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# Commentary, Critical Legal Theory in Intellectual Property and Information Law Scholarship, Cardozo Arts & Entertainment Law Journal Spring Symposium

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SPRING SYMPOSIUM: CRITICAL LEGAL STUDIES &  
THE POLITICIZATION OF INTELLECTUAL  
PROPERTY AND INFORMATION LAW<sup>♦</sup>

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INTRODUCTIONS

EDITOR-IN-CHIEF\*

We are so pleased to be here with you today, our esteemed panelists, professors, alumni, and distinguished guests. Thank you so much for coming. We have an incredible group of scholars, policymakers and thought leaders here with us today. Many of my colleagues from *The Cardozo Arts & Entertainment Law Journal* (“AELJ”) are here today as well. Thank you for being the best editors and staffers one could possibly ask for. A big thank you to our Acquisitions Editors, Danielle Gorman and Al Roundtree, who helped us develop our topic, and to our Senior Articles Editors, Cary Adickman and Ashleigh Hebert. And especially, thank you, Agatha Cole, our Executive Editor, without whom this symposium could not have come to fruition. Thank you also, Eric Einisman, Managing Editor, for making all of this possible. Thank you for your unyielding dedication to AELJ, and for your unwavering friendship. Today would also not have

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<sup>♦</sup> The following compilation is composed of edited transcripts from *The Cardozo Arts & Entertainment Law Journal's* spring symposium, which took place at the Benjamin N. Cardozo School of Law of April 7, 2013. Permission is hereby granted for noncommercial reproduction of these transcripts, in whole or in part, for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the journal and speakers, a complete citation, and this copyright notice and grant of permission be included on all copies. © 2013 Cardozo Arts & Entertainment Law Journal.

\* Sarah L. Farhadian, Editor-in-Chief, *CARDOZO ARTS & ENT. L.J.* Vol. 31; J.D., *cum laude*, Benjamin N. Cardozo School of Law (2013); B.A., *magna cum laude*, Brandeis University (2007).

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been possible without the help of AELJ's faculty advisor, Professor Brett Frischmann, and Professors Peter Goodrich and Michael Burstein, who have gone above and beyond at every step of the way to make our symposium a success. On behalf of AELJ, thank you for all that you do to support our journal. Your guidance in crafting the symposium has been invaluable and we're so grateful to have your advisement and mentorship.

Last but certainly not least, thank you to all of our panelists. It is an honor to have you with us today, and to have you share your thoughts on Critical Legal Studies ("CLS") and the politicization of Intellectual Property ("IP") and information law.

It is because of the support of all of these people that AELJ has been cited three times by the United States Supreme Court, as well as the high courts of Canada and Australia, and it is, of course, a staple in the District Courts. It is also thanks to this support that I can proudly share with you that AELJ has maintained its top spot as the number one journal in the country for arts, entertainment, and sports law and has also maintained its rank among the top five print journals in the country and number one in New York State for IP law. That was a mouthful, but all good things.

I thank you again for joining us, as I turn things over to Agatha, who will give us a brief overview of our symposium topic. Thank you.

EXECUTIVE EDITOR\*

Good afternoon, and thank you. As most of you already know, Cardozo's IP program, along with our esteemed journal, is recognized around the world for producing some of the most groundbreaking and significant work in IP and information law.

Many of you may not already know, however, about our faculty's engagement in the CLS movement, and its influence both within and outside of legal academia. It was only after Jacques Derrida visited Cardozo for a symposium on deconstruction in law in 1990 that he turned to the question of justice, and effectively became a political activist. Derrida's subsequent work against apartheid in South Africa with Nelson Mandela is a tremendous inspiration to scholars who view the pursuit of political and socioeconomic justice as a central goal of their projects.

So what is CLS, you might ask, and how does it relate to politics, activism, and IP and info law? As I'm sure we will see throughout the symposium, the very definition and scope of CLS is itself subject to

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\* Agatha M. Cole, Executive Editor, CARDOZO ARTS & ENT. L.J. Vol. 31; J.D., Benjamin N. Cardozo School of Law (2013); B.A., New York University (2008).

debate. Some scholars characterize CLS as scholarship that employs a particular methodology—more of a “means” than an “end.” On the other hand, some scholars contend that CLS scholarship demonstrates a collective commitment to a political end goal—an emancipation of sorts—through the identification of, and resistance to, exploitative power structures that are reinforced through law and legal institutions.

After a brief golden age, CLS scholarship was infamously marginalized in legal academia and its sub-disciplines. But CLS themes now appear to be making a resurgence—at least in content, if not in name—in IP and information law scholarship.

Over the last year, our journal’s staff has noticed that contemporary IP and information law scholarship is increasingly post-modern and interdisciplinary in nature. Themes that were originally associated with CLS are now making a regular appearance in legal scholarship about privacy, access, fair use, the public domain, and other topics related to IP and information law.

The conceptualization of identity and the author as social constructs and the rejection of law and economics principles, the identification of interdeterminancy and paradox in information networks, and the renewed emphasis on collectivity as a context or scholarship about commons management are all popular themes in recent IP and information law scholarship that are reminiscent of the CLS movement.

And just as the first wave of CLS scholarship was associated with the civil rights movement, the reemergence of CLS in the IP and information law context seems somewhat aligned with newly emerging manifestations of technologically inspired grassroots activism.

Why is the revival of CLS themes so apparent in IP and information law scholarship as compared to other legal sub-disciplines? Is it simply a manifestation of a significant cultural and historical nexus between IP and the humanities? Or is the reemergence of these themes in the context of IP and info law scholarship politically motivated, as CLS scholars might posit? To what extent is the push for copyright and patent reform coincident or concurrent with emerging CLS themes in IP and information law scholarship? Are the goals of CLS being realized, intentionally or not, in popular efforts to recontextualize IP and information law debates? These are questions that we hope to examine in today's symposium.

Our first panel will focus on the resurgence of CLS in IP and information law scholarship, and our second panel will explore the relationship between critical work in legal academia, and political activism in the IP and information law policymaking realm. Finally, our third panel will examine the increased politicization of IP and information law policymaking, and how it may or may not intersect

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with increasingly politicized nature of IP and information law scholarship.

With that brief overview, I am pleased to turn things over to Professor Peter Goodrich, who will lead our first panel.

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

PETER GOODRICH\*

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

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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

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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

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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 mediated 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).

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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.

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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).

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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

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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).

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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.

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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>.

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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).

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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

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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).

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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

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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).

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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.

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## PANEL II: CRITICAL LEGAL ACTIVISM AND NETROOTS MOVEMENTS

VICTORIA SMITH EKSTRAND\*

BRETT FRISCHMANN\*

JOHN TEHRANIAN\*

SIVA VAIDHYANATHAN\*

**BRETT FRISCHMANN:** Thank you for being here today and thank you to Sarah, Eric and all the AELJ members for their hard work in putting the conference together, and especially to Agatha for having such a vision to bring these three different panels together and all of these great scholars together. I think the vision is really quite amazing.

We are going to pick up where we left off with the last panel and continue an excellent discussion. The theme here for this panel is “Critical Legal Activism and Netroots Movements.” In a sense the panel is going to serve as a bridge between the first and third panels with the first panel that's focused on critical legal studies and IP and the third panel with its focus on the role of the public in IP and Information Law policymaking.

We have three outstanding scholars whom I will only introduce very briefly. I want to begin with Victoria Ekstrand, from UNC's School of Journalism and Mass Communication. She specializes in media law and First Amendment issues. We are using Victoria's Article, *Birthing “CLA”: Critical Legal Activism, the IP Wars and Forging the Law*, as a springboard for our discussion so we're going to hear from her first.<sup>29</sup>

Then next we'll have the pleasure of hearing reflections from Siva Vaidhyathan, the Robertson Professor of Media Studies and the Chair of the Department of Media Studies at the University of Virginia. Siva is a cultural historian and media scholar. He is a prolific and very influential author, and has even been on *The Daily Show* with Jon Stewart! Finally we will have the pleasure of hearing from John Tehranian, the Irwin R. Buchalter Professor of Law at Southwestern Law School. John is a very experienced IP and Entertainment Law

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<sup>29</sup> Victoria Ekstrand et al., *Birthing “CLA”: Critical Legal Activism, the IP Wars and Forging the Law*, 31 CARDOZO ARTS & ENT. L.J. 663 (2013).

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litigator. He is also a prodigious scholar, and his recent Article, *Towards A Critical IP Theory: Copyright, Consecration, and Control* influenced the organizers of this symposium.<sup>30</sup>

**VICTORIA EKSTRAND:** I know the first panel went into some of the history of CLS but to talk about what we mean by critical legal activism I think it's worth reviewing some common themes of first wave CLS if we can call it that.

First, CLS, in its initial incarnations, talked about rights demonstrated the law's indeterminacy and showed how the same law often yielded different results. Secondly, CLS was interested in interdisciplinary analyses that revealed how the laws' effects were varied and inconsistent. Third, CLS exposed how the legal system created its own realm of insiders, effectively blocking participation from untrained legal actors. And finally CLS showed just how impenetrable the law could be. CLS argues for social visions and reform that the law often seemed to block.

We would argue that CLS scholars were very good at exposing the laws' indeterminacy in their work and the value of interdisciplinary scholarship in looking at the effects of law and policy, how it was that law actually worked on the ground. Where they struggled more was in effecting actual change.

In other words, if CLS 1.0 was a movement, it was a movement mostly on paper. It was a response to what the 1960's were about but it did not really carry forth a lot of these visions into practice. There are a number of reasons for that, some which we've heard about and some of which our paper gets into and we can talk more about that later if you want.

Our primary argument in these two papers is that the intellectual property wars have been a privileged location to help realize some of the goals of first wave CLS. CLS did not cause a realization of those goals but those goals have nonetheless been realized to some extent in the last decade or so by engagement in these disputes. We began to talk about how that happened. Who's made that happen?

The reaction and responses to the IP wars have come from a number of different locations and actors, all people affected in one way or another by increasingly overprotective IP policies. The discussion has engaged academics, students, lawmakers, industry hackers, artists, musicians, even my mother, every time she asks for a photo of my daughter and she wants to do something fun with it. That has made it a unique location for discussion about legal reform.

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<sup>30</sup> John Tehranian, *Towards A Critical IP Theory: Copyright, Consecration, and Control*, 2012 B.Y.U. L. REV. 1237 (2012)

Academics have been talking forever about the problems with the fair use doctrine and the sometimes arbitrary and subjective way fair use is applied. If you work in IP or have any relationship to these issues you're constantly bombarded with questions about fair use.

