UNITED STATES PATENT AND TRADEMARK OFFICE

DEPARTMENT OF COMMERCE PUBLIC MEETING: COPYRIGHT POLICY, CREATIVITY AND INNOVATION IN THE DIGITAL ECONOMY

Washington, D.C.

Thursday, December 12, 2013

A G E N D A

Opening Remarks:

ANDREW BYRNES
Chief of Staff, USPTO

LAWRENCE E. STRICKLING
Assistant Secretary of Commerce for Communications and Information
Administrator of the National Telecommunications and Information Administration (NTIA)

The Appropriate Calibration of Statutory Damages: Individual File Sharers and Secondary Liability:

Moderator:

DARREN POGODA
Attorney-Advisor for Copyright Office of Policy and International Affairs, USPTO

Panelists:

DAVID SOHN
Center for Democracy & Technology

STEVEN TEPP
Sentinel Worldwide

SANDRA AISTARS
Copyright Alliance

PROFESSOR PETER court
University of California at Berkeley
School of Law

MARKHAM ERICKSON
Internet Association

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The First Sale Doctrine in the Digital Age:

Moderator:

KARYN TEMPLE CLAGGETT
Associate Register of Copyrights
Director of Policy & International Affairs
United States Copyright Office

Panelists:

EMERY SIMON
BSA, The Software Alliance

JOHN OSSENMACHER
ReDigi

ALLAN ADLER
Association of American Publishers

SHERWIN SIY
Public Knowledge

PROFESSOR JOHN VILLASENOR
University of California, Los Angeles

Legal Framework for Remixes:

Moderator:

MICHAEL SHAPIRO
Senior Counsel for Copyright, USPTO

Panelists:

DAVID CARSON
International Federation of the
Phonographic Industry

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PROFESSOR PETER DiCOLA
Northwestern University Law School

JAY ROSENTHAL
National Music Publishers' Association

JOSH SCHILLER
Boies, Schiller & Flexner LLP

PROFESSOR REBECCA TUSHNET
Organization for Transformative Works

Current Copyright Office Initiatives on Digital Issues:

Introduction:

SHIRA PERLMUTTER
Chief Policy Officer and Director, International Affairs, USPTO

Speaker:

MARIA PALLANTE
Register of Copyrights and Director
United States Copyright Office

Improving the Operation of the Notice and Takedown System:

Moderator:

JOHN MORRIS
Associate Administrator and Director of Internet Policy, NTIA

Panelists:

VICTORIA SHECKLER
Recording Industry Association of America

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FRED VON LOHMANN
Google

CORYNNE McSHERRY
Electronic Frontier Foundation

SUSAN CLEARY
Independent Film & Television Alliance

TROY DOW
The Walt Disney Company

CHRISTIAN GENETSKI
Entertainment Software Association

DAVID SNEAD
Internet Infrastructure Coalition

The Government's Role in a More Efficient Online Marketplace:
Panel #1: Access to Rights Information:

Moderator:

GARRETT LEVIN
Attorney-Advisor for Copyright Office of Policy and International Affairs, USPTO

Panelists:

COLIN RUSHING
SoundExchange

PROFESSOR PAMELA SAMUELSON
University of California at Berkeley School of Law

MATT SCHRUERS
Computer & Communications Industry Association

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JIM GRIFFIN
OneHouse

JEFF SEDLIK
PLUS Coalition

LEE KNIFE
Digital Media Association

Panel #2: Online Transactions:

Moderator:

ANN CHAITOVITZ,
Attorney-Advisor for Copyright Office of Policy and International Affairs, USPTO

Panelists:

ROY KAUFMAN
Copyright Clearance Center

MEREDITH JACOB
Creative Commons

JOHN LAPHAM
Getty Images

PROFESSOR BRANDON BUTLER
American University, Washington College of Law

Closing Remarks:

SHIRA PERLMUTTER
Chief Policy Officer and Director, International Affairs, USPTO

JOHN MORRIS
Associate Administrator and Director of Internet Policy, NTIA

P R O C E E D I N G S

(8:34 a.m.)

MR. BYRNES:: Good morning, everyone. I'm Andrew Byrnes, Chief of Staff at the US Patent and Trademark Office. We're glad to have you here today in Alexandria for this public forum the USPTO is hosting in conjunction with our Department of Commerce colleagues, the National Telecommunications and Information Administration.

We're also happy to be joined by those of you watching this event at home. I'd also like to convey a special welcome on behalf of Peggy Focarino, the Commissioner for Patents, who is performing the duties of the Director and is in Europe meeting with our colleagues there and also Michelle Lee whom as you may know it was announced yesterday has been appointed to be the Deputy Director of the PTO beginning January 13th, 2014. She's in California packing and not able to be here today but you'll see a lot of her come January.

In a moment we'll hear from Larry

Strickling, the Assistant Secretary of Commerce for Communications and Information, but first I want to tell you a little about why we're here and what you can expect from today's event. This forum marks the beginning of our discussions of the issues identified in the Green Paper titled "Copyright Policy, Creativity and Innovation in the Digital Economy."

That paper was produced by USPTO and NTIA in July as part of the Commerce Department's Internet Policy Task Force. We've just concluded our first round of public comments and we're starting another one after this conference. The comment period will run until January 10th of next year and throughout 2014 we will continue to engage with the public on these critical issues.

I encourage you to stay connected to the latest news on the Green Paper including alerts on events and comment filings by subscribing to our copyright alerts. You can find that e-mail service on our subscription center at enews.uspto.gov.

The Green Paper is a major milestone for the Department of Commerce as well as for USPTO and NTIA. It reflects the perspectives of a wide spectrum of stakeholders with interesting copyright policy, a cross section represented on today's agenda as well. The Green Paper is not only the most comprehensive statement from this administration to date on copyright in the digital environment, it is the most thorough analysis of digital copyright policy issued by any administration since 1995, multiple lifetimes ago in the Internet's evolution.

The Green Paper is also timely as we know that Congress has engaged in the early stages of a comprehensive review of copyright law. And of course, the Copyright Office continues to be engaged in important work on a wide range of cutting edge copyright issues. The feedback and guidance we receive from all of you will be indispensable to the overall dialogue on copyright law.

Copyright plays a critical role in the

US economy and cultural life as does the Internet. We know that many policy questions related to copyright in the digital environment are highly charged. To quote the Green Paper, "Some would argue that copyright protection and the free flow of information are inextricably at odds, that copyright enforcement will diminish the innovative information disseminating power of the Internet or that policies promoting the free flow of information will lead to the downfall of the Internet. Such a pessimistic view is unwarranted."

When the Internet Policy Task Force was created, Commerce Secretary Gary Locke said the goal was to focus on "the sweet spot on Internet policy, one that ensures the Internet remains an engine of creative and innovation and a place where we do a better job protecting against piracy of copyrighted works." Keeping our focus on that sweet spot, today's is an ambitious agenda.

The bulk of the conference today will consist of moderated panels on the topics

identified in the Green Paper. Our moderators include my Commerce Department colleague, John Morris, Associate Administrator and Director of Internet Policy for NTIA and the Associate Register of Copyrights and Director of Policy and International Affairs for the US Copyright Office, Karyn Temple Claggett. The remainder of the panels will be moderated by Senior USPTO officials. We will also hear from the Register of Copyrights, Maria Pallante who will discuss the work that her office is doing. And she'll be introduced by USPTO Chief Policy Officer and Director of International Affairs, Shira Perlmutter, who has been instrumental in the production of the Green Paper and in organizing this event.

We hope that you can stay the entire day to experience the impressive lineup of panelists assembled here. If you must miss a portion of it, however, please know that we will be posting the full recording of the event of our website uspto.gov in the very near future. Now, let me

hand the microphone over to a true leader in promoting innovation, Assistant Secretary of Commerce Larry Strickling.

Well, thank you Andrew and thanks to all of you for joining us here today. NTIA is extremely pleased to join our colleagues at PTO in continuing the important work of the Internet Policy Task Force as we focus our attention on digital copyright issues. And today we're asking you to help us as we begin our work to translate the ideas and issues identified in the Green Paper into more concrete proposals.

