsiders and understandable as aesthetically and politically good. These works needed to have a well-done, legible, critical message even if the viewers weren't fans, which turned out to require careful selection of examples. Within the OTW, we don't believe that quality in that sense is important to fair use, but strategically we can't get an exemption if we don't show the Copyright Office exemplars that they understand as transmitting a critical message.

Then we faced a second barrier, which is technical quality. The way the law is set up, the Copyright Office takes the position that you need to show that you have a technical need for footage of the quality that you can get by ripping a DVD instead of just using, say, filming the screen with your phone or using screen capture software. And you *should* be laughing at that because those methods produce terrible results. However, the idea that you have to show a need for technical quality forces us further into defending a particular aesthetic and also subjects us, again, to someone else's determinations about how good and how nice-looking our messages need to be to deserve an exemption.

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<sup>5</sup> See Henry Jenkins, *How to Watch a Fan-vid*, (Sept. 18, 2006), [http://henryjenkins.org/2006/09/how\\_to\\_watch\\_a\\_fanvid.html](http://henryjenkins.org/2006/09/how_to_watch_a_fanvid.html).

The Copyright Office formally disavows quality judgments but still ends up making them and deciding that some people but not all people need more than screen capture to do their artistic or educational work. It's a very dispiriting process, not least because we have to go back and do it again: in eighteen months' time we will start over again, because exemptions are granted every three years and expire if not renewed, and the exemption process begins well in advance of the three-year anniversary. It's an example of the deep capture of the copyright system by powerful copyright owners: they get their rights forever and we get them back in short periods.

The thing that the rulemaking really highlighted to me was the way in which making critical claims intelligible to policymakers is vital just to preserve the breathing space that we need to keep making this stuff. The more of these works we make, the more this kind of creativity is out there, the greater the chance is that the next generation will find it easier to understand the claims we're making. Ideally, fannish creations could be seen within the law in the same way many people think about opera: you might not understand it, but you recognize it as a field of artistic endeavor deserving of its own protection.

**SONIA KATYAL:** It's a great pleasure to be here. I'm so happy to be sharing this panel with two people whose work I've really admired. And I also just want to start off by congratulating *The Cardozo Arts & Entertainment Law Journal* on coming up with such a pressing and prescient topic, I think, on the intersection of CLS and intellectual property.

For myself, I did not plan to devote my life to intellectual property. I actually went to law school to be a civil rights lawyer and learned a lot about CLS along the way. Along the way, I realized that many of the same concerns that we focus on in the civil rights movement were, at the time, reemerging in the digital context.

Questions about equality, access, the balance between freedom of speech and proprietary rights, issues about privacy, issues about the distributive effects of entitlements on minorities, all of those kinds of themes, I think, were themes that also in some ways, animated some of the early work on crucial legal studies. So it's been fascinating for me to see them reified in the digital context today.

I want to actually spend my time focusing on a couple of these moments in sort of intellectual property scholarship and discuss how some of those contemporary issues, I think, demonstrate some resonance with some of the CLS movements of yesteryear.

In addition, I also think that the relationship between the IP scholarship and CLS is really quite indirect, and that's particularly what makes it so interesting and worthy of deeper exploration. It's because

there is not a clear, direct intersection between the two fields. One focuses on theory, the other encompasses practice. But CLS, I think, indirectly offers IP scholars a solid and yet nuanced framework from which to excavate areas that might benefit from further study. It's an indirect connection, a kind of parallel layering of theory and practice that offers significant insights for both lawyers and scholars.

So the first area of resonance that I see is a kind of a *structural* critique of our intellectual property system that is really deeply informed by CLS principles. So the original framework of copyright law comes from Article I, Section 8 and it's this idea of an exchange: to promote the progress of social welfare, the law provides an exclusive right to authors and investors for a limited period of time.<sup>6</sup>

The conflict between a private right and public welfare is one of the key sorts of questions, obviously, that frames much of our work on intellectual property scholarship. But it also raises, I think, a really interesting fundamental question about whether property rights always *promote* the public good. And in the age of copyright overbreadth, it actually becomes hard to see how extending copyright outwards and further and investing it with a broader level of protection actually promotes social welfare.

I would argue that the issue of how scholars have constructed a notion of public progress and social welfare is deeply entrenched with CLS notions about providing alternative understandings beyond economic efficiency. So when intellectual property scholars approach the study of expression, as a value in and of itself, or address the concept of freedom as a value in and of itself, these are themes that are deeply, deeply intertwined with traditional CLS scholarship.