Academics, outside the law schools, are also greatly involved in this discussion. Both papers we've written talk about the unique role people like Richard Stallman have played in taking action and inspiring others to take action. Scholars like Siva and Gabriella Coleman more recently and others have set the stage for thinking about copyright in particular as a historical and current power struggle.

My UNC colleague, Paul Jones in the School of Information and Library Science was among the first to set up one of the first free and largest open source databases online. So IP was and remains a very interdisciplinary exercise.

Programmers, academics, and legal professionals have set up new systems and new organizations to make IP law and policy more accessible to people like my mom and others: Creative Commons; the work of EFF and Public Knowledge, these are all efforts that, in Christine Harold's terms, intensify. Are they perfect solutions to all the problems we face in IP law? No, but they are, we argue, real efforts towards reform.

Finally the activists' efforts of the past year which the next panel is going to get into, the blackouts and so on about PIPA, the pushback against the Research Works Act, the new pushback against the revised CFAA, these are all responses that demonstrate some promise of reform, we argue, some promise of moving vision into action. Again the realization of these last two objectives of CLS here are what we're terming critical legal activism and in Harold's terms a kind of resistance in which untrained legal minds, actors, critically employ the controlling structures of society rather than simply fighting against them.

Critical legal activism lives in what Dave Karpf might call the organizing layer of collective action. This is a relatively new space in collection action theory. It's what the Internet has obviously enabled us to do, to organize on it, to use it, to think about, debate, and influence policy. Karpf might say the work of IP activists in the last decade or so has been an NMAO, a non-membership advocacy organization.

That's less a group and more a kind of a loosely organized coalition of netroot activists who petition, but more importantly, are creating these online tools for collective action. Some of these tools look like "clicktivism," you might argue, and I think that is a valid critique.

By contrast, some of these tools seem to have a greater potential impact. "Fork the Law," for example, is a group of hackers and law students based in Silicon Valley, who are working to reform the

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Computer Fraud and Abuse Act. Our second paper goes into more detail about this group, which is building Internet tools that allow for more direct commentary from citizens on law and proposed legislation. Along the same lines, Representative Lofgren recently solicited comments from various groups interested in reforming the CFAA on Reddit after the suicide of Aaron Swartz' suicide. Fork the Law is actively recruiting hackers write code to enable this idea of an open source, citizens' legislative markup.

What fuels critical legal activism, if we're going to call it that? The papers don't address this directly but our discussions have led me to think about what's behind the shift, and I think there are a few possible answers.

First, I think the subject matter here, intellectual property, is a factor. Everyone is touched in some way by intellectual property in either their professional or personal lives. It has ubiquity.

Second, speaking as a former journalist and somebody who worked at the Associated Press for ten years, I think a really compelling narrative helps in this activism. Part of what happened in the SOPA and PIPPA debate was this story about Wikipedia being down in the black and a bunch of hackers jamming the phones of US Congress. This makes for a good story. Similarly Aaron Swartz' suicide this year has been another compelling heart wrenching story and those narratives have helped to fuel this type of activism.

Third, is this interdisciplinary collaboration and cooperation, even here at this conference. IP law and policy requires cross-collaboration among and across layers of knowledge, skill, and social power. Professor Litman's work has talked about this and the importance of engaging all these different people in the discussion. Dave Karpf's work is also really instructive here. We have this new layer online to create and coordinate the effort and talk about our rights and the law. These tools are not going to save democracy and reform every bad law. They're not going to turn us all into lawyers. Let's hope not. But they invite a new level of participation. And Karpf has convincingly argued, in my view, that this is happening. I like to think that is a promising step towards reforming much of what's wrong or problematic with IP policy today.

Finally, CLS struggles because of internal disagreement within law schools about the role of the critical theory in legal academia. It is often said that law professors associated with CLS have been or will be denied tenure because of it, and the label has become quite suspect. As a result, fewer law professors identify themselves as "crit" scholars, despite the fact that many law students came to law school, and still come to law school, looking to delve into critical scholarship, or make the kind of change we're talking about. All of this, I think, raises

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questions about the role of legal education.

**SIVA VAIDHYANATHAN:** Hi, thank you for staying to listen to me, and thank you for staying to listen to Victoria discuss her paper. It's very provocative, and it sparks a lot of great thought. It started a wonderful, but all too brief, phone conversation among all of us the other day.

I also want to thank you for just being you, for being Cardozo. This is an amazing place. I spent nearly eight years just down the avenue at NYU, the other school in Manhattan. But, this particular school always had its doors open to me.

And there were so many wonderful events in my time that I spent in law school—great symposia, great guest speakers. I always seemed to be on the right email lists. The faculty and students here were very welcoming, so I felt like this was a second home when I lived in Manhattan, much more than that other law school down the avenue.

But I want to talk about Tori's paper because it's an exciting confluence of ideas. It has revived a thought I have had for some time. We are going to have to get our minds around the intellectual history of the free culture movement, or whatever term you want to put to this notion of information policy activism, copyright activism, et cetera.

Now, if and when we actually take the intellectual history very seriously, Tori's contribution will be a central part and chapter of it. It's not the whole story, of course. The story is of how a ragtag group of copyright scholars in the academy in the early 1990s started noticing opportunities, changes, threats, and they happened to get together, in many cases with librarians who were noticing the same things and a few other disparate intellectuals, and raised early warnings about some rather scary proposals in Congress that ultimately became law by 1998.

You can't necessarily draw a direct lineage between critical legal studies ("CLS") and all that happened, the free culture movement; but as Victoria explains, because the legal academy itself was altered by the presence and the experience, the often painful experience of CLS, you can't help but pay attention to its influence in general. It's the extent to which CLS changed the game, changed the "habitus" of the legal academy.

So that means there's actually this whole fascinating story of the rise and fall of CLS, which has been told in various forms, and in various ways, but I think there's probably a much bigger and richer analysis yet to be told.

If I were to give direct advice to Victoria on how to expand and deepen the paper, I would suggest that she run with one particular set of scholars and talk about their influence. It's too easy to trace this free culture movement to the writing of Larry Lessig and Jamey Boyle, two people that I love dearly and certainly in many ways are the loudest and

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proudest among us. But in terms of who they're footnoting, who they're reading, who the rest of us are footnoting and reading, there's such a fascinating set of concerns and issues rolling through the legal scholarship that don't always make it onto Larry's presentations but nonetheless affected how all of us think and discuss this.

I'm referring to the work of Pam Samuelson and Jessica Litman in the 1990s, and far beyond of course, right up through Julie Cohen's work, which I think really exemplifies a lot of the powerful critiques offered by CLS, as we heard earlier from Sonia, and the work of Ann Bartow and her very explicit feminist analysis of copyright and many other issues that is essential to this. You could actually take a cast of characters like Pam Samuelson and Jessica Litman, Julie Cohen, Ann Bartow, Rebecca Tushnet, Sonia Katyal and tell an amazing story of the conversation among these scholars and their influence on other scholars. What you're seeing here is a feminist and/or subaltern influence on a dominant set of ideas within the legal academy to the point where these scholars, all of them, started their careers at different points, have had remarkable influence on the rest of us.

And therefore they have had remarkable influence on public policy. If you have just started to get interested in digital copyright, and you started Googling for "digital copyright," chances are you're going to find Jessica Litman's book because it's called *Digital Copyright*. So what a great thing and what a great primer and what a great introduction to those issues and it's free, which is the whole point of this, right?

One of the things that I think could be fruitful in the paper is a deeper analysis of the battles in the 1970s and 1980s between CLS and law and economics. Because so much of what was changing in the legal academy in the 1970s and 1980s and changing in jurisprudence was the profound influence of law and economics: Robert Bork's book on antitrust, Richard Posner's early work, et cetera. This stuff was rocking the right and having a tremendous influence on the left and of course having a tremendous and immediate influence on regulatory policy in the Reagan Administration. In the wake of law and economics, CLS was trying to say, "wait, the story's not that simple."

The last thing you want to do is simplify all of these complex stories of power and human relations. What you have is CLS working in direct response to and opposition to law and economics. You also have it trying to displace, in a lot of ways, a more established liberal rights framework—a Dworkin-Rawls framework, for instance. So CLS was playing this fascinating role in the 1970s and 1980s. That complicates the relationship between CLS and the free culture movement because law and economics turns out not to have a definite and clear set of answers about what sort of copyright policy we should have. It actually yields a fascinating and complicated set of answers to the point where,

for instance, libertarians like Alex Kozinski or originators of the law on economics like Richard Posner, can at various times in their career be the most vocal and fervent advocates of looser intellectual property rather than stronger—although not always in Posner’s case.

Okay. Here’s a caveat in this whole story. It comes to the activism part. That intellectual property law is politically contested and that it’s politically contested by multiple stakeholders does not necessarily mean that there’s a direct link to CLS. Many areas of the law are politically contested by multiple stakeholders. Lots of areas of the law are subject to political sway and movement. You can look at the gun rights movement and gun rights policy as a similar phenomenon. So there are multiple stakeholders active in various ways, nongovernmental organizations, dispersed groups active on both sides of these issues, on multiple sides of these issues. So it doesn’t necessarily follow that just because there is activism there’s a CLS influence. However, I think if you trace it intellectually, there’s something to go on here.

So it’s not just the CLS loosened up the legal academy in the 1970s and 1980s, although it certainly did, to the point where, as Tori’s paper discussed and as we heard in the first panel, CLS has left us all with the ability to ask questions in different ways that we might not have asked in 1970 or 1971 and maybe even yielded different answers. The spirit of CLS has certainly been taken up by all sorts of people in the academy, whether they know it not or whether they cop to it or not. But, it’s not just that. Cultural studies and cultural theory has loosened up U.S. intellectual and academic life.

It’s done it in a similar way, in a sense that at its high point of visibility in the late 1980s, early 1990s, it was the object of intense derision. By this I mean left wing cultural theory. And it was quashed in the sense that it is no longer “the thing.” To traffic in these ideas, to write dissertations quoting Deleuze and Guattari throughout, is not necessarily an avenue to a good job and tenure anymore. However, the influence of Roland Barthes, Michelle Foucault, Deleuze, Guattari and the Frankfurt School are so embedded in the habitus—in the common sense of the cultural academy and therefore the classroom and so many people who receive an undergraduate education at America’s leading universities—that of course it’s playing a role in the lens we use to examine the world.