Our agenda today reflects the broad range of parties with an interest in ensuring that we find the right balance between protecting and promoting copyrighted works online while encouraging technological innovation. And among those here today are those who create copyrighted works, Internet and online service providers that provide digital access to those works and users of those digital works. And as Andrew mentioned, the copyright Green Paper grew out of the Commerce

Department's Internet Policy Task Force and was the result of a truly collaborative process.

We worked with our colleagues at PTO and in other bureaus at the Commerce Department and have sought comment from a wide variety of stakeholders outside the administration. The Green Paper asks for input on five specific issues. These include first examining the relevance and scope of the first sale doctrine in the digital environment. Second, determining what legal framework should govern the creation of remixes and mash ups which involved using parts of creative works in new ways.

Third, we're looking at the calibration of statutory damages for both individual file sharers and online services found liable for large scale infringement under theories of secondary liability. Fourth, we're assessing whether government has a role to play in improving the online marketplace including access to comprehensive databases of rights information. And last, we want to start a multi-stakeholder

dialogue aimed at improving the operation of the notice and takedown system for removing infringing content from the Internet.

Now, the Green Paper provides a starting point for discussion. We did not offer policy prescriptions. Instead we identified key issues for you and others to debate to ensure that copyright keeps pace with technological change. Your participation will help us achieve the goals of the Green Paper which aim to balance the importance of copyright protections to incentivizing the creative process while ensuring that Internet innovation can continue to grow and prosper.

For example, the multi-stakeholder dialogue we will convene to improve the notice and takedown system will involve a wide variety of stakeholders with different perspectives including right's holders, Internet service providers, consumer and public interest representatives and companies in the business of identifying infringing content.

Now, some of you may not be very familiar with multi-stakeholder processes so let me take a moment to provide you some context. The multi-stakeholder process is one that we at NTIA and the Department of Commerce have championed as an effective model for dealing with a wide range of issues related to the Internet both internationally and domestically. Internationally, we have worked with stakeholders from around the world to help solve tough policy issues related to the Internet through such groups as ICANN, the Internet Corporation for Assigned Names and Numbers and the IGF, the Internet Governance Forum. If you're following the debate on Internet governance internationally, this is the major issue to determine whether Internet policy will be set by multi-stakeholder groups or by just governments. And that's an issue we'll be engaging in quite heavily over the next 12-24 months.

Here at home we are using the multi-stakeholder process to apply the

administration's Consumer Privacy Bill of Rights to various business contexts. Earlier this year we completed a code of conduct developed through a multi-stakeholder process on mobile app transparency and we just announced last week that we'll be launching our second process after the first of the year which will focus on the use of facial recognition technology.

Now, the multi-stakeholder approach facilitates transparency and promotes cooperation. It allows innovation to flourish while building trust and protecting other rights and interests. It's been key to our approach to Internet policy and we see opportunities to utilize it as we develop our digital copyright policy as well.

The multi-stakeholder approach requires hard work. To be successful, the approach requires that everyone listen carefully to the viewpoints of others and then work to find common ground. Everybody in this room remembers the disputes over SOPA and PIPA in Congress a couple of years ago. It was a difficult debate and it

left a lot of bruises. And looking back at that debate and looking forward to our work on the issues identified in the Green Paper, we think using a multi-stakeholder approach similar to ones we have deployed in other Internet related context might help bridge some of the differences between stakeholders on these important issues.

The goals espoused in the Green Paper ensuring a meaningful copyright system that continues to provide the necessary incentives for creative expression while preserving technology innovation are ones we think can and must be accomplished in tandem. And to achieve these goals, it's critical that we heard from a wide variety of stakeholders including those who create content, those who distribute it and those who consume those works and everyone in between.

Now, before we get on with the business at hand I want to thank some people whose contributions were critical to the Green Paper and to the continued debate. First, at PTO Shira Perlmutter and Garrett Levin have both put an

enormous amount of effort into the Green Paper. And in fact, it was really Shira's leadership when she came onboard that drove it past the finish line. So thank you, Shira.

I also want to thank NTIA's contributors, John Morris who was previously introduced along with Jade Nester, Aaron Burstein and Ashley Heineman. And together with the Internet Policy Task Force, they have provided an excellent road map for future work. And now, it's up to all of us to move forward to establish the policies we need in this important area. Thank you very much.

MR. LEVIN: Hi, good morning. My name is Garrett Levin. I'm an attorney advisor here in USPTO's Office of Policy and International Affairs. I'll be serving as the informal Master of Ceremonies today giving the webcast time to make cuts for the new panels and things like that, making logistical announcements. I have a few to make before we get on with the first panel.

First for those of you who are here in

the room, I hope you saw the signs when you came in. This event is being recorded so be on your best behavior. Second, at the end of each panel we're going to try to open it up to questions from the audience. There's a microphone in the center aisle. We're going to try to reserve the last 10 minutes or so of each panel for questions from the folks assembled here. Unfortunately, we can't take questions from those watching on the webcast but if you end up having questions here in the room, feel free to make your way towards the microphone there.

There's a charging station for those of you who need to charge things back in the back left corner as I'm looking at it and we've got a hashtag for today's conference for those of you who feel like tweeting either here or while watching on the webcast. It's #GreenPaperConference, with a capital G, capital P and capital C. I actually don't know if the capitals matter. I don't use Twitter but that's the hashtag.

And so, with that I'd like to introduce my colleague here at the USPTO's Office of Policy and International Affairs, Darren Pagoda, whose going to be moderating our first panel on statutory damages and I'd ask that the panelists on that panel to make their way up to the stage. Thank you very much.

MR. PAGODA: Good morning everyone. Thank you for being here. As Garrett said, my name is Darren Pagoda. I'm an attorney here in the Office of Policy and International Affairs at the Patent and Trademark Office. This panel is going to cover statutory damages. As most of you know, the Copyright Act permits the plaintiff to pursue damages in one of two ways, either actual damages or to recover statutory damages within a range prescribed by statute.

As noted in our October 3rd request for comments, we are interested primarily in exploring whether consideration should be given to a recalibration of the existing scheme primarily in two identified areas; one, individuals who make

infringing content or allegedly infringing content available online via acts like file sharing and secondary liability for large scale online infringement.

We live in a very fast-changing technological environment and for me, at least, I think no point drives that home better with proper context than a small excerpt from the Department of Commerce's 1995 Report on Intellectual Property and the National Information Infrastructure. And I'm referring not to the substance of that report itself but instead to a rather small blurb from the inside flap of the report where we explain to people the different ways they could obtain a copy of this report and I'll read it to you.

So in addition to stating that copies could be obtained via mail, we also noted and I quote, "Copies will be available from the IITF bulletin board. The bulletin board can be accessed through the Internet by pointing your gopher client to IITF.doc.gov or by Telnet to IITF.doc.gov logging in as gopher." I will

confess that I have no idea what that means, truly.

Today's event by contrast is being webcast live simultaneously and we have the capacity to provide that feed to up to 100,000 people. Such changes over the course of a little more than 15 years obviously have wide-ranging implications and particularly so on copyright law.

Your panelists today are from the Center for Democracy and Technology, David Sohn; from Sentinel Worldwide, Steven Tepp; from the Copyright Alliance, Sandra Aistars; from the University of California Berkeley School of Law, Professor Peter Menell and from the Internet Association, Markham Erickson.

I am going to give each panelist two to three minutes maximum -- please respect the time -- to introduce themselves, to give whatever prepared remarks they see fit and then we'll go into a moderated discussion. The purpose of this event today as you all know is to begin a process of gathering input, providing building a good

public record. It's your views, panelists, that we're interested not mine so within reason please feel free to respond to points other people make, to ask questions. I will do my best to ask interesting provocative questions as well and also to play the role of polite traffic cop when necessary.

I also hope to save somewhere between 5 and 10 minutes at the end for any questions from the audience that we might have. So I think we'll just go right on down the line. Mr. Sohn, if you'd care to start?

MR. SOHN: Sure, thank you and thanks for the opportunity to participate today. So my organization CDT is concerned about this issue because the current operation of the statutory damages regime basically acts a massive risk multiplier. And it would be one thing if the risks that it poses fell mainly on the shoulders or exclusively on the shoulders of real bad actors, criminal piracy rings, malicious infringers who are infringing on a large scale and

with a lot of harm but the risks fall more broadly than that.