Many of us who are influenced by CLS, for example, tend to conceive of copyright as a system of social relationships and dynamic entitlements that are really about allowing access to others instead of a pure right of exclusion. This way of reconceiving the notion of public progress has really been influenced by the structural critiques that were offered by Lawrence Lessig, Siva Vaidhyanathan, and Jessica Litman, who gave birth to a critical information studies movement that was really focused on critiquing the structural relationship between broad flows of information and the danger of overbroad property rights.<sup>7</sup>

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<sup>6</sup> U.S. Const. art. I, § 8.

<sup>7</sup> See generally Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999); Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (2004); Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (1st ed. 2001); Jessica Litman, *Digital Copyright: Protecting Intellectual Property on the Internet* (2001); Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (2001); Siva Vaidhyanathan, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System* (2004); Lawrence Lessig, *The Path of Cyberlaw*, 104 *Yale L.J.* 1743 (1995); Lawrence Lessig, *Innovating Copyright*, 20 *Cardozo*

A critical information studies movement, as I see it, is also deeply influenced by the value placed on freedom of expression and freedom of thought but it's also important to note that many of those scholars, I think, were steeped in other areas of legal scholarship before they came to intellectual property. So, for example, Lawrence Lessig is a constitutional law scholar; Siva Vaidhyanathan came from an information and library studies background; both of these fields were deeply influenced by thinking about modes of analysis and modes of value that were far beyond the economic efficiency model that other intellectual property scholars had embraced.

The second big development in terms of commonality that I see between intellectual property and critical legal studies involves the emergence of what we might call a *cultural* critique of intellectual property. And so here I'm thinking about the power of the image, remaking the image, recoding the image, the immense power of subversion, of parody and satire in enabling racial and sexual minorities and others to recode certain established works.

Now it's true to say parodies are everywhere but I also think that there is this really interesting intersection between critical legal studies' focus on minority rights and distributive justice and the way in which fair use scholars routinely have heralded the rights of minorities and others to recode certain works for the purposes of critique and commentary.

For example, we have a lot of great scholarship today about rap music and jazz and how these areas of creativity forced us to imagine these worlds of creativity that existed beyond the controls of copyright law. And we also have some wonderful work by Rebecca Tushnet and others about how women and other minorities have recoded common texts through things like fan fiction, slash fan fiction, gender parody and the like.<sup>8</sup>

We also have this rich body of work that unpacks that romance of authorial control and the way in which audiences can themselves interpret and recode existing works.<sup>9</sup> So many artists and activists today, I think, offer questions that have deep resonance to basic CLS questions. For example, questions like: for whom does intellectual property protection serve? Who is actually being represented? Who is being excluded? And why are these individuals being excluded? These

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Arts & Ent. L.J. 611 (2002); Jessica Litman, *Copyright Legislation and Technological Change*, 68 Or. L. Rev. 275 (1989); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 Or. L. Rev. 19 (1996); Jessica Litman, *The Politics of Intellectual Property*, 27 Cardozo Arts & Ent. L.J. 313 (2009); Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 U.C. Davis L. Rev. 1207 (2007).

<sup>8</sup> Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and A New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997); Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL'Y & L. 461 (2006).

<sup>9</sup> Madhavi Sunder, *Ip3*, 59 STAN. L. REV. 257 (2006).

are questions that are deeply embedded in a critical legal studies approach, as well.

Along these lines, the work of scholars like Ann Bartow comes to mind in pointing out areas of creativity, particularly areas of feminist creativity and criticism that are completely unrecognized by copyright law and asking the question of why.<sup>10</sup> There is also very powerful work done by contemporary artists and activists that I think challenge the boundaries of trademark and copyright, and lend credence to the idea that at times challenging the boundaries of property and intellectual property law can be just as creative and just as innovative in terms of compelling a greater dynamic force for the public good.<sup>11</sup>

Through this important area of scholarship, we see how the critical aspects of these approaches has offered us some legal purchase in fair use cases. Today, as Rebecca pointed out, many of these cases now overwhelmingly favor the power of defendants in expressing their freedom of speech. So these cases, I think, do underscore the continued need for -- and the success-- of a critical and distributive approach to intellectual property. Today, some troubling older cases, like the Supreme Court's infamous gay Olympics case which refused to allow a gay organization to use the term Olympics,<sup>12</sup> I think coexist with these more modern trademark cases that staunchly defend gay activists' right to set up domain names and websites that parody and comment upon people like Jerry Falwell. So you do see a really interesting shift.<sup>13</sup>