So, it should not be a surprise that when young people who have gone through the elite universities of the United States enter the elite law schools of the United States and then enter the legal academy, they are carrying through some of these habits of thought, and perhaps standpoints or perceptions. That doesn’t mean that those habits are dominant. It doesn’t mean that those habits always yield the same simplistic answers, which is always a danger in any ideological shift,

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but it is part of the milieu of ways that it certainly was not before the 1970s.

It is also important to remember the relationship between CLS and legal realism. Remember, in American life pragmatism never went away, and so legal realism, while out of fashion after World War II for a variety of reasons and the rise of rights-based liberalism pushed it away, was never out of the political and intellectual life of the United States. So there always was an opening for it.

Now we are at the time when Victoria makes the point that CLS has had such a profound influence on the legal academy that it's been absorbed without being identified. Nothing strikes me as better evidence of this than, just last week, in the oral arguments in *U.S. v. Windsor* (the Defense of Marriage Act case) when Justices Scalia and Alito both hinted that they could not traffic in the rights-based analysis because the rights-based analysis would not go their way.

They can't play, and you can't play around with the Fourteenth Amendment, anyway. They can't do a textual reading of this case because there's no text to read. So in fact you have Scalia asserting that sociologists disagree about the effect of gay marriage on children, which is not true but it's something he wants to believe very much.

And you have Justice Alito saying that we're asked to judge a very recent thing here, you know, how long has there been gay marriage?—as if his job is to make a policy decision. It's striking that these are the two justices essentially asking sociological questions poorly, without real information. Nonetheless, they are—it's as if they want Gunnar Myrdal to show up and write a brief for them all of a sudden. So this is just how much this habit of thought has actually affected legal thinking.

Ultimately, how much has legal realism and CLS affected legal thinking? I would assert that those of us living in this country in the wake of *Bush v. Gore* have a real hard time believing that the law is the law is the law. Thank you very much.

**JOHN TEHRANIAN:** I want to thank the organizers for putting together this great conference and I would like to echo both Siva and Sonia's sentiments that this is a prescient topic. This invitation came at a particularly timely juncture, not just because of the ubiquitous headlines about the Stop Online Piracy Act ("SOPA") and the Protect IP Act ("PIPA") last year and the Aaron Swartz tragedy this year, but with respect to my own scholarship. I recently published an Article that touches on the specific themes of this symposium, so I'm appreciative of this invitation and the opportunity to meet with some great scholars in this field and talk about these issues.

I first suspected that the IP world had permanently changed a

couple of Thanksgivings ago—specifically, the Thanksgiving of 2011. I was seated around my dining table, having a classic turkey dinner with a group of relatives, including one of my younger cousins. He’s about sixteen years old and, like most teenagers, he’s never paying attention to any of the boring things that the adults are talking about. Instead, he’s usually texting or tweeting with friends on his iPhone. So he’s sitting around, tinkering, per usual, on his iPhone—this time listening to some music on it—when, all of a sudden, he looks over to me and says, “Hey John, I’ve got a question for you.”

Startled at his sudden attention, I look over to him and reply, “Yeah, what is it?” And he responds with the following line: “So, you know, what’s up with SOPA? What do you think?” A bit stunned, I look at him and think to myself that there’s no way he’s asking me about *the* SOPA. Remember, this was before all of the coordinated protests and the most vocal activity against the legislation. I just figure he must be referring to a new band I’m not familiar with. In a (misguided) effort to maintain my “indie cred,” I tell him that I haven’t heard of them but am eager to learn more: “So who do they sound like?” I ask. My cousin drops his phone on the table and retorts, “You haven’t heard of SOPA, John? I thought you were an intellectual property expert. You *are* a law professor, *right?*”

Rattled and looking to reestablish my bona fides, I mutter, “Oh, of course, you mean SOPA, the Stop Online Piracy Act . . . what do you know about that?” And he just shakes his head and then starts telling me all about SOPA and how he and his friends are outraged. All the while, I’m still thinking about how a sixteen-year-old kid could be following bills pending before Congress. And at that moment, it occurred to me: we are in the midst of a sea change. So it wasn’t too surprising when, in January, there was the famous blackout where Wikipedia, Google and others gave unprecedented attention to the arguments against SOPA and PIPA and secured the demise of the legislation.

Of course, the incredible netroots/grassroots resistance to SOPA and PIPA played a critical role in the bills’ swift defeat. But there will be more SOPA’s and PIPA’s down the line. Still, it was a remarkable moment, as evidenced by that dinner table conversation where I put my foot in my mouth and forever called my credibility into question in front of my young cousin.

The SOPA/PIPA moment demonstrated that there were serious changes afoot in the world of intellectual property. Now I came to this topic in a way that’s similar to Sonia. As she mentioned, she went to law school hoping to become a civil rights litigator. Although I do mostly intellectual property work, in another part of my academic life, I focus on civil rights issues and write about the social construction of race and the history of whiteness. My two main areas of academic focus

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are, therefore, seemingly unrelated. Well, as you know, when you're going up for tenure, you often put these packages together where you have to explain your research agenda and trajectory and you get questions from colleagues about why you pursue these two divergent fields and what they might have in common.

So, post-tenure, I really started thinking about the relationship between intellectual property and civil rights issues. It became clear that the thing that they have in common is, at least for me, a similar methodological approach which is very much informed by the critical legal studies and critical race theory movements; an approach that analyzes societal hierarchies and power relationships and how they can be either accentuated or reproduced through the use of seemingly neutral principles and ordering laws applied formalistically in our legal tradition. What I've effectively done—and what I think all of the scholars here have done—is begun to look at intellectual property through such a lens.

Of course, this is an important time in the development of intellectual property. Copyright is exploding in large part because copyright law actually means something to the average person in a way that it didn't just a generation ago. It was hard to get hold of a printing press in the 1970's when the last major copyright act was passed in 1976. However, now, we all have printing presses of our own, both at home (by way of the networked computer) and in our pockets (by way of our networked smartphones).

Many of you are working on these “printing presses” right now. They allow us to make many types of uses (both authorized and unauthorized) of copyrighted works that were never before possible. Copyright law now influences our daily lives to an unprecedented extent. It tells us what words we can write, what movies or art we can watch, what tattoos we can get (think about the Mike Tyson case involving *The Hangover* sequel), what yoga sequences we can perform (think of Bikram claiming copyrights to yoga sequences), and even what kinds of worship we can engage in (think of the countless cases involving splinter groups and religious traditionalists fighting over copyright claims to books of worship).

So copyright law has a profound impact on the digital, networked lives of the twenty-first century. Of course, as I've argued elsewhere, because of the way copyright law is written, it has the possibility of turning us all into massive infringers. We all unwittingly infringe copyright law hundreds of times a day—in some ways that are quite harmless, and in some that are potentially more harmful. And at every corner, the law mediates our relationship with cultural and expressive content and its ability and means to do so is ripe for deconstruction.

I've looked at this issue in terms of three different moments:

when rights are being vested, when rights being asserted, and when rights being adjudicated. I've examined how, in those moments, our ostensibly neutral laws and ordering principles can actually consolidate and perpetuate existing power structures.

So to give you a small example of what I'm talking about, I'll take what is, at first blush, a seemingly boring topic: the registration requirement of copyright law. This is something that doesn't get a whole lot of academic attention; yet for anybody who actually litigates copyrights, this is perhaps one of the most important things to consider in a piece of infringement litigation.

As you all know, we live under a copyright regime that has supposedly done away with almost all formalities. That's the rule under the Berne Convention, which the United States adopted in 1989. Yet in the United States, unlike any other major country in the world, we have a requirement that you must timely register your copyright in order to qualify for the two big prizes of copyright remedies: statutory damages and attorneys fees. If you don't timely register, all you can recovery is actual damages as a plaintiff. Now this may seem like a relatively innocuous rule—just a harmless procedural formality—until you start doing a big-picture analysis of what this means in terms of whose copyrights are enforced and whose copyrights aren't.

Effectively, this unique rule creates a massive rift between sophisticated creators and unsophisticated creators—a rift that also falls on socioeconomic lines, that falls on racial lines, and that can fall on gender lines. For the unsophisticated creators of the world (who almost never timely register), when their works are infringed, what can they do? Almost nothing. They can try to get an injunction at the perfect time, but if they miss that window of opportunity, they can only recover actual damages and profits, which are tough to prove; they can never receive their attorney's fees and they don't qualify for statutory damages. In short, they cannot practically litigate their copyrights even though we're told that our copyright regime lacks formality and copyright vests instantly at the moment of creation.

For sophisticated content creators, the situation is much more sanguine. They have the hammer of statutory damages and attorneys fees available, such that even a an individual act of copyright infringement might be worthwhile to push into court—something we've seen with the aggressive anti-p2p campaigns that resulted in huge judgments against the likes of administrative assistants and students for the unlawful sharing of files online.

So, for example, if you infringe the works of a Hollywood studio, you're going bankrupt or even to jail. But if the studio infringes your work, the studio lawyers know exactly what to ask first: did you register your work and when? And most often, you didn't register your work or

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you didn't register it timely, in which case they can say, good luck, sue us, go for it: you'll never recover enough to pay your attorney. As victims of infringement, sophisticated companies can pursue back-breaking penalties against defendants; meanwhile, as alleged infringers themselves, sophisticated companies can often times escape with only *de minimus* liability.

This massive power differential, emboldened by legal formality, perpetuates cultural hierarchy and it's only by looking at copyright through a critical lens that we can begin to appreciate this dynamic and its broader societal consequences. But there is hope on that front with the development of a popular copyright consciousness. Copyright has grown increasingly relevant by affecting us in myriad ways in our daily lives; as a result, there is a growing mainstream awareness of copyright law, a trend epitomized by the example I gave earlier involving my cousin. Consider the stark contrast between the relatively indifferent public response to the legislation that led to the *Eldred* case (the Sonny Bono Copyright Term Extension Act which passed in 1998) and the massive outcry against PIPA and SOPA some fifteen years later.

In 1998, the public knew little about the Copyright Term Extension Act. It was passed without much debate—just a voice vote in Congress—with scant public dialogue on the subject. A decade and a half later, it's a different world. With the SOPA and PIPA incident, we just witnessed remarkable scrutiny over the minutiae of pending legislation before Congress by a massive number of individuals who are typically not politically inclined. And this leads to another interesting point: the critical activism that we're now seeing in copyright appears to transcend traditional political divides.

This is a salient aspect of critical intellectual property activism that I think powerfully distinguishes it from its predecessor, CLS, and gives me some hope that it can enjoy greater achievements in the real world than CLS ever did. One of the charges against CLS was that it was primarily an ivory-tower, elite-based movement that never really moved that far beyond academic circles. With respect to the copyright activism that we're seeing now, however, the impetus is coming not just from the top down but from the bottom up; and we're witnessing individuals who are traditionally apolitical getting engaged.