The risks fall on any companies and individuals who are trying to navigate the uncertain contours of the copyright regime and in today's world that can be just about anyone and everyone. We live in a world where digital technologies mean that all kinds of products and services include the capabilities for copying, storing and transmitting information.

And so, copyright issues and issues of copyright law are relevant to more businesses than ever before. Meanwhile, on the individual side, individuals are using those technologies in all kinds of new ways. They're engaging in their own creating. They're remixing as we'll hear about later today and they're trying to move content between devices and platforms. They're engaged in a lot of copyright involved behavior as well.

So for both companies and individuals the current regime means that any misstep, any mistaken interpretation, any failure of judgment

or oversight becomes not just something that's punished but something that can lead to arbitrary and entirely disproportionate consequences. And it does that because the current regime imposes damages that are really untethered from anything. They aren't tied to the amount of harm caused. They aren't tied in any way to the amount of unjust profits or any realistic assessment of what an appropriate deterrent would be.

There aren't any guidelines for where within the broad range of damages permitted by the statute an individual award of damages should fall. So I think the last point I'd make for an intro here is just that this problem is really a meta problem in copyright. Statutory damages cast a long shadow that makes a lot of other issues in copyright worse and more problematic.

It's part of what makes the orphan works problem so bad. It is -- it complicates the remix issue. It makes any kind of reliance on fair use very risky. It's a drag on business innovation and it encourages the growth of copyright trolls,

entities that are using the system really not to protect any creative expression but just to create a shakedown scheme through large scale litigation.

And then finally, it undermines respect for copyright law. When there are disproportionately large cartoonishly large damages awarded, I think that feeds the perception that the law in this area is not worthy of respect and think that's a problem in and of itself for all those reasons I have substantial concerns with the substantial -- about the current statutory damages system. Thanks.

MR. PAGODA: Thank you.

MR. TEPP: Thanks very much, Darren. My name is Steve Tepp. I am President and CEO of Sentinel Worldwide. It is a pleasure and an honor to be here today and have the opportunity to participate in this program.

Let me begin with in the interest of full disclosure saying that I am a paid consultant of the Global Intellectual Property Center of the US Chamber of Commerce and the Motion Picture

Association of America. That said, I am here in my individual capacity today. My remarks are my own and not necessarily reflective of the views of any client.

I think in order to know where we're going we need to know where we've been. So I'd like to start with a little bit of history. Statutory damages are, in fact, as old as copyright law itself. The world's first copyright act, the Statute of Anne in the UK had a statutory damages provision. State copyright laws that predated even the Constitution of the United States had statutory damages provisions.

The first federal copyright act enacted in 1790 by the very first Congress of the United States of America included a statutory damages provision. And statutory damages has remained in the US Copyright Act without interruption to this day.

Far from being merely a Commonwealth or American approach to remedies for copyright, statutory damages are referenced with approval by

the TRIPS Agreement of the World Trade Organization which doesn't require their inclusion in a country's law but clearly envisions it. Over 50 years ago, Abe Kamenstein, then Register of Copyrights, rearticulated that the need for statutory damages, "Arises from acknowledged inadequacy of actual damages and profits. The value of a copyright is, by its nature, difficult to establish and the loss caused by an infringement is equally hard to determine. As a result actual damages are often conjectural or may be impossible or prohibitively expensive to prove."

So by helping to ensure that creators are compensated for infringements and by their effect of deterring for profit businesses from engaging in facilitating and encouraging wide scale infringement in the first place, the availability of statutory damages helps to promote the creation and dissemination of creative works by giving artists, copyright holders and distributors confidence to create, invest and

innovate.

The realities of the Internet age make statutory damages more important than ever. They help drive a thriving online marketplace by giving content creators as well as developers of new and innovative distribution services, devices and applications a measure of security that their efforts will not be misappropriated without consequence. And because the more rampant piracy becomes, the harder it is for legitimate online actors to compete.

In fact, the last time Congress addressed the statutory damages system, about 15 years ago, it raised them and the justification for that was that "many infringers do not consider the current copyright infringement penalties a real threat and continue infringing even after a copyright owner puts them on notice." That statement of the House Judiciary Committee is as pertinent today as it was back in 1999.

Statutory damages are a foundational part of our copyright system that throughout the

course of our history, Congress has carefully revised and readjusted. They're needed today more than ever and I urge this Task Force to focus on that history and those current needs. Thank you.

MS. AISTARS: Thanks for the opportunity to participate today. I'm Sandra Aistars with the Copyright Alliance and just by way of background, the Copyright Alliance is an organization that represents a diverse cross-section of creators across the creative spectrum. And we have individual creators as well as larger corporate interests and labor union interests represented in our group.

And I want to start by saying today that it's true and I agree that there are challenges both with respect to ensuring effective enforcement mechanisms exist for all types of creators and in ensuring that the public and other stakeholders understand and respect the law. There have certainly been public relations challenges related to various enforcement issues including statutory damages both as a result of

some overly politicized enforcement cases and also as a result of predatory practices by the unscrupulous attorneys in certain instances.

And those challenges definitely make our task harder today in taking pragmatic approaches to the entire copyright review process and the Green Paper process. But perhaps through open and respectful discussion like sessions today we'll be able to take more pragmatic approaches and find some common ground.

I want to say just a couple of policy oriented things. Often I find that the tendency when speaking about any copyright issue is for people to look at it from the perspective of the largest corporate stakeholders with whom they are most familiar. But copyright law exists to promote and foster the creation and the dissemination or works by all types of creators and all sizes of creators. So it's very important to understand also how these copyright issues will affect small business and individual authors.

And in this case, it's particularly true

with respect to statutory damages provisions. Statutory damages are oftentimes the only legal recourse that an individual or a small business has to address an infringement of their work. And the availability of statutory damages is often a threshold question for an individual deciding whether or not to pursue a claim against an infringer, especially when you take into consideration the extreme costs of bringing an action in federal court. We hear from our grassroots members all the time that they cannot obtain legal assistance for cases where statutory damages are not an option.

There are a variety of features and motivations of the current system that are important to creators and important certainly to individual creators. The fact as Steve Tepp mentioned that statutory damages are both a deterrent and a compensatory function is very important and that the system recognizes the difficult nature of proving the value of a copyright and the loss that's caused by an

infringement.

This is particularly true when you're looking at online infringements where a single case of uploading makes works available to the entire Internet population without authorization. For good reason there are statutory damages that are not limited to directly provable damages in many cases, particularly again with individual creators and small businesses, the only direct loss that you could prove is the amount of a license fee. And allowing an award of only such an amount would be an invitation for people to infringe without consequence.

This system that currently exists is also premised on the understanding that actual damages capable of proof might be less than the cost of investigating and pursuing and infringement separate and apart from the cost of bringing a federal action. And notably our system also recognizes that awarding the profits of any infringement could also be inadequate because there could have been too few profits or no

profits or it might be impossible to calculate the profits that would be attributable to any particular case of infringement.

And the fact that the infringer has not been profitable in their unlawful enterprise doesn't lessen the infringement that has occurred. So for these reasons the existing statute provides a very broad range of damages that can be awarded in a given case and awards judges and juries the ability to flexibly apply them.

I'll note just a couple of points that are worth keeping in mind as I close and first, beyond all of these motivations I think it's also crucial for us to keep in mind that any statutory damages scheme that we consider needs to preserve a creator's right to say no. Merely compensating a creator for lost licensing revenues turns the system into little more than a de facto compulsory license.

And related to this, the fact that creators so often have to resort to statutory damages in cases of infringements is not because

they've suffered no actual damages as some people might argue, but it's because the harm to the creator and to the community is greater and broader than what can be established as provable damages and may also include non-economic harms especially when a work is infringed in an unusual or unexpected manner. And I can speak to some examples of those from our grassroots when we speak further in the discussion.

MR. PAGODA: Thank you.

PROF. MENELL: Good morning everyone. I want to commend the Patent Office and the Department of Commerce for beginning this debate, beginning this process. I think the Green Paper is a great beginning point but as we've already heard a little about history, I worry that we can often come up with somewhat simplistic views of that history.