Today, I would argue that the defense of fair use bears an intimate relationship to the way in which critical legal studies focused its gaze on the role of entitlements for minority groups. Like critical race theory, a critical approach to copyright law tends to ask the question of how entitlements are distributed and their effect on disenfranchised groups, and also to employ tools like fair use to restore some balance between property rights and social justice.<sup>14</sup>

Now a third area in which CLS has deeply influenced intellectual property although indirectly is in the area of indigenous people's movements towards *collective* management of their tribal resources. So in crafting new models of governance of intellectual properties and traditional knowledge and coming up with new ways to "propertize" these resources, I would argue that tribal movements demonstrate and personify a more collective, group oriented approach to the

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<sup>10</sup> Ann Bartow, Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law, 14 AM. U. J. GENDER SOC. POL'Y & L. 551 (2006).

<sup>11</sup> For a discussion of some of these projects, see Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U.L. REV. 489 (2006).

<sup>12</sup> San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987).

<sup>13</sup> Lamparello v. Falwell, 420 F.3d 309 (4th Cir. 2005).

<sup>14</sup> Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

management of these intangible resources.<sup>15</sup> Here is where we see, again, a social relations approach to property taking hold in cases where strong rights of exclusion give way to a larger and more malleable focus on group rights and collective knowledge.

Now a final area in which we see CLS emerging aside from the structural, cultural, and collective areas that I've outlined is the *political* arena, which is something that we'll be talking about a lot today. I know that we have a lot of panels on this topic today but I would also argue here that many of the social movements that surround access to information and open source creativity bear very strong parallels to the kind of institutional critique that CLS offered us so many years ago.

Here I'm thinking of a number of articles, but one of the particularly great pieces from that period is *Nomos and Narrative*, by Robert Cover,<sup>16</sup> and how that same rhetoric we also continue to see in so much of today's social movements surrounding intellectual property. As I, Eduardo Penalver, and other people have written, copyright activists like Downhill Battle which organized the Gray Album protest from a number of years ago, and other copyright activists of today, like the legacy of Aaron Swartz, I hope, will force a number of important exceptions in the law, assuring that some malleability continues to attach to copyright law and its enforcement.<sup>17</sup>

Admittedly, copyright activism hasn't always been successful, but at times it has offered significant potential for reshaping a discussion about property rights. Emerging from these movements is this idea: while the issue of civil rights surrounding race, I think, dominated the 1960's, today what we're seeing is the emergence of this really vibrant social movement that has been focusing a critical gaze on the role of intellectual property and the need for access. As one civil rights activist has suggested, without access to information today, democracy is a myth.<sup>18</sup> I think a lot of those themes bear great resonance from the work that was done in earlier generations by CLS scholars.

In sum, the role of interdeterminancy, the malleability of authorial control, the role of a structural, cultural, collective, political and institutional critique and of course the importance of activism and

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<sup>15</sup> Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313 (2008); Carpenter, Katyal & Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009).

<sup>16</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>17</sup> Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. Pa. L. Rev. 1095 (2007); Eduardo Moisés Peñalver and Sonia K. Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (2010); Lawrence Lessig, *Aaron's Law: Violating a Site's Terms of Service Should Not Land You in Jail*, The Atlantic, Jan. 16, 2013.

<sup>18</sup> For a discussion of Downhill Battle's role in the "Eyes on the Screen" protest, see PROPERTY OUTLAWS, *supra* n. 17, at 7.

social movements—all of these elements of intellectual property scholarship that we're seeing today have great parallels to the work that was done generations ago by CLS scholars. They also show us how this movement, I think, does continue to sort of live on, perhaps not always directly, but definitely indirectly to the world of intellectual property. Thank you.

**PETER GOODRICH:** A wild array of themes, and thanks very much to both panelists. I guess I have a variety of questions, but first I'll throw it open for those that burn. . . .