It's not just that the youth became involved in the movement against SOPA and PIPA; rather, as the debate over SOPA and PIPA demonstrated, the traditional fault lines of politics don't necessarily coincide with the emerging fault lines of copyright law. For example, on the Supreme Court, perhaps the most ardent protector of content owners is someone whose views are typically associated with the progressive left: Justice Ginsberg.

Meanwhile, some of the most ardent criticisms of copyright in

recent years have come from the political right. An individual who's going to be in the next panel, Derek Khanna, epitomizes this observation. Khanna is the author of the influential study from the Republican Study Committee last November that criticized copyright law by talking about its need for greater fair use protection and questioning its increasing duration. Khanna did so from a free-market perspective—a libertarian point of view—which critiqued runaway copyright as a form of corporate welfare and an anti-competitive, unnatural state-granted monopoly.

Now what was really interesting was that report came out on a Friday (I know this because I remember receiving a copy of the report immediately from a friend who saw that my book, *Infringement Nation*,<sup>31</sup> was cited in it); but, by Saturday, it had been formally withdrawn. The Republican Study Committee had quickly issued a statement claiming that the report was not properly vetted and that an oversight resulted in its mistaken release. Many people questioned the official explanation and wondered if powerful lobbying efforts behind the scenes explained the abrupt about-face and mea culpa.

There remain a lot of questions as to why the report came down. But, regardless of what happened, the very fact that the report came out at all under the aegis of the Republican Study Committee suggests that there is unusual potential for an alliance here between progressives, on one hand, who are looking to question corporate power and welfare from a social justice point of view (and who are asking how copyright law might cut across color, gender and socioeconomic lines) and free-market conservatives, on the other hand, who are concerned about undue government regulation of the economy and the inefficiency consequences. Both sides also have shown concern about the impact of copyright on the vindication of First Amendment values.

Meanwhile, you see a sizeable rift occurring between two traditional Democratic bases—Hollywood and Silicon Valley. Hollywood, of course, is strongly supportive of a strong copyright regime to protect content creators, whereas Silicon Valley, as evidence by what happened with the SOPA and PIPA protests, has increasingly questioned the unfettered expansion of copyright. The tectonics of the emerging copyright world are an area rife for analysis.

There is one final note I want to leave you with. I don't often talk about my practice life when I'm speaking before a group of law professors because they often look down on it. They might see me as less of a scholar as a result. Likewise, I don't often talk about my professorial life when I'm speaking before a group of lawyers because they often look down on it. They might see me as less of a skilled

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<sup>31</sup> See JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* (2011).

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tactician and practitioner as a result. But critical intellectual property law is an environment where the two areas—focusing on the theory and actually putting it into practice—can meet.

One thing I've always tried to do is to take the cases that I work on—including a lot that I do on a pro bono basis—and get my students involved. This provides law students with a direct opportunity to experience litigation related to critical intellectual property activism. For instance, in one example, I had students help with a fair use defense for a senatorial candidate famously sued for copyright infringement by a well-known music icon for using his songs in a campaign ad. In another case, I had students working on behalf of a critically acclaimed artist in a dispute against one of the big music publishers.

I think on a small practical level, there is a lot we can do as law professors and, for you in the audience who are law students right now, I would urge you to take advantage of your time in the academy to gain practical experience in IP. It is such an exciting and dynamic field and it will enhance your education immeasurably to put some teeth into critical copyright theory by taking the skills that you're learning in the classroom and applying them in the field through IP activism. Thank you very much.

**BRETT FRISCHMANN:** One of the questions I had in reading Victoria's paper was trying to make the connection between critical legal *studies* and critical legal *activism*, and in particular critical legal activism in the context of net activism or netroots activism. I am going to throw out a couple of questions that are all connected and just ask each of you to respond to the particular question that jumps out at you . . .

First, is net activism special? Or is it critical? And when is net activism *not* critical? How might we distinguish "critical legal activism" as opposed to just plain old "activism?"

Relatedly, what about netroots movements make them powerful or weak, effective or perhaps ineffective? The reason I ask is that I wonder whether we should systematically study these developments before we celebrate them? In other words, might we be putting too much attention on the few that seem to succeed without also paying attention to the many that fail or the many that don't quite arise or get the public attention that's necessary?

After that, we can come back to the role of academics in legal education in this kind of area.

**VICTORIA EKSTRAND:** Certainly, net activism has many of the same characteristics as regular activism. But there is something unique about the Internet's infrastructure, that in reaching people like your 16-year old cousin, it has really helped to empower them in a way that I think

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the initial CLS scholarship, the initial crits were talking about. That was really the thing that was not as present, in CLS 1.0. I think in that sense this conversion into action by virtue of some of these net tools is really, really quite powerful. Evgeny Morozov's work warns a lot of us who get excited about the Internet to stop getting so excited. He's apt to label a lot of us, perhaps, as Internet solutionists. I'm pretty mindful of that critique but there is this tendency, now, for a lot of these folks to just click, yes, I agree and, you know, I'm going to send another tweet to my Congressman or whatever.

Perhaps there's more to it than just getting excited about a tweet or sending yet another email to a member of Congress, however. I do think that there is an opportunity. I think students in particular have this sense that they have these tools at their disposal and will use them.

**SIVA VAIDHYANATHAN:** I have two thoughts about that. One, what kind of activism isn't digitally mediated? I mean, is there anybody really planning an activist campaign that its specific issue is social media or YouTube? What kind of idiot would do that, right? How are we going to test this proposition? That's one thing.

Secondly, it's important to remember that when human beings want to get something done, they employ the tools that are available. So, if what is available is the telegraph, you use the telegraph. If what is available is the telephone, you use the telephone. If what is available is Twitter, you use Twitter. There's nothing really profound about that.

Now that's not to say that those media systems have the same reach into the world, that they don't have different levels of friction embedded in them, but it's never a simple story. So, one of the things about the activist ecosystem today is that there is so much noise. I mean we are, if we are engaged with any sort of activist movement from any political position right now, instantly profiled as the sort of person who would be and are thus barraged with many more requests for our attention and our money. So, that creates a tremendous amount of diffusion of attention, right to the point where, "how do I know what I'm going to focus on? How do I know whether I'm actually making a difference? How do I know whether I've just clicked to support Planned Parenthood and whether that's going to matter more than the check that I write to some other group?"

Those are all questions that, I think Brett Frischmann's inclination was right. It is going to be years until we figure out a measurable way of assessing how these tools have altered the political environment of just the United States, let alone the world. It's great that Brett pointed out, and I think very helpful that Brett pointed out, that we often focus on the successes.

One thing that really bugs me about a lot of my peers' writing, is

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that Wikipedia is like the universal solvent in all of it. Like “oh my gosh, look at Wikipedia!” Therefore, anything can be like Wikipedia without recognizing that Wikipedia is essentially special, perhaps a one-off, right, that we’re waiting for the second Wikipedia. We’re waiting for the second Talking Points Memo to revolutionize journalism although, you know, maybe *The Huffington Post* is that. We’re waiting for the Howard Dean campaign to finally win a primary. We’re waiting for all of those things.

And so focusing on failure as well as the successes is really important. And analyze! You know that we have the tools today that we didn’t have five years ago, and we’ll have a different set of tools in five years. People are going to use whatever tools are around. I’m not sure that we’re in a position to generalize too much about it.

Now the Stop Online Piracy Act (“SOPA”) and the Protect IP Act (“PIPA”) movement is fascinating for a couple of reasons. It has to do with not just the fact that Wikipedia was involved or Google was involved or that Reddit was where your cousin found out about it. Those are important parts of it. But let’s not forget that a lot of us were banging the pots and pans together for more than a decade to get a vocabulary, to get a narrative, to get a set of clear examples and a couple of nightmare stories out there, so that enough people—even if they were just elites—understood that there was a lot at stake here.

It took from 1998 to 2012 to essentially prime the public or a sufficient segment of the public to care about things like this and enable that sort of reaction. So the people who were alarmed by what they read on Reddit about SOPA and PIPA probably ran to a book, ran to a website, ran to the EFF site, picked up Larry Lessig’s book, picked up John’s stuff and said, “here’s something I can actually digest that can make sense of it and this is why I care and this is what I can do about it.”

Now Reddit provides a tremendous forum for rage. But it’s not the only one. And in that particular case it was very helpful. There are a dozen cases in which Reddit was not such a great example of rage.

**JOHN TEHRANIAN:** I think it useful to have a healthy dollop of skepticism about what happened with SOPA and PIPA. I always think about what Larry Lessig said in the wake of his disappointment about his arguments not carrying the day in the *Eldred* case: “what do you expect when you’re fighting all the money in the world.”

What was different about SOPA and PIPA—unfortunately and maybe cynically—was that all the money in the world there *wasn’t* in favor of SOPA and PIPA; instead, there was a lot of money on the other side and that’s what made it a fairer fight. If you think about it chronologically, the debate over SOPA and PIPA was taking place right

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around the same time as the Occupy Wall Street Movement. We don't even talk about Occupy Wall Street anymore. It seems like it's gone—and WikiLeaks too. Those are movements where all the money in the world was on one side and look what happened to them even though they had access to the Internet—they had the youth, and they had the new tools of digital democracy at their disposal.

SOPA and PIPA were perhaps different because they had Google. Google and a whole coalition of very powerful companies could countervail the forces of Hollywood. Now that's not to say it wasn't a big moment; it was. But I think it's also important to recognize that what made the SOPA/PIPA moment different is that there's money now on both sides of the debate. That makes for a fairer fight.

**AUDIENCE MEMBER:** [inaudible question]

**SIVA VAIDHYANATHAN:** It's really unhealthy to bracket out copyright from any of these other information policy issues. Facebook's new quasi-operating system for your phone is essentially a massive surveillance tool to make sure that Facebook knows everything you do on your phone. That's really why it's there. It's not because you are tired of making three clicks to get to Facebook. It's really there to make sure that every app-active gets filtered through Facebook and thus monitored so Facebook has a much better idea.

Now there may not be any harm to that, but that's certainly not what we're told about it. So that's just one of many issues where people who have a critical stance from a scholarly or an intellectual point of view or critical journalist should be connecting with activists, should be making it clear that that's a front where we need a narrative and we need a vocabulary and we need stories exactly like that to raise awareness, because these are not separate issues. Julie Cohen made it clear a decade ago that copyright and privacy are not separate sides of the issue. That in fact digital rights management, a big part of that was knowing what your customers are doing.