To say that copyright -- that statutory damages is the right question and that this is well established misses a lot of that context. The current copyright statutory damage system

really derives from the problems that ASCAP and BMI faced decades ago. And we now live in a completely different era. I mean it's almost comical to think that that's how these provisions began.

And even in 1999, Congress was not yet thinking about the enforcement problems that would emerge within a year. And so, I worry that history can be an imperfect guide especially when things change as dramatically as they have.

In some ways our panel is focusing a little too narrowly and the Green Paper is a good indication of that. This issue is nested within a much larger section about making -- keeping rights meaningful in an online world. And it concludes with the statement that there's no silver bullet and any successful plan to curtail online infringement must be multifaceted. And in that spirit I want to say, the issue we're trying to solve is enforcement and it must be viewed holistically.

And I think there are some principles

that we can use in thinking about that broader question and statutory damage is part of that but it's not the total solution. So first, in the Internet age we want a copyright system that garners public approval. This is something that several people have already talked about. And I think that's something that has been lost. And statutory damages has played a very significant role.

It is disproportionate and the way in which these issues get put out to the public often distorts the public's perception. And so, we ought to be concerned. Not just for the public at large but also among judges. Judges are seeing cases through this very peculiar mechanism. The cases that come to court are selected based on the incentives that are created.

And the statutory damage regime is bringing some rather bizarre and I think unfortunate litigation to the courts. And they're inundated. Although we don't read about these cases every day, judges are seeing them to a

remarkable degree. The porn litigation that has come out of this regime is rampant. It doesn't often reach the appellate courts because this is all about trying to use the system as a business model for some lawyers and that's unfortunate.

So the first principle is I think we ought to care about public approval of copyright and statutory damages is playing a very, I think unfortunate role in that. Second, we ought to think about the system in terms of channeling consumers into authorized markets. That's the long term goal for most players in the system. And statutory damages was thought to be a successful way of doing it but the last decade has shown that it wasn't very good. In fact, the recording industry backed away from using it in that mode and I think we ought to reflect on that lesson.

The third piece, which is a very hard piece, something that David referred to, is to what extent is this system promoting the types of technological and creative advances that we would

like? And as I've written about, I think we want to have a very symbiotic ecosystem in which technology companies and content companies are working together. And I'm not sure statutory damages is producing as much and as rapid symbiosis and I also worry that it's creating this great risk for the types of creators that the Internet and digital technology allow.

So when we step back from the problem, it seems that we can usefully divide this piece of it into distinguishing between non-commercial small players and bigger players, we can think about the orphan works problem as a very distinct and solvable part for which statutory damages is, I think, causing more trouble than perhaps it should. And then the much more difficult problem which is the sort of large scale enforcement problems and even there I think the system is a bit out of whack.

Even though we can think about $150,000 per work as perhaps a useful measure, as a deterrent in certain -- when you can aggregate it

across hundreds or thousands of works, it produces obscene numbers. And that's a simple solution. We can look at how to scale damages and not use a simple multiplier. I'll end there.

MR. ERICKSON: Well, good morning. My name is Markham Erickson. I'm a lawyer with Steptoe and Johnson and as part of my practice I serve as General Counsel to the Internet Association which is an association made up of approximately 22 leading Internet companies in the US but who are global brands and global services.

I'll try to hit on a few points that don't repeat the very good points that are made here on the panel so to keep this a little bit more interesting. The first point I'd like to make is I really congratulate the Internet Task Force in developing the Green Paper because as was noted, copyright reform, copyright policy generates a lot of rhetoric. And I think the Green Paper was a stand against that rhetoric, was a very well written document done in a transparent way. It's made available. We're taking a lot of

time to look at those questions that have been posed by the Task Force.

And so, I congratulate them on doing that. I think too many times we get caught in positions where we're squeezed on proposals or court cases come out or technologies come out where we generate a lot of fast moving flurry of activity, proposals, court cases and this is a nice time to be able to look at this in a more sane way.

So I'll make a couple of points, I guess. The first is in terms of statutory damages, you know, I think they're both -- we want to think about them both in a context of secondary liability and in the context of primary infringement. And in the context of secondary liability, while statutory damages have been in the statute for a long time, you know, secondary liability is completely judge made law.

And the NAS, the National Academy of Sciences, earlier this year raised a question which I thought was an appropriate question. To

what extent should enterprises that facilitate consumer access to copyright content be held responsible for illegal activities carried out by users? It is an unusual framework. We don't see it in other parts of the law. The automobile industry manufactures cars every one of which can exceed the highest speed limits in the United States and we don't generally hold them liable for users that are violating the speed limit even though they know that those cars will be used to do so.

The second point is while a lot of the important case law has been done with regard to technology has been made in the context of secondary liability, increasingly and in recent times we're seeing more litigation around the concept of primary infringement. The Cablevision case I think was the first big case in the Second Circuit to do so. We have the Dishhopper DVR case and the Aereo case where we're looking at issues of primary infringement to settle cases that have traditionally been done under theories of

secondary liability.

And I think that's kind of an interesting dynamic. Because of the scale of statutory damages, we do have situations where even nascent technologies are not able to come to market because the threat of claimed damages are so out of scale and so out of proportion that small technology companies aren't able to offer a product knowing -- when they know that they'll be sued. That's a hard metric to demonstrate because it's hard for copyright counsel to publicly talk about clients who've declined to make such functionalities available because of the threat of litigation.

And I think that leads to sort of the primary question with regard to statutory damages and it's one that was raised by the Green Paper itself. And that is the Task Force mentions the role of statutory damages and providing deterrence. I think the key question is deterrence of what? There is no reason that the statute should deter legitimate, non-infringing

innovation.

Moreover, the statute should not deter efforts where there is a good faith objectively reasonable belief that a new technology is not infringing. The application of copyright law to new digital technologies will inevitably lead to some disputed areas were reasonable minds differ. And here the role of the statute should be to encourage innovation and if necessary litigation to clarify the disputed issues not only for the litigants but for the larger stakeholder community. And that's exactly the dynamic that produced the Grokster case and the Betamax case.

So I think the question of what are we trying to deter is in the context of statutory damages is the key question that I hope we'll spend some time on not just today but in the time going forward.

MR. PAGODA: Thank you to all the panelists for that. I think I'll start this off with a question and we'll see where it takes us. I'll try to start off with a broad one and maybe

we can try to sort of sharpen the questions as we move forward here. One of the questions we're asking ourselves here is sort of, you know, how do we or how can we conduct this cost benefit analysis? Let's assume hypothetically that in fact the presence of a statutory remedy is indeed chilling, legitimate, non-infringing innovation. Let's assume that is the case.

And if it is, that's obviously a problem. But, you know, of course the real question is it truly a problem and some of the questions we're asking ourselves are how do we measure this? Or how can we measure it? What should we be looking for to test this hypothesis? Is it really a binary issue of either chilling innovation or not chilling innovation? Are there sort of other factors at play here that might explain or correlate to either a negative or positive effect on innovation?

And I'll open this up to any of the panelists but feel free to address sort of the flipside of that too which is let's assume

everyone agrees that it hasn't or isn't chilling innovation or it won't in the future. How do we measure that? How do we test that as well? What factors would we look at? I'll just, if anyone wants to sort of volunteer to take a first crack at that and then we can go from there.

MR. TEPP: I'm happy to jump in on that because I'm honestly not willing to accept the premise that it's a given that what has been claimed is in fact true. We have a multitude of very successful online services and I would say that your question actually left out half the equation which is to what degree does the existence of statutory damages that deter purely illegal services, promote innovation by allowing legitimate licensed services to move forward with the confidence that they will not be undercut by illegal services.

Then that most vulnerable to online piracy perhaps, are the services that actually paid for the content they're trying to deliver. It seems to me that if we fail to consider that in

the context of a discussion of statutory damages, we've missed half the equation. And the reality of the volume and diversity of services that are out there speaks well to the reality that the system is working well.

MR. PAGODA: Mr. Erickson? And you can go next David.