**AUDIENCE MEMBER:** [inaudible question about “commercial” versus “noncommercial” uses under the fair use doctrine, and referring indirectly to *Prince v. Cariou*, a case concerning the extent to which new works may be considered transformative under the fair use doctrine]<sup>19</sup>

**REBECCA TUSHNET:** As far as I know, *Prince v. Cariou* is still awaiting decision by the Second Circuit.<sup>20</sup> I recommend reading The Warhol Foundation's amicus brief in that case,<sup>21</sup> which is fantastic, because it shows you all these pictures of art, some of which almost anyone is likely to recognize, and explains the ways in which they are appropriative. It makes the argument that there is a particular set of practices in the art world that deserves respect because of the ways in which the community changes the meaning of the art even though in other circumstances that transformation might not happen. I actually find that an attractive view of what transformation is, as opposed to a view that transformation has to be something that's intelligible to everyone as making a different meaning from the original.

Let me say something maybe that is more towards the CLS portion of the symposium. One of the compromises that you make when you decide to essentially be a liberal organization, and work within the system, is that we decided to focus on people who, because they're doing stuff that's noncommercial, never get representation. Their stuff never sells for \$100,000. It doesn't happen. Also they're culturally disadvantaged because rephotographing the Marlboro Man and putting it inside the Met is just treated differently, or at least historically has been, than being a big fan of Star Trek and making Star Trek stuff.

Because of that, we do not try and cast commercial

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<sup>19</sup> See *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013).

<sup>20</sup> *Id.* The case was decided several weeks after the symposium on April 25, 2013.

<sup>21</sup> Brief of Amicus Curiae the Andy Warhol Foundation for the Visual Arts, Inc., in Support of Defendants-Appellants and Urging Reversal, *Prince*, 2013 WL 1760521, available at <http://www.scribd.com/doc/71837645/Cariou-v-Prince-Warhol-Foundation-Amicus-Brief>.



transformative uses under the bus, but they're not our thing. So we talk a lot about the ways in which the fact that you do something deliberately and noncommercial with no hope of making money indicates something about the expressive value of that particular conduct to you. You're not doing it to satisfy a market, so we can be sure that it is intrinsically connected to something that you wish to communicate. That's the importance of it being noncommercial.<sup>22</sup> There's plenty of commercial fair use out there. It is something that I worry about, that if I spend a lot of time just saying how wonderful noncommercial uses are, then we're sort of giving up ground for commercial fair uses.

**PETER GOODRICH:** One feature is precisely the deficit of knowledge that Rebecca was talking about. The key role that scholarship can play in actually exposing, learning about, disseminating, and transmitting the basic facts that relate both technologically and empirically to what is happening, who is doing what to whom. The question that intrigues me, a slight tangent, but there is one area in which critical legal studies is also extraordinarily vibrant and in which it never actually faded and that is international law. This I will suggest is the third element, namely the unholy ghost in the leftist trinity that is manifest in the revival of critique in law, the resurgence of political activism, and this in a domain where disparities of power, knowledge gaps, and opportunities for overreaching and aggression are evident and as great if not greater than elsewhere.

I wonder if the panelists would muse on the relationship between the impetus for critique in international law and in IP law because it would seem to me that there are a lot of parallels and useful conjunctures both in terms of disparate civil rights between nations, as also the status of minorities within states, and particularly the survival of autonomous minority groups seeking recognition. The big issue is assertion of identities in oppressive contexts all the way to the Arab Spring.

The other dimension is simply the evanescence, the chimera of boundaries past and passed. There's no longer the possibility of control. What intrigues me here and I think connects quite nicely, is that international law, in the sense of relations between states is not conventional law at all but rather a play of diplomacy and belligerence, politics and war. And there's a very strong sense at least in which international law has to deal with a whole series of factors that simply do not respond to classical legal analysis or classical legal boundaries

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<sup>22</sup> See Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J. L. & ARTS 497 (2008).

but at the same time escape any direct forms of control outside of punitive interventions and eventually warfare.

**SONIA KATYAL:** I actually want to pick up on the question that was asked earlier about commercial versus noncommercial uses under the fair use doctrine. One thing that I was thinking about as you were speaking, and as Rebecca was responding, is how different a world we live in today with respect to various uses of imagery. When the early forms of CLS scholarship were being written, it was a lot easier to tell who was David and who was Goliath, right? It was a lot easier, also, to delineate the boundaries between noncommercial and commercial use.

One of the big problems that we face today is that we have these structures and doctrines that suggest clear boundaries between commercial and noncommercial use, but the reality is that when we expand the boundaries of fair use, we expand them for *both* noncommercial and commercial entities, often unwittingly.