So, I think that leads us to ask a series of questions about where we should go with the critical legal studies/critical information studies/free culture movement. What should we be focusing on next? I have a few ideas obviously.

One is challenging this notion that information is information and that information maximalism is our goal; that the idea that what we're fighting for is the good of the Internet. Well, that's probably not a good idea. What we're fighting for is the good of the people and it just so happens that the Internet is an important tool in many of those battles, but it's not the only answer. So we should not essentialize the Internet or essentialize Internet freedom.

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It really is about what people can do. There are all sorts of limitations on what people can do and all sorts of pitfalls. So we have to keep challenging corporate platforms. We can't be satisfied with the occasional friend on our side, on one particular issue, and thus absolve it of all of its sins or problems, especially when they claim to be champions of the public interest.

We also—and Sonia brought this up last session—have to challenge the liberal US-centric narrative of the public domain by paying close attention to the demands of cultural citizenship in all its forms around the world and not just the liberal individualism with which we're so comfortable playing. And as Andrew Ross brought up in an important article that Victoria cited in her paper, we have to pay attention to labor issues as well. We have to understand that a lot of the valorization and celebration of the public domain and radical freedom goes hand in hand with the dissolution of the status of labor as well.

So these are the different ways we should be thinking through in complicated ways that may actually undermine our political efficiency but in fact will, I would say. But I think that as responsible scholars these are issues we really can't avoid.

**BRETT FRISCHMANN:** Victoria, I want to give you one last chance to make your pitch to this audience of eager and anxious students. Is there something you want to close on? We used your paper to anchor this session. I want to come back to you.

**VICTORIA EKSTRAND:** You may call me an optimist, but I think John's story about his 16-year old cousin really helps to illustrate this so well and the fact that for those of us who are listening to our students well enough, we are seeing these tools work. They are fleeting—I will concede that these movements come through. There are opportunities that are grabbed and then they move on. These are not very highly centralized groups that are coming together. They're very loosely formed.

Nonetheless, they are adding significant value in the discussion and the debate about IP policy. I never would have imagined, for example, that my mother would ever ask me to explain to her what fair use is about. We have been discussing this for a number of years now but I do think that folks are more involved. They just are. And the Internet does help to facilitate that.

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PANEL III: POLITICS AND THE PUBLIC IN IP &  
INFO LAW POLICY MAKING

MICHAEL J. BURSTEIN\*

DEREK KHANNA\*

JESSICA LITMAN\*

SHERWIN SIY\*

RICHARD S. WHITT\*

**MICHAEL BURSTEIN:** We have been moving gradually from the theoretical to the practical. Having examined the impact of critical legal studies (“CLS”) in the academy and having discussed the intersection between scholarship and activism, we now turn to the nitty-gritty questions of how to actually enact change in intellectual property and information law and policy.

It seems that the political economy of intellectual property and technology policy has changed in very interesting ways that pose certain challenges to actors in this space. To oversimplify a bit, tech policy used to be somewhat easier to understand in the 1990s and I think even into the early 2000s. It tended to be somewhat siloed—which is to say that issues were more distinct from one another—within each issue you could tell a relatively straightforward story about how policy developed based on social choice theory, political economy, and competing interest groups. For example, in 1998 the Copyright Term Extension Act was pushed by the content industries, who were able to exert enormous influence in Congress as compared to a relatively dispersed and unorganized group of folks who were on the other side. With respect to telecom policy in the 1996 Telecommunications Act, the Bells were running the show for the most part, pushing against somewhat more organized interests among Congress people but by and large they sort of shaped that legislation and in particular shaped the litigation that led to its mostly demise in the years immediately following passage. And the folks who were interested in telecom policy and the folks who were interested in copyright policy for the most part didn't talk to one another. These two pieces of legislation were the product of legislative compromises between largely distinct actors. This

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is no longer the case. The simple world, to the extent that it was simple of the 1990 is, has been complicated in I think at least three ways.

One is the number of players and their interests, so the arrival on the scene of tech policy of companies like Google and Facebook that have their hands in multiple issues and that are distinct from the traditional industry incumbents such as Hollywood on the one hand and say telecom or cable providers on the other hand. We've also seen the maturation of the public interest community in this space. Organizations like Public Knowledge and the Electronic Frontier Foundation have come into their own as forces in tech policy. And of course we've seen the rise of a grassroots or netroots movement that uses technology, and tends to be much more organized than the sort of disparate public interest or grassroots type movements that attempted to gin up opposition to copyright extension or to telecommunications reform in the 1990 is.

The second way in which the world has become more complicated is the range of issues that people who are interested in this space have to confront and the ways in which they interact with one another. So these issues have all moved out of their silos. So now if one is interested in tech policy, one can't for the most part be interested solely in telecommunications regulation or solely in copyright.

One has to have one is hands in each of these issues because they're all very much interrelated. And they're also bound up with a range of new issues, things like cyber security, things like free expression, that has become of much greater salience than it was in years past, and even things like entrepreneurial policy and funding concerns. Tech policy activists find themselves talking about securities regulation when they talk about the Jobs Act and whether or not the securities laws can accommodate things like crowd funding.

Finally, the number of forums in which these issues are debated and in which policy is actually made have become somewhat more complicated. So it is no longer just Congress and the regulatory agencies; there are private sort of self-help measures that are deeply enmeshed in policy questions. Much of policy has shifted to the international stage, to negotiations for treaties between the United States and other nations. New regulatory actors have become much more powerful. The Copyright Office itself, which used to be a ministerial office responsible solely for copyright registrations, has now taken an active role in policymaking as the result of many new statutory innovations.

To guide us through this complex world; we have a terrific set of panelists before us.

Derek Khanna is a Visiting Fellow at the Yale Information Society Project. He is also a Policy Advisor to the Department of Defense

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Science Board on Cyber Security and he is a J.D. candidate at Georgetown. And Derek comes to us from a background as a Congressional staffer. So he was on the staff of the Republican Study Committee and is the author of the now notorious paper that was mentioned on the last panel in which Derek advocated for copyright policy based on weaker copyright protections, a position completely consistent with conservative free market principles but anathema to the incumbent industries who are concerned with this particular policy area.

Jessica Litman is the John F. Nickoll Professor of Law at the University of Michigan. Her distinguished academic career has taken her to Michigan, to Wayne State University, to NYU, American University and to the University of Tokyo. Jessica has in many ways bridged the gap between academics and activism both in her writings which include some of the seminal critiques of copyright in the digital world and in her work outside of the academy where she has served on the Advisory Boards of Public Knowledge, the IP and Internet Committee of the ACLU and the Advisory Council of The Future of Music Coalition, among many other extracurricular endeavors.

Sherwin Siy is the Vice President of Legal Affairs at Public Knowledge where he coordinates the organization's work on copyright issues. He was previously staff counsel at EPIC, the Electronic Privacy Information Center. So these are organizations that have really emerged at the forefront of public interest work in technology policy. And his current employer, Public Knowledge, is actively involved in legislative debates, rulemaking proceedings, and litigation over a variety of tech policy issues.

And finally Rick Whitt is the Vice President and Global Head of Public Policy and Government Relations at Motorola Mobility. Prior to that position he was at Google for more than five years serving as Director and Managing Counsel for Federal Policy and for Telecom and Media Policy. So Rick has spent much of his career in the trenches in Washington representing some of the leading technology companies before Congress and Federal agencies concerning IP, privacy, cyber security, free expression, and internet governance issues.

Rick has also written a terrific paper that the AELJ is going to publish that advocates for better alignment between the logical structure and the functional structure of the internet and the governance regimes to which it is subject. So with that brief introduction, I'm going to turn it over to the panelists and invite each of them to spend about ten minutes or so sort of reflecting on the state of telecom policy and the political economy of intellectual property and tech policy and what we can do actually to enact change in these areas?

**DEREK KHANNA:** I'm Derek Khanna and I wrote the memorandum on

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copyright reform for the Republican Study Committee (“RSC”). What the last panel left out of the story is that two weeks after the RSC released my memorandum I was told that I would not be retained as a staffer—which is why I no longer work on Capitol Hill.

I wanted to briefly touch on the memorandum that I wrote for the RSC because I think it frames some of the issues that we’re talking about here on how to move forward on intellectual property issues. First, in contrast to the previous panelist’s characterization of the memo, I wouldn’t really describe it as advocating for being weaker on infringement of intellectual property. I think it’s more about jiggering the way we look at intellectual property law.

I think most law students who encounter copyright law for the first time probably ask themselves, “What rational system could have come up with this regime of copyright, this hodgepodge, where if the content is from the 1920s then you have this one system of laws, but if the content was a corporate work or after 1920s, you have a different system of laws?” I don’t think that any student can really parse through it and conclude that it is logical. The reason is because there isn’t a logical coherent theory that strings it all together.

Instead, it’s the result of lobbyists that have succeeded in perverting the law and perverting the way that we frame issues that relate to copyright. I’ve written that success in perverting the law, in perverting how we frame these issues and think about these issues, should not be confused with constitutional fidelity. Just because these lobbyists, such as the Motion Picture Association of America (“MPAA”) and the Recording Industry Association of America (“RIAA”), are using 18th Century vernacular does not actually make the policy they are espousing consistent with constitutional principles. So if lobbyists saying things like “natural rights” or “property rights,” that doesn’t actually, magically, make their policy constitutional or consistent with our Founding Fathers’ intent.

My memorandum, which ultimately led to my no longer being a staffer on the Hill, talked about a series of myths in how we frame copyright issues. The first myth is that copyright is free market capitalism at work. I argued that instead it’s a guaranteed government-instituted, government-subsidized content monopoly. The second myth is that the current copyright legal regime leads to the greatest innovation and productivity. I argued that copyright is a Goldilocks-like balance: we want some copyright, but not too much. And, whereas too much copyright can stifle innovation and content, not enough of it can stifle content creation. I argued that our current poorly-crafted implementation of copyright has resulted in the hindering of a whole variety of types of innovation.

Specifically, my memorandum advocated for reforming statutory

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damages, expanding fair use, dealing with false takedown requests under the DMCA, and limiting the term-length of copyright to 46 years. After my memorandum was released, it was endorsed by many major conservative organizations, with The American Conservative Union (“ACU”) even putting it up on their website. Unfortunately, within 24 hours, the RSC removed the memorandum from its website. Shortly thereafter, my memorandum became ridiculed by some critics and industry lobbyists who referred to me as a Marxist because I was advocating going back to the Constitution and figuring out what actually leads to the most economic growth.