MR. ERICKSON: Well, I think that kind of binary framework isn't really appropriate for these kind of conversations. I mean certainly we want to encourage licensed services and we can takedown services that are clearly infringing. I think what we're really trying to deal with here is those areas where there is a grey area where services that are operating in good faith are exposed to a statutory damage regime that can be clearly out of whack.

And I'll just give you an example. And when you say that it, Steve, that the question should be to what extent will the statutory damages regime result in -- it will benefit the ecosystem by resulting in services that are

licensed services. Well, if you look at Cloud locker services, Google's Cloud locker services, Amazon's Cloud locker services, there is no possible way that every piece of content can be licensed. You can have a lot of licensed content but as long as you're willing to let users upload lawful content and store that there, Amazon's not in a position to determine and they don't have that license. They're allowing someone who's bought that content lawfully to store it on their service.

So you can't have a purely licensed server in that kind of context, a licensed operation if you allowing users to upload that kind of content and I think for many of our companies that question and it's one that's really at the fore in the Cablevision type of cases, is if we are going to allow users to store remotely lawful content and share that content with the user in any time and in any place, space shift that, are we going to put those Cloud services that are merely serving as a way for the user to

store that lawful content in a position where they'll be liable under these statutory damages regime?

So Google and Amazon have taken the risk that they could be sued for the storage for those files but they're big companies that can withstand lawsuits. So I guess the point is I think that binary framework that does this push everyone into -- do we want to see everyone be in a purely licensed environment is not a practical way to look at this.

MS. AISTARS: Can I just briefly respond to Markham's point?

MR. PAGODA: Please go ahead and then David wants to make a point but please yes.

MS. AISTARS: I just wanted to note on the Cloud services and whether all content should be licensed or not point, I think if you look at legitimate Cloud businesses like Amazon, for instance, and compare them to business models which employ functions that are more clearly intended to drive infringing content to those

Cloud storage systems whether it's a Megaupload or another such system, that's where you'll see the cases being brought, not where you're talking about a commercially practical widely used kind of stable article of commerce, sort of Cloud business.

MR. PAGODA: Go ahead, please.

MR. SOHN: So I take the question before this panel and the question raised by the Green Paper to be less the existence of statutory damages than their calibration. That's certainly what's in the title of the panel.

And so, I think that the issue is much less do we need some kind of statutory damages? Is the cost benefit analysis that you're talking about, what are the costs and benefits of having a statutory damages regime at all? I think it's much more about can we find ways of minimizing the costs by focusing statutory damages more appropriately and finding ways when to structure our regime so that for real bad actors statutory damages are available and are significant but that

there is less risk imposed on entities that are simply trying to navigate an often uncertain copyright regime.

And I think that might be a useful way of thinking about it. I do think that in terms of cost benefit analysis this is going to be a very hard area to quantify what the costs are. Deterrence is a hard thing to prove. It's hard to prove what legitimate activity has been deterred because by definition that's activity that hasn't occurred. By the same token it's hard to prove what infringement has been deterred.

And I think as a matter of policy analysis, we can't really have it both ways. We can't just assume that statutory damages deter infringement but then turn around and say that deterrence of legitimate activity has to be proved through some kind of hard proof. I think we've going to have to accept that when you're asking what behavior has been deterred on both sides of the equation it's going to be difficult.

PROF. MENELL: So I do think that when

we frame the question from sort of an ex post standpoint, it has this character of creating windfalls and trying to figure out how we get incentives right. Most investment contexts are best thought of from an ex ante standpoint. I don't think a lot of these entrepreneurs want to run these risks and we don't want them to run these risks.

We have similar issues on the patent side. We want people to be able to make better estimates as to whether they're going to be able to get protection for their work before they have to go out into a market. But we don't operate that way.

So there's talk about the Cloud services and how we all accept that. Well, a decade ago Michael Robertson tried to introduce a Cloud service. Now, there were some questions about how it was put together. But it resulted in one of those poster child statutory damage awards that led to this rather bizarre situation in which the record company ended up taking over the whole

company and even suing the lawyers for malpractice for advising.

And now, we accept that you can have Cloud storage of these sorts of things. In an ideal system, we don't get to those questions because people are able to make informed judgments. We can't easily make informed judgments when juries are going to decide statutory damages, when it's going to take several years to do it.

So if we're going to think about the problem of statutory damages, we ought I think to come back to that entrepreneurial decision and really focus on how we can better assess those risks, how we can perhaps create mechanisms for clearing or at least assessing those risks before we even get into bringing in lawyers and looking at incentives.

MR. PAGODA: Thank you.

MR. ERICKSON: You know that is the tension in copyright law because much of copyright law is judge made law. And in a sense I think I

embrace the uncertainty there that it does allow for a tension where innovators can come up with a service or a product that they may know they will be sued over and try to explore the parameters of what's appropriate.

I think the, you know, if we lurch too far to the other side in terms of clearly delineating what are lawful products and services like much of the many other countries do, you do tend to lock in innovation in probably a way that is not helpful. For my purposes, I think the more appropriate, at least one appropriate way to get to those legitimate cases and allow for innovation and the court process to work in the way I think it should work, is to really scale down the kind of insane awards that can be made.

So that a company that thinks it has a service that is lawful but knows that it likely will be sued can try to bring the product to market and see what the consumer reaction is and test that against our copyright statute. And I have a harder time trying to figure out how we

delineate in an ex ante way what might be appropriate.

PROF. MENELL: Let me say, I don't disagree with that premise at all. I think part of it that we have found ourselves in this situation in part by just the peculiarities of our Constitution. The Supreme Court decided the juries decide these things. That in and of itself has created a lot more uncertainty and that's what we see the judges struggling with.

But if we were to move towards a system where beyond a certain range of damages you have to prove more than that the work was infringed. You have to prove some measures of damages and coming up with a more variegated system. We do sentencing guidelines in other areas. We have ways of trying to better correlate the actual damage to what's going on and the statutory damage regime brings in this element of trying to deal with the under-enforcement problem.

We don't have under-enforcement in a lot of these areas. When someone brings out a product

that's going to affect a large market sector like Aereo or some of these other, we're going to get a decision. Those things are not going to go under the radar. Statutory damages was initially thought of, at least in the 1960s legislative debates about dealing with those nightclubs and those bars.

We're not dealing with one sort of category now. We have several different categories. We have non- commercial users, we have sort of large scale technology entrepreneurs, we have orphan works, we can break the system out and think about those risk settings distinctly and have a more variegated approach.

MR. PAGODA: Why don't I let Mr. Tepp finish up this point and perhaps try to move on to a different topic after that.

MR. TEPP: So what we're hearing is kind of interesting because the one hand we're being told that there's so much uncertainty in the law and it's judge made law, which by the way this is the Copyright Act that Congress passed. So

Congress has done a fair amount of work here.

But there's so much uncertainty that we can't have statutory damages but then I'm told we embrace the uncertainty. Well, I took that to be a reference to fair use because you want to be able to argue that more and more things are non-infringing. Well, that's your prerogative.

But let's not import policy debates over the scope of exclusive rights, over the scope of fair use into a discussion of statutory damages. Let's remember that statutory damages are available against only one class of people in the entire world, those found by a court to have infringed copyright.

So when we have this discussion we need to keep in mind that the range of statutory damages is intentionally wide. We're giving discretion to the court to be able to find an appropriate and just award based on the very specific facts before that court. Congress cannot possibly anticipate every possible scenario and legislate that in advance. That's the benefit of

a wide range of statutory damages just as other parts of the Act that flexible allow the courts to apply their specific judgment and specific set of facts.

That does mean because there's a wide range that it gives the opportunity for people who are so inclined to discuss exaggerated potential claims. The reality is that we have no substantial evidence beyond the theoretical and occasionally anecdotal that there is some epidemic of huge outsized statutory damages awards. And I'd further note that there are some significant checks on the available of statutory damages.

Only those who have registered their copyright either within three months of publication or prior to the commencement of the infringement even have the option of getting statutory damages. So there are many cases out there in which statutory damages aren't even on the table for a successful plaintiff. I think these things need to be kept in mind as we hear some of these broader characterizations.