When First Amendment rights are expanded to allow upcoming and lesser-known artists to use parody, the doors open for well-financed artists like Richard Prince<sup>23</sup> to come along and appropriate the work of less well-financed artists.<sup>24</sup> The economic disparities become even more apparent where the expanding power of fair use winds up having distributive consequences that benefit some artists and leave others disadvantaged.<sup>25</sup>

I also think that our world is very different today than in an earlier generation. We often characterized artists and the production of art as being situated, to a varying extent, outside of the capitalist “system” of our political economy, but today, art production is very much *within* our commercial, profit-motivated system, now more than ever. So it's very difficult for us to tell when things are commercial and when things are not commercial. That creates a lot of interesting questions for how we might approach the boundaries of fair use going forward.

Finally, in picking up on the international point that was raised earlier, a significant parallel that I see between IP and CLS involves the unmaking of, or recoding or subverting, of the idea of sovereignty. CLS offered us a significant degree of utility in terms of piercing the sovereignty of a work, and saying that authorial control is indeterminate, and, relatedly, that there's immense power of the audience and various third parties to reinterpret and recode.

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<sup>23</sup> Richard Prince is the defendant in *Cariou v. Prince*, *supra* n. 19.

<sup>24</sup> See *id.*

<sup>25</sup> Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004).

If we turn to the international realm, we observe a very similar thing unfolding—the Arab Spring, and even to some extent here, when we think about the Occupy Wall Street movement—there is this piercing of sovereignty of both private and public sectors in the sense that dominant political narratives are more fluid and are more susceptible to reinterpretation—opening up opportunities for third parties to engage in a deeper contemplation of the function, limits and possibilities of sovereignty.

**REBECCA TUSHNET:** I want to take that in a different direction, which is that power flows. I just heard Bruce Lehman a couple of weeks ago explain how they've gone to the World Intellectual Property Organization ("WIPO") in order to get an international agreement. This was actually the U.S. telling other countries what the U.S. wanted. The other countries agreed on a law for the Internet age, including the anti-circumvention provisions. Then Lehman went back to Congress and said, "hey, we signed this international agreement, now you have to pass a law to go along with it."

The fluidity and the multiplicity of structures is not a victory for anyone. It's a set of new potential sources of power. People who are good at managing power and, in particular, people who have international lobbying groups, are going to be better at dealing with it than people who don't.

Jack Lerner, who works with documentarians, said that we never even knew that our rights were being traded away in another country. Documentary filmmakers found out that the law changed, and it took a long while to even get a teeny little back through the DMCA exemption process which, not for nothing, the U.S. has not allowed other countries to adopt in the free trade agreements it's made with them requiring them to adopt circumvention laws.

To the extent that CLS is about being attentive to flows of power and the way power can reconfigure itself in new ways, I think there are many lessons and we're living through another example of what CLS tells us always happens. In terms of power being slippery, we are hearing content companies talk about streaming media as the future. You'll get all your content, whatever it is; it will come to you over the Internet. Control is going to be moved so you as individuals will only be hailed as consumers of video. You'll get it on demand and you'll be encouraged to tweet about it and so on but you will not be understood by anyone, and hopefully not even by yourself in the view of these companies, as a creator or as an owner. That's a very different way of thinking about yourself that I think is disempowering and needs to be fought back against. I don't think that control will be perfect because I think it ignores the human tendency to make new stuff but increased

control is definitely part of the vision.

One thing that I thought of when I was listening to Sonia is a question that I vividly remember from the Copyright Office panel at the 2009 DMCA hearings, which was: “you’ve brought us all these examples of works that are critical of the gender dynamics of an existing work or the racial dynamics. Could we just give an exception for women and racial minorities? Would that be okay?”

Of course the answer is no, you can’t, but the point of the strategy in some ways was to put these various liberal commitments, and I mean liberal not in the sense of Democratic versus Republican, but political, liberal commitments into tension. The idea of authorial freedom and freedom to criticize had to be invoked against the idea of property as control. We successfully did that, but only by invoking one half of that narrative.

**SONIA KATYAL:** I would argue that the author *is* part of the public interest. I think that obviously authorial control is such an important part of why we have our copyright system to begin with, but I also think that fair use is also an important part of this system as well. To the extent that we think about the balance between the two, or striking the right balance, it has to be in favor of this notion that if we really want to incentivize people to create new works, we have to allow for some capacity for appropriation. I don’t think this observation works perfectly all the time, and I definitely think that the boundaries of commercial and noncommercial use are very fuzzy and often result in significant confusion.