So, after I left Capitol Hill, I wanted to figure out the best way to move forward on intellectual property reform. When I was on Capitol Hill I tried to frame the debate and talk about broad, high-level ideas for the optimal way to approach reforming our entire system of copyright. But off of Capitol Hill, my approach was to take on small, targeted campaigns in order to reform copyright with small victories.

I thought that was an important thing for me to talk to you all about today because we are all now off Capitol Hill. I think a lot of us saw the success of the campaign against the Stop Online Piracy Act (“SOPA”) and thought to ourselves, “How can we do something more than just stop legislation? How can we actually put something positive on the table?”

I wrote an article on *Boing Boing*, a technology website, in which I laid out my perspective and discussed what I saw as a cohesive strategy going forward. I said this fight is going to take engaging our generation. And it’s going to take a movement. To that end, allow me to suggest the following pointer: we cannot continue to stay on the defensive, watching and waiting for the next SOPA. If we slumber they will sneak provisions into law that effectively do the same things as SOPA. Therefore, the best defense is a solid offense.

Many provisions of SOPA have already been implemented through other means. For example, the United States government has used Immigration and Customs Enforcement to go after infringing websites. Lobbyists have been engaging in international treaty making, through the Trans-Pacific Partnership negotiations, to potentially filter Internet communication, implement a three strikes policy, and re-codify parts of the Digital Millennium Copyright Act. Private companies have also implemented the provisions of SOPA that allowed for the takedown of infringing websites and also cut off payment processors such as American Express, Mastercard, and Visa from supporting the infringing websites. These payment processors have largely cut off funding to those websites, in the absence of any law requiring them to do so. In my piece in *Boing Boing* I argued that we must analyze existing law because we will realize that our current laws (and regulatory structures)

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are in some ways nearly as nefarious and dangerous as SOPA would have been.

We must recognize that progress will require support from both Republicans and Democrats alike and therefore we need to be strategic in our battle choices. We need to realize that while we may have different perspectives and different priorities, we need to focus on areas of common interest where we form a collective whole.

We must also recognize that in this fight for meaningful copyright reform, we are the insurgents, and so we need to be looking for those asymmetrical battles rather than taking on whole-hog, major, pie-in-the-sky reforms on day one. My first battle was on the issue of cell phone unlocking because I saw this issue as representing a major misstep by the “other side”—the big content industry side.

By way of background, on January 26, 2013, it became illegal for individuals to unlock their own phones. Unlocking your phone is a process by which you change the settings on your phone to allow you to use a SIM card (a card that essentially securely stores mobile subscriber data) from another carrier. Basically, you take an AT&T phone, and “unlock it” so that you may use it on another wireless carrier. This is a technology that is pro-free market and that exists in every cell phone market in the world, but is now illegal for American citizens.

It was made illegal because AT&T and Verizon asked for it to be illegal through their trade association, The Wireless Association. AT&T and Verizon spend \$32 million annually on lobbying, so it’s not surprising that they were successful. But it is surprising that there are over 100 wireless carriers on the other side of this issue, in support of unlocking, whose voices were ignored. Nonetheless, on January 26th, it became illegal for individuals to unlock their cell phones, and potentially 32 million Americans became felons and face the prospect of spending five years in prison and paying a \$500,000 dollar fine for simply unlocking their own phone. And I know the immediate response is “oh well, who’s going to enforce that law? It’s very unlikely that anyone would be arrested for it.”

In response, I argue that laws that are seldom enforced but could be enforced against everyone are the most nefarious. And so I led a campaign on this issue, first highlighting the issue in *The Atlantic* magazine and proving how the cell phone unlocking ban made a person who unlocks her phone liable for five years in prison. I helped to create a White House petition on the issue, which collected 114,000 signatures. But before I did that I reached out to members of Congress and said let’s get in front of this issue. Let’s just fix this problem. At the time I didn’t receive many substantive responses.

Once our White House petition reached 114,000 signatures (the first petition to get over the new 100,000 threshold), the White House

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reversed its previous decision—a decision made by the Librarian of Congress through executive rulemaking, which banned cell phone unlocking—and endorsed cell phone unlocking. The FCC then announced an investigation into the matter. And now members of Congress are tripping over themselves to introduce legislation of their own. We now have four bills on the issue—H.R. 1123, H.R. 1892, S.467, and S. 481.

What this shows is that if you take an isolated asymmetrical battle and you demonstrate that there is a collective will to move forward on it and you make your legal case, you can often succeed in positive reforms.

I think there are many other battles like unlocking in the future. The next one I see on the horizon is dealing with accessible technology for persons who are blind and deaf. There is technology that could help persons who are blind and deaf to consume and enjoy media; but that technology is illegal for them to use. That doesn't make any sense. And in fact, the law is implemented in such a crazy way that there's an existing exception for technology, allowing them to use the technology, but the exception means that if a blind person develops the code himself then he can have closed captioning for a movie. That also doesn't make any sense.

The idea that closed captioning of movies, read aloud functionality for books, or phone unlocking has something to do with piracy and copyright is absurd. As a supporter of copyright, I think there's a way to move forward on these issues without touching the third rail of piracy. In so doing, we can create a coalition of the willing, and more importantly, have a discussion on Capitol Hill that leads to rational laws that protect copyright and deal with piracy without inhibiting innovation.

**JESSICA LITMAN:** A little bit of background: Congress has essentially delegated its copyright lawmaking authority to copyright lobbyists. This has been true for more than 100 years. When there's new copyright legislation, copyright lobbyists will get together to figure out what the bill should say, and they exclude from the bargaining table people at whose expense they hope to change the law. Those targets, though, find out about the effort, show up, and usually succeed in blocking the bill.

The Copyright Term Extension Act, for example, was opposed by bars and restaurants that resented paying money to the American Society of Composers, Authors and Publishers (ASCAP). This kept the Copyright Term Extension Act from being enacted for several years. Finally, the bill developed an exception that allowed sports bars to play copyrighted music without copyright liability. The WTO has determined that that exception violates the Agreement on Trade Related

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Aspects of Intellectual Property Rights (“TRIPS”), but that was the price that bar and restaurant owners were able to exact from copyright owners eager to get the term extension law enacted.

Copyright lobbyists in this process never seem to invite the targets to negotiate over the bills, and never seem to take their interests into account, even though they must know that that makes it more likely that disfavored industry groups will be able to defeat the legislation. One reason for that, I think, is that copyright lawyers have learned that there is a strategic advantage in being able to design the shape of the initial bill. It’s easier to do that if the interests you hope the bill will inconvenience are not in the room.

The Digital Millennium Copyright Act (“DMCA”) is really a combination of several different bills, all pasted together in aesthetically unpleasing form. One of the pieces of that bill, the WIPO Treaties Implementation Act, contains the anti-circumvention provisions that Derek Khanna discussed in connection with cell phones and blind people. Those provisions were initially drafted by lobbyists for copyright owners. Another part of the DMCA is the Internet Service Provider Safe Harbor Notice and Takedown. Those provisions were initially drafted by representatives of telephone companies and Internet service providers. I think that copyright-owner lobbyists have decided that they didn’t get a good bargain with the notice and takedown system; meanwhile, the interests that negotiated exceptions to the anti-circumvention provisions have since discovered that most of the exceptions are useless. That may have lead to a sense that it’s important to control the design of the basic architecture of any copyright amendment, so that one can narrow the damage that other interests may be seeking to impose.

Another reason that important interests are excluded from negotiations may be that some copyright lobbyists have views on who is and is not a legitimate participant in the bargaining. In the aftermath of SOPA, Paramount sent out a corporate vice president to talk to law students all over the country. He came here, to Cardozo Law School. He also visited my class at Michigan. And, what we learned from his presentation was that the story that the motion picture studios were telling each other about what happened to SOPA was that Darth Google had whipped people into a frenzy by telling them lies about SOPA.

My students asked the Paramount vice president some questions about specific provisions in the bill that they found to be particularly unsettling. He responded that (as, he insisted, Darth Google knew full well), there had been a secret manager’s amendment that didn’t have those particular provisions. Paramount felt it was improper for ordinary citizens to respond to the text of the only version of the bill that had been made public, rather than to the secret manager’s amendment that

might not have been that bad.

One lesson that I take from this story is that studios may not have realized yet that readers, listeners, viewers, and other members of the audience are legitimate participants entitled to have views about copyright law. Indeed, the studios apparently haven't yet reconciled themselves to the idea that Darth Google is a legitimate player entitled to sit at the table and negotiate with them over the shape of copyright legislation.

Sherwin Siy has spent all sorts of time, successfully I think, getting Public Knowledge a seat at the table, but copyright lobbyists don't necessarily listen to what he says.

I can tell an optimistic story or I can tell a pessimistic story. The pessimistic story is that, gee whiz, the pendulum has now swung toward public involvement in IP policy and that feels great but, you know what, that pendulum is going to swing right back very soon.

Meanwhile, copyright lobbyists effectively control the lawmaking process. Now that they realize that ordinary people may make trouble, they have all sorts of great tools and strategies to respond to that threat. One strategy is to control the initial draft and then limit and narrow any exceptions. Another strategy is to embody what copyright owners want to do in a treaty. It turns out that copyright interests can maintain much more control and secrecy by going overseas and putting the provisions they hope to enact into domestic law into an intellectual property treaty. And while the White House has recently responded to two online petitions about IP policy—one, urging the administration to support an amendment to make cell phone unlocking legal and another to require open-access publication of federally-funded research—by voicing significant concern for the public interest, the administration also seems adamant that we've got no right to know what it is we're signing away in treaties about IP.

The optimistic story I could tell is this: Gee whiz, people seem to be paying attention to copyright law. Politicians might be beginning to pay attention to the fact that people are paying attention. The thing that's been missing has been ways to convey ordinary people's views about copyright policy to legislators in terms they can understand and will take seriously. Sherwin's organization, Public Knowledge, has been working hard to figure out ways to do that. The Electronic Frontier Foundation is another organization that has been harnessing public opinion and energy in constructive ways. You can look at the success of the two petitions as a sign that maybe at least the White House thinks that ordinary people are legitimate voices.

But the one thing I learned when I tried actually to do this in connection with the DMCA—as opposed to sitting in my ivory tower and writing about it—is that lawmaking is a job for professionals.

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Amateurs screw it up. In the 1990s, a group of academics and public interest organizations joined forces to try to bring some sanity to the legislation that grew up to be the DMCA. Boy, did we screw that up. We had the best of intentions. But, you know, we got played. Copyright lobbyists whipped us.