MR. PAGODA: Thank you and thank you everyone for your thoughts on that. I'll try to move on to a different question for no other reason than I spent a good deal of time trying to come up with questions. And this touches upon something Mr. Sohn said. I think that Professor Menell talked about a little bit and something that we certainly received comments on. And what that was was that, you know, some comments we received before the meeting recommended that maybe statutory damages should be tailored toward, I think Mr. Sohn used the phraseology it should be focused then more appropriately to a smaller subset of areas, right?

And so, some of the comments we received said, well, maybe they should be required to in certain cases more closely track an approximation of actual harm or should somehow be reduced or cabined in in those circumstances. And I think the natural counter response to that might be and this gets to the question is, okay, let's assume there's some workable middle ground there among

all the stakeholders. How can we, how could Congress, how could someone developing guidelines reconcile that with the very real fact that a lot of totally above board copyright owners face significant obstacles when it comes to first merely identifying an infringer and then to providing evidence or quantifying actual harm or actual infringement.

Let's just take the P2P file sharing scenario in one case. How is, again, an above the board totally legitimate right holder supposed to provide evidence of actual harm when they face situations where the file sharing network infrastructure might make it very hard to identify what files were shared with whom, might be faced with defendants who engage in evidence spoliation or obfuscate in some way. Would forcing right holders to sort of bring forth some approximation of actual harm in those cases be possible? Would it be unfair?

Also would it possibly be sort of a strain on judicial resources? In some of these

file sharing cases some of the defendants were found with thousands of files in their shared folder. No doubt it would be quite a trial to require as proof or some approximation of actual harm proof of ownership of each and every one of those works, proof of registration of each and every one of those works, so on down the line as opposed to a small sampling which is sort of what we saw in the Thomas and Tannenbaum cases.

So I throw out just -- I know there are a lot of questions in there but you're all very intelligent people. I trust you to take what you want with that and would, if you want Mr. Sohn to --

MR. SOHN: Sure, I mean I --

MR. PAGODA: Okay.

MR. SOHN: I think there might be a variety of ways to do it. I think it is the case that one of the reasons we have statutory damages in the statute is a recognition that it will often be difficult for a rights holder to prove actual damages. But I think one could imagine a regime,

for example, where to get some of the higher level of damages available under the statute, there's at least some showing required. Maybe not of proof of what the specific level of damages are but at least that there are substantial damages or that in this scenario it seems that some substantial damages are likely.

The point would be to try to distinguish cases where the infringement in question is really probably harmless from cases where there really probably is a lot of harm even if it's hard to quantify exactly how much it is. So it could be a prerequisite for obtaining higher damage awards.

There could be, for example, a presumption that you end up somewhere towards the minimum of the range unless some sort of threshold showing is made. The point would be to have it be kind of the middle ground where you're not requiring full on proof of specific damages that we believe to be too difficult. But at least that there be a recognition that this is a scenario where there does seem to have been some

substantial harm.

MR. PAGODA: Sandra and then the Professor?

MS. AISTARS: Well, I would say just as a practical matter I think courts are already serving that function of ensuring that only the cases where there is truly some, you know, greater harm or some greater societal reason for awarding damages that only those cases see the larger damage awards even if you look at some of the default judgments that have been rendered over the past couple of years against file sharing sites. Those all tend to be on the low -- or against users on file sharing sites has been on the lower end of the allowable infringement scale.

I'd go back to what I said in my introductory remarks which is that you need to look at the whole wide variety of creators that are relying on statutory damages and the deterrent effect of statutory damages when you consider any of these proposals. And it's not just the business models that are premised in, you know,

music or movies but you need to consider, you need to look at newspapers, you need to look at photographers all of whom have different impacts in their business and different levels frequently of ability of actually enforcing their rights.

If you're adding new or proposing to add on an entirely new additional kind of damages proof requirements that becomes completely unmanageable for an individual or a small business to handle and it also would tend to overlook the sorts of non-economic damages that individuals and small businesses often pursue infringement claims for. There are, you know, a variety of cases that we've heard of from our grassroots network where the infringement is something that is completely unexpected.

And they have no track record of a licensing in that sort of a context so they can't prove up the level of harm. There may not be directly provable profits. There's a case that I'm thinking of at the moment which involves a photographer whose work was used without her

permission by a clothing designer in a large department store for material design. And she had no record of licensing and in that sort of a context and without statutory damages she essentially has no possibility of recovering in that case.

MR. PAGODA: Thank you, if I -- just one second, Professor Menell. So I see on my timer up here that we have about nine minutes left. To the extent anyone in the audience does has any questions, we have a microphone in the center of the room. Feel free to use it, maybe we can get one or two in possibly and if anybody wants and please.

PROF. MENELL: So I want to come back to your premise of sort of large scale widespread peer to peer music, film, video. I think we can divide it up into different categories. On the music side, if we were starting out afresh we would not build a copyright system built around massive statutory damages. And I think we have very good experience that that system is not a

successful system.

I think a small claims processing, you know, sort of a parking ticket style approach is much better for dealing with those kinds of works. If we get into people who are recalcitrant, who are continually using these methods then perhaps we ramp things up a little bit but not to any of these degrees. In essence, when someone joins a service we've solved the problem. And if that's our goal I think we can achieve that without -- the other thing that's lost I think here is that if you're using federal courts to resolve disputes you're already spending much more than most of works really are about.

And so, we have these very specific pockets that Sandra's talking about, maybe we need to have some other system but not for the peer to peer and these sort of much more broad systems where we can scale.

MR. PAGODA: So I said I'd have to play polite traffic cop. So I think unfortunately I will have to cut it off there 'cause we do have

some questions from the audience that I promised I'd try to get in. Obviously, anyone is free to submit post-meetings comments and we welcome them and feel free to submit at will.

We have about seven minutes left. Some of the people who come after me I answer to directly so I'm afraid I'm going to have to cut it off at seven minutes exactly. But I do believe that's Professor Samuelson first in line, yes? If you have a question, please.

PROF. SAMUELSON: Well, I have less of a question and more a couple of comments. So one thing that I've done recently is a study of statutory damages in the international environment and fewer than 14 percent of the countries that are WIPO members have statutory damage regimes. Most of them are actually post-Soviet states and very few developed countries have them. Those countries that do have statutory damage regimes have many limitations on statutory damages that I think are worthy of some consideration, Canada, for example has a cap on non- commercial

infringement damages.

Canada also gives courts discretion to reduce the amount of statutory damages if, in fact, it's necessary in order to be -- to a just award. A number of countries don't allow per infringed work which is particularly worrisome in the secondary liability context. Google just won a fair use defense but it was facing statutory damages in the billions or trillions for something that was a fair use. So it seems to me that's of concern.

And there are a number of countries that have two to three times damages for statutory damages, a kind of guideline. So I think that there are a number of things that can be looked at for some limitations that would make statutory damages more just. I'm not arguing for repealing them but I do think that they need more limits.

MR. PAGODA: Thank you for those comments and I've read that recent article. Your question? And please just identify yourself for the record, please.

MR. SYNDOR: Tom Syndor, consulting intellectual property fellow at Innovators Network. Quick question, just a brief note, I did have the chance to look at the law of a country that did not have a statutory damages regime when USPTO let me work on the Korea FTA. And I have to say the problem with it was that under the pre-FTA laws I think if I had been a lawyer in that country, my advice would have been infringe. It's economical rational. Statutory damages take that away. I think that's important.

David, I have question for you. You mentioned cartoonish damages awards. In the -- we have now, we've had four trials, four jury trials of individual file sharer cases in which to provide some means of quantifying what -- how you quantify harm in those cases, the defendants actually introduced a reasonable royalty evidence. In other words, what would -- I'm sorry, the plaintiffs actually introduced reasonable royalty. What would this defendant have had to have paid to get a license to do with what they did?

And the uncontested evidence was that would have been equivalent to the economic value of the copyrights of the songs at issue. And with those circumstances it seems like you've got an argument that -- well, the amounts awarded are actually compensatory, not even necessary or deterrent or punitive. Do you believe that the jury verdicts sustained in Thomas & Tannenbaum were excessive? If so, why aren't they justified by compensatory moments -- motives? Why aren't they justified by deterrents and punishment and how do you calculate those?