However, I would emphasize that copyright law cannot be successful entirely by thinking *only* about authorial control, that our system of fair use is dependent on creating some area of malleability between these areas. When we think about the standards for preliminary injunctions, there is a real space for thinking more aggressively about importing constitutional legal principles into our interpretation of intellectual property. There’s been some really powerful writing on the First Amendment concerns about preliminary injunctions.<sup>26</sup> I think the Supreme Court has also weighed in on this debate periodically.<sup>27</sup> But I think that there is more space for more discussion and certainly something that I think is really notable about the world of intellectual property scholarship that we live in is that so many of us arrive at the world of intellectual property through lots of different passions that we may have. So I have this great love of contemporary art, which is why I

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<sup>26</sup> Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 DUKE L.J. 147 (1998).

<sup>27</sup> eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

love writing about intellectual property. I would venture to say that maybe Rebecca's might be fan fiction [laughing] and Peter's obviously is literature. I think that we all come at it from different angles and I think that's part of really why scholarship is so vibrant in that way.

**REBECCA TUSHNET:** Can I pick up on that? In law school we learned about the farmer and the railroad. The railroad creates the sparks. The grain catches on fire. Whose fault is that? And we are taught very carefully that we need to go beyond our intuitions and see that causally they are both responsible; that there would be no fire, no harm, without the presence of both the farmer and the railroad.

What's interesting about claims like the Maria Pallante's is that they forget that insight very strategically with respect to the author and the audience. That work is not valuable in the Marianas Trench; a work is valuable to the extent that it is doing things for an audience. That doesn't mean that the legal allocation of control or payment or anything has a natural ordering. It is actually one of choice, but that's what we were supposed to learn from the railroad and the farmer. It's interesting that copyright tries very hard to make us forget that.

**AUDIENCE MEMBER:** A question for each of the panelists, who all seem to have a unique relationship to the history and evolution of CLS in legal academia. Would you agree with the basic premise of this symposium, which is that CLS has either survived, or made a resurgence of sorts in the context of IP scholarship, more so than other legal sub-disciplines? And from a more personal point of view, I was hoping you could each comment on your experience and understanding of CLS in legal academia past and present, and perhaps, Professor Tushnet, if you could specifically comment on how and whether your father, Mark Tushnet, a founder of the CLS movement, has influenced your scholarship?

**PETER GOODRICH:** Fantastic question and we'll answer in order of age which means not me first. Either of you two.

**REBECCA TUSHNET:** I would just say my father has the incredible ability to give just the right amount of advice: neither too much nor too little. I've read his work. He's given me very nice comments on mine. I don't know that I could trace any particular kind of influence from CLS other than that people did tend to ask me, especially with the copyright and First Amendment piece, "so what do you want us to do?" I actually felt like I didn't need to have any answer to that to have a good argument. Part of the project of critical legal studies is to say, look, I've identified this problem; this problem will persist no matter what

structure you set up, and that's why you have to make political choices about it rather than saying that there is a legal answer. I think my work actually does fit in that tradition that you're going to have to make a political choice.

I didn't perceive political problems with that although that also, I think, has to do with the changing nature of the academy compared to the 1980's.

**SONIA KATYAL:** A lot of my work is (in some ways) considered to be resonant of a tradition of CLS, even though I don't directly reference the foundational works of that movement as much as I probably should. But I will say that one of the things that I think is really special and wonderful about the world of intellectual property scholars that we have is that I think so many of us actually have our own sort of critical edge in our own way and I think the world of intellectual property scholarship has been really deeply influenced by, I think, the senior scholars in the field like Jessica Litman, Siva Vaidhyanathan, Larry Lessig and others, Pam Samuelson comes to mind. All of these are people who were very deeply committed to thinking about equality and thinking about minorities and thinking about freedom and also really actively thinking about mentoring. I think that in many ways our scholarship developed because we had senior legal scholars who were incredibly generous to us and it led us to create works that were generatively linked to the works of those prior scholars.

Intellectual property is different from many other fields in the sense that it is a young, vibrant field and I think that the senior scholars in those fields, Mark Lemley particularly, took it upon themselves to be very, very actively supportive of junior scholars. So I didn't really worry so much about the politics of tenure or the politics of my writing because I knew that most of the intellectual property scholars that I was in dialog with were deeply supportive of the values that I held, even if we had different methodologies.