**RICK WHITT:** Good afternoon everybody. It's a pleasure to be here. Thanks for the invitation. So since the late 1980's, I've been a practicing policy advocate in D.C.—that's a fancy term for lobbyist—first in law firm life, and then for a company called MCI Communications, which I think passed away before most of you were in elementary school. And then over to Google, and now at Motorola, which was acquired by Google.

I've also written a number of law journal articles, one of which, as was mentioned, is out in front there and will be published very shortly by the AELJ. So like other folks here on the panel, I have some idea of both sides of the debate here and around the politics of them.

I was trained as a political science major in college, and a guy named John Kingdon has written a pretty well-known book about how the political process really works—not just the way it can be seen from afar, but analyzing many examples of how the political process unfolds particularly in Washington D.C. He famously has talked about his own view, after looking at many of these examples and really digging deeply into the facts, that it is really ideas more than pressure that normally wins the day in Washington.

I consider him an optimist. I'm not entirely sure that he's correct. I think that a lot of the issues we're talking about now really amounts to the notion that at the end of the day, the truth of ideas will ultimately win out over the sort of inside game of the partisans in Washington, and in other capitols around the world as well. And SOPA/PIPA really helps crystallize that issue for us.

On the one hand it was a victory, right? Because of the Internet blackout day, we had something like fourteen million emails that were sent in to Congress. They were just overloaded—their servers, the phone calls, so that folks who had one day endorsed the bill ran away from it the very next day. I think it was Congresswoman Zoe Lofgren who said, “this was the first time a bill went from becoming inevitable to unthinkable in the course of a single day.”

That was because of the forces that were unleashed from the corporate side, from, of course, the nonprofit side, and many other folks, ordinary citizens, got engaged. It was an enormous success. But it's a success that I fear is difficult to replicate. I think it's one of these situations that was a crystallizing of concerns. It was a well-organized effort by a lot of folks. It hit at the right moment in time, just as the

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White House was starting to have its own second thoughts about the situation. I think these demonstrations of power can be tough to harness. Then over time, in fact, they can often lose their novelty and their impact.

It is my concern that, yes, we won, but we won frankly because of political pressure that was put to bear on Congress. It was unorthodox, right; it was unusual. It was having the platform of the Net out there as the means through which, people organized and expressed themselves. But it didn't necessarily convince. It was convincing politically, but not intellectually.

This is where I come back to this notion of political pressure versus ideas. You know, there were dozens and dozens of Internet engineers who patiently sifted through the various legislative vehicles, of the language that was out there and the various drafts of the bills both in the House and the Senate. They then crafted testimony that was never heard. They submitted letter to members of Congress that I think frankly were never read.

They patiently and carefully pointed out some of the real issues with the legislation in terms of how it was going to mess around with the domain name system, and many of the key numbering and routing and addressing elements of the Net, in ways that were going to have pernicious effects on substantial innocent uses (i.e., folks who were not violating copyright law but would be deemed to be because the mechanisms would be way over inclusive). Ironically they pointed out that there were a number of technical countermeasures that could be employed by those who wanted to get around the mandates in the bill, which would thus render it ineffective. So they were trying to do their best to show even for those who didn't care at all about the potential overbreadth, that the legislation was just not going to do what they thought it was going to do in terms of effectiveness.

But those voices were not heard. And even today, you know, we have the lobbyists on the other side who are thinking, "well, gosh, we have to just harness the users the same way that this big bad Google and Wikipedia and others did." Maybe we can have five-minute commercials in front of every movie, shown in every movie theater across the country. We could tell our side of the story, right? We have that ability. That is our platform, so why don't we use that? So we still don't have a meeting of minds in terms of the notion that, yes, we can agree that the unlawful sale of content is a bad thing and we should try to find some reasonably effective measures to deal with that without otherwise harming innocent uses of the content.

Anyway, to me that is the sort of challenge we face, and my paper talks about that to some extent. The other bookend policy issue I'll mention quickly from last year, which we haven't really touched on

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here today, is that the International Telecom Union (“ITU”) had something called the WCIT, which first I thought was a Broadway musical but, no, it’s actually the World Conference on International Telecommunications. And it’s a treaty organization. So again, as it’s been mentioned already, where you can go to get things accomplished, if you can’t get something through Congress as a national measure, then you typically go to treaty organizations. One of them, the Trans-Pacific Partnership, has already been mentioned. We’re in negotiations underway right now that might have some impact on copyright law. But we all don’t know about it because it’s all behind the scenes and behind closed doors and there are no drafts available for people to comment on.

Last year the ITU was looking at various ways of getting involved in Internet governance. This was a situation where fortunately, we got enough governments involved, and the U.S. government took the lead here and a number of others did as well, to push back on those efforts. But it would have been a quite serious and pernicious impact in terms of the United Nations essentially getting involved for the first time to say they want to dictate what the protocols and standards look like. They don’t care what the engineers who’ve been doing this for forty plus years now have accomplished in terms of the Internet Protocol (“IP”), Transmission Control Protocol (“TCP”), the World Wide Web (“W3”), and all the other elements of the inner workings of the Web. They would take it upon themselves to create the new mandates.

It’s breaking out in different places around the world, not just in the U.S., and it’s not just in the copyright area. I think this is a great debate, a great discussion we are having here today, and I look forward to a further conversation. Thanks.

**SHERWIN SIY:** So I guess I want to sound a note of optimism after this just, because I think, you know, I don’t want to disparage or minimize the work that these engineers did in writing these papers, putting together these letters and this testimony and getting that to The Hill because I think that actually had a good deal to do with priming a number of members offices, people who were in the middle who didn’t know a lot about the issue, who might have been sold, you know, co-sponsorship of SOPA or PIPA based on the fact that they were approached by their colleagues who said, yeah, this is uncontroversial, it’s just another copyright enforcement bill, you know, we want to make sure that there’s strong enforcement. You know, and that’s really about it.

They, you know, had been presented with a particular framework in this and maybe when they first received those letters they weren’t in a position to step out and challenge, you know, challenge leadership, committee leadership or party leadership on it, but then with--you know

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that was enough for them and their staffs to get some idea that there was an actual controversy there. That there was another side and quite possibly more than two sides to this issue. Then when you had a public protest movement behind it, that gave those--that work beforehand, gives that movement more legitimacy in their minds. It gives them the knowledge that this is not just some sort of strange digital rabble pulling some sort of an elaborate prank.

One of the things that I wanted to talk about was the sort of instincts and assumptions that, you know, that might influence the way that Congress approaches these issues. I think that you've heard some of them already, you know, that there isn't as much of a left/right divide on it. There are differences in approaches as to how liberal versus conservative or libertarian approaches to copyright reform might come about.

There's the Silicon Valley versus Hollywood sort of dichotomy that people draw upon that frankly a lot of members do see as a real thing and, you know, when they are being presented with lobbyists from Silicon Valley and from Hollywood, well this is the framework they're going to take. They will try, if they are being earnest about it to look at both sides of this issue when there are also the sides of consumers, publishers, libraries, cable distributors, all sorts of other people that might not make it in that room and that's how you end up with things like the Copyright Alert System.

I think that one of the other dichotomies that sort of presents itself, a series of assumptions that policymakers will have has to do with the distinction between copyright as being a specialized system that applies to a few different types of players and a generalized system that applies to everyone. There's a few anecdotes that I think kind of illustrate this.

Maria Pallante, Register of Copyrights, was testifying before Congress fairly recently about basically the next great copyright act, sort of a fundamental reimagining of what the copyright law should look like. There was, in the middle of her testimony, some comment, she actually talked about how copyright debates have become much more contentions in the years that she's been working in it. She was thinking perhaps this is due to the fact that there's more money involved. There's more lobbying.

There seemed to be, and maybe I'm ascribing this to her, but it struck me that she seemed to have a sort of nostalgia for the past where you would have, you know I think--again this is my imagining of her nostalgia but I'm imagining that, you know, she is envisioning this room full of esteemed copyright scholars debating finer points of the law, trying to get everything right. It's the people, the scholars involved, the repeat--the people who are involved in repeat transactions with

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intellectual property and so on, a collegial atmosphere.

In my--I take a look at that room and what I'm imagining that room looked like in the 50's and 60's and 70's and I think of a collusive atmosphere. Not in the antitrust sense necessarily but, you know a club, right? It's a place where you have implicit rules and norms as well as explicit rules which end up in the statute.

A couple of examples that I think illustrate that, you know fairly recently I was a guest lecturer, I don't know, at a seminar class of a noted copyright scholar. I mentioned the fact, we were talking about the first sale doctrine and Kirtsaeng I mentioned just sort of in passing like, you know look, the distribution right is weird. It's just very strange the way we do this and the way that Section 109, you know, the first sale doctrine is codified is very strange.

You can become a copyright infringer by not returning your friend's DVD and then putting it up on eBay. That makes you a copyright infringer, not just a thief. And she just had a very hard time believing this until I actually went back and said I'm pretty sure that's right, looked up Section 109 on my laptop and said, no, no, you have to be the owner of the particular copy in order to have the first sale doctrine apply to you. She said, well, okay, that's interesting and she used that as a teaching moment to tell of her students and that is why you must always go back to the text.

At the same time though she also said, still, really, who's going to bring those suits. Who's going to make that? Who's going to make those claims on those grounds? The same thing happened in Kirtsaeng itself. We would argue with people. One of our favorite parts in our amicus brief was we cited that fact that how many donations Toys for Tots gives out, right, and there are copyrighted works embedded in toys, you know logos, designs, copyrighted text, software built in certain things.

Somebody said, well, nobody's going to sue Toys for Tots. I think maybe not Toys for Tots, maybe not at first but certainly people will sue individual consumers. And that's because we have in landscape where it's not just a series of colleagues and a series of repeat transactors dealing with each other. It's a case where you're not talking about a major studio talking with a major broadcasting network in every case.

In each case you're also talking about much smaller entities and individual consumers who now stand in the shoes of being the distributors of and the competitors to people who hold copyrights. So the fact is you know people are going to get sued. You've got new players. You've got consumers, users, hobbyists, and those people are going to get sued also because enforcement and I realize this is going to be controversial, enforcement is easier than ever, certainly by

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percentage.

The number of infringing acts that are going to be visible by virtue of being networked is a lot higher than anything that happened in the past, right? People aren't going to be--aren't switching--aren't swapping mixed cassette tapes and fewer mix CDs. They're sharing those things online and that's more visible so it's actually a higher percentage of enforcement is possible.

Now the numbers of infringing acts that won't be enforced I would estimate probably, just taking a wild guess, probably will increase just because you have more works and more networking available. But of course, you know, all of those facts are very fuzzy because the studies we have are all over the place and sometimes suspect methodology.