MR. SOHN: Well, I do think that for individual behavior damage awards in the hundreds of thousands of dollars and in one of those cases in earlier stages of the litigation it was up in the millions instead. I do think that is more than is necessary for a deterrent purpose for most individual behavior.

MR. SYNDOR: But what is it's compensatory? There's no such thing as in a compensatory -- as an excessive compensatory

award. If that's the cri -- what you would have had to pay to get a license, that's compensatory. Do you disagree? Are you aware of a case in which a compensatory award has been held excessive? I'm not.

MR. SOHN: Look I think that for individual behavior you want the damages to reflect certainly an amount for deterrence and then certainly something that reflects what the damages would be. I mean, you know, you always have actual damages and you always unjust profits under the statute. So you do want awards that can cover both of those things.

I do think that if you want to talk about both deterrence and public perception as well as the actual damages at issue in those -- if you were to look at actuals in those cases, hundreds of thousands of dollars is probably more than is needed. That said, you know, I think the real focus individual behavior is less the specific kind of actions in those suits because where it really hits home for individual behavior

is that individuals are engaged in lots of behavior that is not the pretty clear cut infringement that I understand to be going on in those cases.

Individuals do a lot of other things these days that are involve moving content around, involve tricky questions of copyright law and I think it is a problem to have a regime that suggests that if they make a wrong interpretation the consequences are hundreds of thousands of dollars for individuals.

MR. PAGODA: I think Steven wants to jump in here and we have one minute left. So please be efficient.

MR. TEPP: Well, I will be very efficient. I think this question raises an important point which is when we think about the nature of the infringer we are naturally more sympathetic to someone who is a single mother or whatnot rather than a large commercial enterprise.

The reality in the Internet age is the harm that that person can impose on the copyright

owner can be just as great. And by posting works online, unauthorized for millions of people to download, the harm may in fact be that great. When we consider statutory damages, we need to consider that for a purely compensatory perspective it may be a large award because the damage may be so great.

MR. PAGODA: So I'm told we have time for one more question and please, sir.

MR. KUPFERSCHMID: Thank you very much. I'll be brief. This is Keith Kupferschmid with the Software and Information Industry Association. And to me it's a little surprising that the -- sort of this is the first panel out of the gate because if anything I would argue that this should -- the discussion of statutory damages should be sort of put on the back burner because it seems some themes here. Things like, you now, lessening risk, we don't want to deter legal activity, we want to get that dividing line a little bit better when you're at orphan works and secondary liability come up in that respect.

And so, to me it seems like we ought to be talking about to the extent there are issues or problems in the other areas, be it secondary liability, orphan works, we ought to have those discussions and see if we can all agree on some standards and then revisit the statutory damages issues at that point. So to what extent, if I were to take my little magic wand here, which I also use on patent abuse litigation I should mention, if I take this little magic wand and we speed things up and we address orphan works and we address secondary liability and whatever problems may be out there, to what extent would there still be issues in the statutory damages regime?

MR. PAGODA: So why don't you take it and maybe we can finish up after that. Thank you, Markham.

MR. ERICKSON: Keith, I think, I mean it's a valid point that I think if you deal with secondary liability you go a long way in addressing issues. But as I noted in my opening comments, you know increasingly we're seeing cases

that have been brought under primary infringement theories and maybe should have been brought under secondary liability theories and have been in the past. That where there's legitimate issues and debate about whether that service is a valid service.

So I think it doesn't solve the entire problem but I take the point. I think that it is a --

PROF. MENELL: I would just say that I think enforcement is a very big issue that can be thought of up front. Copyright lawyers will often ask the first question, did you register your works? Because they are thinking about the incentive side of statutory damages. But I do think that there's a holistic question and you're touching on a whole bunch of pieces depending on how they're resolved, you might not need to focus on this.

MS. AISTARS: Yes, I would agree and I would say along with enforcement there is room for both as you note in your recent paper, public

enforcement to try and reduce this harm especially to individuals and small businesses who can't afford to bring these sorts of cases. There's a need for, you know, resolution of sort of a small claims process. There's all sorts of activity that can usefully be done in a voluntary stakeholder process that includes all of the necessary players and that seeks to make enforcement less burdensome for all of us in the ecosystem whether we're representing individuals and small businesses in the content creation side or we're representing Internet innovators who are likewise burdened by enforcement challenges with these problems.

So I think there is a whole host of issues in addition to the maybe more legislatively tailored remedies that you're thinking of that could also be helpful. And I think there's room in this process for all of that.

MR. PAGODA: I want to thank the panelists. I'm afraid I'm going to have to -- we're going to have to cut it off there but I want

to thank you each for your participation. These are hard answers to hard questions. These are not easy to stand up here and put yourself on the spot. So thank you for your participation and for a great first panel and I look forward to the rest of the day. Thank you.

(Applause)

MR. LEVIN: Thanks, Darren and all of our panelists. We're just going to switch out the tent cards up here on the stage and get out next panel set up. Just a reminder, Darren mentioned this when folks came up to ask questions from the audience, please do identify yourself when you ask a question. Just your name and any organizational affiliation you might have.

So we're going to get this next panel started very shortly and then we're going to take short break. This next panel is going to be about the first sale doctrine in the digital age and we're delighted to have as our moderator of that panel, Karyn Temple Claggett, the Associate Register of Copyrights and Director of Policy in

International Affairs at the US Copyright Office. And she's going to lead what we hope is a spirited discussion along the lines of the last one we just heard.

So as soon as we've got our cards set up which seems to be almost ready we will turn it on over. So Karyn, it's all yours.

MS. CLAGGETT: Good morning. As mentioned my name is Karyn Temple Claggett and I am Associate Register of Copyrights at the United States Copyright Office. Our panel today is entitled, "The First Sale Doctrine in the Digital Age." The Copyright Office studied the issue of first sale in the digital environment in detail in 2001 and subsequently released a report titled the "DMCA Section 104 Report."

We concluded at that time that though existing law under the first sale doctrine, while not limited to a particular type of media, whether digital or analogue, by its plain meaning only applied to limit the distribution right. Because digital transmissions also involved reproductions

of copies, neither contemplated by the language of section 109 or its common law history, we concluded that the concept of a digital first sale right simply was not permitted under existing law; something that has been reiterated by recent United States court cases.

The Copyright Office also reviewed policy reasons why the law may need to be extended to cover reproductions. But ultimately we concluded that the benefits of further expansion of the first sale doctrine did not outweigh the likelihood of increased harm to legitimate interests from piracy and a significant undercutting of the primary market. Nor, we concluded would an expansion serve the underlying purposes of the first sale doctrine itself, which was grounded in a focus on the right to transfer tangible property and distinguish the right of distribution clearly from the fundamental right of reproduction.

Obviously, that report was more than 12 years ago in 2001, and much has changed in the

legal and business environment since the time of the report as the Commerce Department's Green Paper highlighted -- including an increased market for digital goods and a corresponding consumer expectation as to what they should be permitted to do with the digital goods that they lawfully purchase.

So we have an expert group of panelists with a wide variety of different views on this topic. And I'm sure we will begin a lively dialogue that would almost certainly need more time than the hour that we have allocated for a final resolution. But this is, of course, is just the beginning of the conversation.

So before we begin, a couple of housekeeping details, a reminder to the panelists that the panel is being recorded and webcast and also since we only have an hour for our panel today, I will just ask each panelist to limit opening remarks to just two to three minutes. And I will briefly introduce each panelist by just their title and organization in order to save

time.

Immediately to my left is Emery Simon who is counselor at the Business Software Alliance. Then we have John Ossenmacher, I believe if I've pronounced it correctly. He is creator, founder and CEO of ReDigi which bills itself as the world's first marketplace for resale of used digital goods. Next we have Allan Adler who is General counsel of the Association of American Publishers, then Sherwin Siy who is Vice President Legal Affairs of Public Knowledge. And finally, John Villasenor, who is a non-resident Fellow at Brookings Institute and Professor of Electrical Engineering and Public Policy at UCLA.

So I will start first with Emery for about two minutes for opening remarks.