I went to the University of Chicago Law School, and I also went to Brown University for my undergrad work, so I had sort of a varied educational experience. In many ways it was really helpful for me to learn a totally different methodology of thinking and to understand that fairness is one value, and efficiency is another, and to think in terms of externalities and the Coase theorem was actually a really useful thing to study and to reflect upon.

Anyway, in many ways the field of intellectual property is, I think, vibrantly reflective of the leadership of intellectual property scholars who have been really committed to many similar ideals that engaged critical legal studies, in addition to projects devoted to rethinking social welfare and efficiency.

**AUDIENCE MEMBER:** [inaudible question concerning the application of fair use principles to trademark law]

**REBECCA TUSHNET:** Deven Desai has this interesting paper, which I'm not entirely convinced by, making precisely that move with respect to trademark.<sup>28</sup> I think the argument does have a lot of logical force. Now here's the question. CLS teaches us that logic doesn't always get the job done when some other commitment is actually driving the result. Look at *Eldred* and *Golan*. Under real First Amendment doctrine, *Eldred* and *Golan* are travesties. And the Court just says, "no, sorry, no First Amendment for you. Fair use and idea/expression are the only First Amendment constraints on copyright. We didn't mean what we said about the traditional contours of copyright as constraints. It doesn't matter that copyright looks nothing like it did when the Framers put the First Amendment together." The reason that I distrust this type of argument based on extending the logic of *Citizens United* and similar cases to expressive uses is that I don't believe that, when it comes down to it, courts are going to be willing to follow the logic. They're going to say, "no, but trademark," in the same way that it happened in *Eldred* and *Golan*.

I think we lose more than we gain in adopting that argument. However, it is completely logical. It's not that it doesn't make sense. You might get some victories from it, but I don't think that the game is going to end up being worth the candle there.

**PETER GOODRICH:** I was going to say a very great deal in response to the audience member's question concerning the evolution and resurgence of CLS in legal academia, but time has passed on. I think it's important that we move on, so just very briefly, I think Rebecca mentioned Foucault, in the sense that power generates resistance. I think that there is a reversal of that flow which is captured surprisingly and not badly by Rebecca's father who said that CLS was really about finding a place within the legal academy for a particular leftist position and so was expressive of the concerns and rights of the legal academics and activist lawyers of the time.

I think a new generation seeks novelty as well, but this is more of purpose than of place, of use rather than possession. The expectation of institutions as habitus and community has dissipated somewhat, and it is project rather than position that is the ground of renewal. It is a shift

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<sup>28</sup> Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 MINN. L. REV. (forthcoming 2013), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2235381](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235381).

from class struggle, the fundamental contradiction, which is a spatially and structurally defined dialectic, to the virtual apprehension, the play, the use, the uselessness of images. This is the struggle for the imaginary constitution of society, as Castiodoris put it all those years ago, a struggle prefigured in but hardly exhausted by the culture wars in which CLS participated. So I will end with a parable of sorts from my own experience. It is one that nicely takes me back to one of our starting points, the role of Derrida in CLS, and of law in his philological and literary politics. Back in 1987 I was in Eastern Europe, behind the Iron Curtain, in Russian occupied Budapest. I had been invited to lecture but when the Marxist professoriate of Etvos Lorand University Law School met me and discussed my planned lecture, they rapidly realized that this was not a good idea and cancelled the class. Sensible folks. I had a day free and decided to travel to Sopron, a city on the border with Austria where my host had a sister willing to show me round. I took the train and a copy of Jacques Derrida, *The Postcard*, as my reading. It did not occur to me that I needed a passport to travel inside the country but close to Sopron the police entered the train and asked for ID. My only document was *The Postcard*, which they scrutinized, discussed and then shaking their heads indicated that it was not enough and arrested me for a while until my host came and vouched for me. When I was next on a panel with Derrida, I told him the story. He paused and pondered for a moment and then said "I am sorry that my book was of no help." And of course it was useless, but in the best of senses. It gave no comfort to the authorities. It provided no identification of me. It made no demand. And yet I read it on the train, I read it in the police cell. I finished it on my return. Socrates and Freud were comfortingly to hand. At random, though I am fond of quoting it: "In history, this is my hypothesis, epistolary fictions multiply with each new crisis of destination." And as for me, I'm delighted to reminisce, to join Jacques, to do something completely useless, and so with that in mind, I bid you farewell and we move on to the next panel.