The point that I want to get at with those anecdotes about the assumptions people have is that those are the assumptions that are baked into the heads of legislators. And it's those attitudes that we're going to be wanting to challenge. The other thing I want to close with is the idea that copyright reform is coming. The fact that we have the Registrar of Copyrights saying that it's time to take a fresh look at these things means that we are going to be addressing these issues and not just the DMCA, not just circumvention and safe harbors, also possibly the framing of 106 rights generally, right?

Look people recognize that our system for digital, audio, public performance being wildly different from non-digital, audio public performance, that's very strange and sort of an artifact and something that probably shouldn't be distinguished in this way. There's a lot of fundamental questions that are coming up. One of the things that I'm hearing, that I hear a lot, in D.C. from people who I tend to side with a lot of the time is basically don't open up these issues.

If we open up this debate, we might lose ground. I think if you're saying that and I'm not saying you shouldn't be strategic but I do think if you're saying that you are essentially saying the copyright law is as good now as it ever will be. If that's the case I really should be looking for a new job. Thank you.

**JESSICA LITMAN:** I think as a historical matter, members of Congress, rather unreflectively, appear to have believed that the copyright statute did not in fact make individual readers, listeners, and viewers liable for copyright infringement. You can find clear evidence of this as recently as the early 1990s. Why did they think that? Did they think that it was fair use? That's unclear, but there seems to have been a general consensus, also shared by the Copyright Office, that the copyright law didn't make individual, personal copying illegal. There is, I think, still some political salience to the idea of readers' rights, listeners' rights,

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and consumers' rights. I think that the first sale story is an effective story about the rights of readers and consumers. Many members of Congress may be willing to respond to that sort of story. Some of the pushback from the DMCA came from questions and stories about people who used bookmobiles. Members of Congress asked proponents of the DMCA whether the law would make bookmobiles illegal. So, to the extent that this can be expressed as a problem that Joe Constituent is going to have, I think that's one wedge that may actually be effective. Congress has not yet sat down and said, "Oh gee, there's all this piracy. I know what let's do; let's make every citizen in the United States liable for thousands of dollars in statutory damages."

**AUDIENCE MEMBER:** [inaudible question]

**RICK WHITT:** That's a good question that I don't agree with the premise of. So, yes, there are some good arguments that a number of the countries that weighed in on in favor of proposals to have the ITU become more involved in Internet governance. They are concerned that the United States, through the contract it has with the Internet Corporation for Assigned Names and Numbers ("ICANN"), and through its general influence as being one of the original originators and funders of the Internet, has too much sway and needs to be pulled back, and that the way that the Net is governed should be done in a much more multilateral fashion.

The problem is, from my perspective at least, the ITU is the wrong kind of instrument to be using to do this kind of thing. The ITU is a government-to-government treaty organization. Private citizens and individuals cannot become members of the ITU. Their deliberations typically are not made public, so the transparency is pretty weak. Third parties are typically not invited. Companies, corporations, and certain other entities can become members, but they'd have access only to a limited number of documents so it's not really a great place to have these kinds of open conversations.

Then you look at the contrast of where are these decisions being made. ICANN is sort of unto itself, but really what ICANN does is around the domain name system and a few areas around the top-level domains, it's actually relatively limited. I would argue that most of the power of the Internet's architecture has come from what economist Eleanor Ostrom has called the polycentric governance groups, and that's the Internet Engineering Task Force ("IETF"), and the World Wide Web Consortium ("W3C"). These are the groups of engineers, in most cases volunteers, and they increasingly come from corporations but represent themselves as individuals. They get together, their proposed standards and protocols are freely distributed, made available

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ahead of time, and people can comment on them. People can come to the meetings virtually. They can come there in person. The process that they've used over the years have yielded some tremendous benefits in terms of the actual protocols, the openness of IP, and of the principles and the other things that are embedded now into the Internet.

Those are the very things that are under attack at the ITU. What I would submit is that the ITU is both the wrong kind of instrument and the kinds of ways that they were thinking about going about exercising authority against the U.S. They would have had serious damaging lasting effects on the Internet.

**MICHAEL BURSTEIN:** Maybe I'll invoke my moderator's privilege to ask the following question and bring our discussion back to the theme of the symposium, which is moving from scholarship to activism to political change. So I'm curious, particularly those of you who have spent time on The Hill, Jessica told sort of cautionary tale with respect to the DMCA about policy being made by professionals, and Derek told or sort of juxtaposed the need for kind of broad frameworks with the need for sort of targeted, you know, asymmetrical particular bites that are winnable. My question is the following: for those of us who inhabit the legal academy, is what we write in law journals at all relevant? And to the extent that those of us who write articles that appear in law journals do so out of a desire to help change things and to actually have an impact on policies, if you think the answer is no or not really, what more can we do to make what we do more relevant to the policy process? What are the gaps that legal scholarship *can* fill?

**RICK WHITT:** I can start on that one and I'll go back to the person I mentioned earlier, John Kingdon, the political scientist. He has a memorable phrase; he talks about "the garbage can of politics." What he means by that is there are these different sorts of elements all mixed together in the political scene. He separates them out into three basic "policy streams," as he calls them.

The first stream is the notion of identifying problems—that's what lots of members of Congress like to do, find things that are wrong with America and be seen as helping to fix them. Once you identify the problem, the second stream is then to identify what the solution might look like. Then the third stream is the actual political process that is engaged to actually get to that end game of the solution being enacted as law and implemented.

What he talks about—and I think it makes a lot of sense, frankly—is that you need to have all three of those streams to be successful. The problems identified tend to be something that occur sporadically. So there are all these sorts of policy windows that occur. Maybe it's some

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sort of national tragedy, some big event that galvanizes attention; maybe it's a slow, steady movement of people starting within the general populace, a certain view about something that they didn't have previously. Whatever it is, there's something that creates this effect of an opportunity, a temporary window, for something to happen.

Once that something happens, then you have this sort of competition among different types of solutions that are being proposed. Obviously politics is involved here too, but really I think at this point again, members of Congress often really do want to understand and try to come up with good solutions. They have their prisms like all the rest of us do, in terms of how they look at things, but that's the point at which I think what happens in academia can be translated into actual solutions, and then harnessed by folks at organizations like Public Knowledge, companies like Google, and others who are out there trying to articulate what they think is right for the public good. Then the political process engages; whether it's successful or not involves lots of variables there as well.

If you think about it in that context, there really is ample room for academia to become engaged. And then turning to the political side of it, we need to find out how to harness the forces like we had with SOPA/PIPA, like we're having now with the cell phone locking issue. We need to start to get people engaged from the bottom up, not the top down, to be effective advocates to try to make these kinds of changes.

**SHERWIN SIY:** I guess I would just be giving my impressions, but staffers aren't going to read a law review article, right? I mean if I write something that's five pages long it's too long, cut it down. They have time for one page. That's not to disparage them at all because what they have on their plate is impressive in terms of what they need to process in a day.

That doesn't mean that those law review articles are useless because they provide the backing for shorter pieces that can come out of the academy, can come from professors, can come from anybody really but they provide the necessary background and the necessary actual research that gives those arguments credence. Literally you will see proposals coming out of offices, right, that have ideas, concepts within them, and they're not entirely sure where they came from. You'll see them, these ideas proposed in papers 10, 15 years old.

**JESSICA LITMAN:** As someone with no Hill experience whatsoever, I think something that academics can do (easier once you have tenure than before you do) is to write and talk about the problem in ways that infect other folks with the virus of your idea so that they don't even know where it comes from, but other people catch it.

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**AUDIENCE MEMBER:** [inaudible question about cell-phone locking legislation]

**DEREK KHANNA:** With the unlocking issue in particular I wanted to engage in civil disobedience but people were very scared of being arrested for unlocking their phones.

I feel like the IP community is a community that's not as acclimated to the tools of civil disobedience as other communities have been in the past. Maybe that's a broad statement but that's my impression. If you disagree with me and you want to join me in engaging in civil disobedience and getting arrested in the Library of Congress, let me know, because I will join you.

**JESSICA LITMAN:** It is worth noting that the Organization for Transformative Works started out supporting what seemed at the time to be civil disobedience. It actually succeeded in nudging the law several inches towards sanity. Back when OTW decided "we're going to post your fan works in an archive on the Internet even though most people don't think it's legal to do that," it took an enormous legal risk, although it spoke for a community of committed folks who were going to be doing what they were doing anyway.

**SHERWIN SIY:** Carl Malamud's digitizing, you know, copyrighted building codes that have been incorporated by reference into municipal and state codes. He's putting them up online. I don't think his objective is to get sued. I don't think he wants to be a test case but he's doing it. And as he does it I mean I think we saw this with D.C. recently with the District of Columbia's laws. He digitized them, told people he was doing that, put them up online, and D.C. recently said, oh, you know what, yeah, we will put an unofficial version of the code on our website. I there's definitely room for it. I think that it depends upon what—where you're doing this. I mean it's easy for somebody to be characterized as wrapping themselves in the mantle of civil disobedience when they want a free album. There was an essay somebody wrote fairly recently and I wish I could remember who so I could cite them properly talking about Thoreau and the origins of--and his essay and the fact is he went to--he was in prison because he refused to pay taxes to support the Mexican War. The connection between what law he was violating and his political objective was not quite as distinct as I think we normally would want an act of civil disobedience to be, to send the message about that, right? I mean just because--anybody with a generalized grievance against the government stops paying taxes and the you know your tax, I'm sorry, you're not paying taxes. You're a...

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Right. I mean--yeah, he's a Committee chairman but his district is his district, right? The people who are voting for or against him are in that particular area. Their interests, unless it's a particularly copyright nerdy district, these issues aren't going to be election issues generally. Not yet.

**RICK WHITT:** I was going to just point out that the very nature of what it is to be disobedient in a civil manner, you know, what does that mean now in the age of the Internet? It's about acts, about posting your things online. It's about saying things online. It's less about getting arrested in the halls of the Library of Congress, which I think can still be every effective, but it also to me means if you're trying to make a point with members of Congress who tend not to be as technically savvy, it may not have the same kind of impact as chaining yourself to the Library of Congress walls and refusing to leave.

Think about SOPA/PIPA again, that was in large sense a virtual protest. You didn't have thousands of people in the streets with big banners. It was people basically sending emails and websites going down or putting up particular points of view on their opening pages. What it is to be civil disobedient in the twenty-first century, I think is a really fascinating question, particularly because of this chasm between the folks who have now the tools of the Internet and the people, the audiences, we're trying to reach in Washington who oftentimes don't really get it.