MR. SIMON: Good morning everyone. Copyright is back and it's fun. For me who has -- I've been buried in the morass of patents for the last several years including last week, this week, every week, copyright is a lot more fun, a lot more interesting plus the people are better

looking. So that by itself is a good place to start.

All right, so digital first sale is the title of this panel but really the issue for us is not that. The issue for us is the license. And what can you do or not do with licenses? And licenses are changing and the nature of licensing is changing and the marketplace is changing.

So a few thoughts. So what and maybe I'm the only software person anywhere on this panel. Google appears later but Google is really an advertising company not a software company. So let me give you a little bit of a software perspective.

So three reasons why we care about copyright and this will help set the context. One reason we care about copyright is obviously piracy as a way to enforce against people who steal. Two, we care about copyright because it's a way to deal with competitors who misappropriate and the third reason is the reason that is actually the most important for the industry which is it's the

foundation for our business which is a licensing business.

And software perhaps first among copyright industries is a licensing business. Other copyright industries are increasingly moving to licensing models and that changes a lot of stuff. It changes a lot of stuff, most importantly from my perspective less as a legal matter although there are legal implications before from a business matter.

We are in transition in the software industry. We're moving increasingly from distribution though license for installation on a person's device to access the software through the Cloud and other licensing models. It's a big transition for the industry. We'll talk maybe more about that in a minute.

Licensing is under pressure. So we've had a series of cases. We've had cases in Europe, UsedSoft and the SAP case and there's now an Adobe case pending, all of which basically say that even though the transaction was a license it's going to

be treated more like a sale. And that creates a lot of pressure on the system, some confusion on the system. Although those court decisions I think are ultimately very hard to implement because they require policing of the disgorgement by the original licensor or licensee and that's hard to do.

The goal of the license is obvious, right? So it's to meet consumer expectations and as I'm sure John will talk about in a minute, to create secondary markets. Those make sense; they make sense in a marketplace context so it's not an ultimate good. It's a path to serving the purpose of the copyright law.

I'm not going to talk about the benefits of licensing. We'll get to that but one last thought here before I do too much grandstanding which is the key to the licensing, keys to the licensing model are two. One is clarity, what does the user get? And the second one is actually respect for the user. And we try in our industry, better or worse, some licenses are clearer than

others but we always try to feel how our customers are going to react and take that into account.

So I'm going to stop there 'cause we're going to get into the pros and cons of digital first sale. I want to give you guys a little context, gals, a little context of how we perceive licensing, licensing models going forward.

MS. CLAGGETT: Thank you, Emery. John?

MR. OSSENMACHER: Hi, my name is John Ossenmacher. I am the founder and CEO of a company called ReDigi. We've been on the front lines of digital copyright and first sale doctrine as to which this panel is addressing. For those of you who are not aware of it, I'll talk about it briefly but our company launched a couple of years ago. We built a technological and innovative mechanism in the digital society to be able to verify people's digital goods, their actual ownership of those digital goods and then to build a system of technology that allowed for what we absolutely believed to be the lawful transfer of those goods from a buyer to a seller without

making copies.

So we found ourselves in the heart of a very interesting battle, one we didn't intend to find ourselves in. But I will say a couple of things and I appreciate Emery's comments and I think he was very accurate about a couple of the key points that we all need to understand. And one of those was clarity. In the panel before us there was a lot of discussion about statutory damages. When, should, how much, et cetera.

But in terms of first sale, I guess I'd like to say in all of the investigations our company has done, our attorneys have done, there has never been a discussion of method of delivery and whether or not first sale doctrine should apply. When first sale doctrine started in the early days or the property laws before that or the extinguishment rules before that, you know, there has always been this issue now that we talk about it since it's digital and we're in this digital economy, what rules apply and what don't.

And I think the issue at stake with this

discussion is the altering of the balance of power between different parties and will that balance of power really ultimately effect a result that is result we as government Copyright Office, Commerce congressional members, whatever, may be looking at to attain. And I guess our perception and we certainly have a lot of data in this area shows that there can be a lawful exchange of digital goods between consumers that the technology exists today.

So when we talked about the letters that had been written a decade ago and did technology exist to do that, technology exists today to do the things that need to be done to allow digital first sale to exist and thrive and actually provide a better stronger level of copyright protection than ever even existed in a physical world. When Emery stated the point about clarity we agree the point of respect, we absolutely agree. And he brought up the point of what was going in the EU with UsedSoft and Oracle and some of the other cases.

And he had mentioned one of the complexities of that and for a software guy, a software guy knows what complexity is. I mean, their software is awesome. We're a software company too and we build software but I think one of the issues there is the software exists, the technology exists today to ensure that when rules are set like the high court or Europe set to say that the seller of a digital good which happens to be software it that case, has to render unusable their copy of it if they're going to sell, for example, their version of it.

That technology exists today. Make no mistake about that. If anybody wants to be concerned about is technology capable of enforcing digital first sale, the answer is absolutely, unequivocally yes and we can prove that as evidenced through some of the things we're doing in our company.

I think ano --

MS. CLAGGETT: I might have to cut you off there just so we can get our opening remarks

from everyone. Let's go with Allan next and I'm sure we'll circle back on some of the points you just raised.

MR. ADLER: So we are here on this panel today because at this point in the digital era, some stakeholders I guess are more interested in securing the rights of copy owners than they are the rights of owners of copyright. And that's okay because copies are a critical element of the entire ecosystem here. They're really at the center of things.

What may seem a bit ironic to some, perhaps predictable to others, is that at the center of this should be the commonplace, ubiquitous, very unglamorous nature of books. And rather than all of the glittery shining objects that have come with the digital era, we talk a lot about books, whether they should be capable of being mass digitized by people who do not hold any of the copyright rights with respect to them. Whether or not they should be the subject of licenses or whether or not they should strictly be

items that can be purchased in transactions that are sales conveying ownership.

This is all rather extraordinary because of the fact that just 10 years ago in 2003 e-books were viewed as a flash in the pan. You know, there had been a lot of hyperbole about how quickly e-books were going to dominate the world of books and how quickly readers were going to adopt e-books so that there would no longer be prints available. And that's the reason we're discussing this because I think the reading community has not yet cast its full bet.

The people that I represent in the book publishing world are still very much engaged on both the analogue versions of books as well as in electronic versions as well. And we've come to electronic books at just the time when people seem to have now looked at the world of software and licensing of software and decided that perhaps it needs to be cut back. It's a little bit difficult to imagine how one could function in the world we live in today at all without engaging in the

production of software.

And all of the publishers that I represent, regardless of whether they're in the trade sector or the educational sector, professional scholarly publishers are all producing their works in electronic formats and following the model that has traditionally followed the development of software, they are using licenses. And the question is whether or not they're dealing with a product, whether they're dealing with a class of works that suddenly should not be allowed to be treated in the conventional way that other software is being treated. We would disagree with any argument to that extent.

We would also point out that markets as everyone knows move much more quickly than regulatory regimes do. And if you've been paying attention at all in the last 10 years, it's hard to imagine that copyright in this respect has been in any way a real hindrance to innovation in this field. People are now reading books through their

telephones. Something that would have been unimaginable even 30, 40 years ago and that has to be taken into account that the market continues to surprise us with the moves it makes, with the way it develops the applications of technology.

And we need to be nimble in responding to that. And we think that the market responds to it better than regulatory regimes do and the market has already demonstrated that as we move forward.

MS. CLAGGETT: All right, thank you. Moving on to Sherwin.

MR. SIY: So thanks. I think, you know, there's a couple of different issues that have come up in some of the discussions already. One of them is the question of when do you have a sale, when do you have license and how that alters the questions around transfers of ownership. The other question really is the sort of thing that ReDigi is addressing and that's the question of when you have something that you have bought in the form of a digital file can you then transfer

that later?

I think but what I want to do is take a little bit of a step back and talk about the first sale doctrine not just in terms of a restriction on the distribution right because it's origins, I mean the Green Paper notes that the origins of the first sale doctrine come from this desire to balance the rights of a copyright holder with a consumer's control over her tangible physical property.

Now, somebody's control over their tangible physical property includes things like the right to publicly display it, the right to distribute it but it also includes a lot more than that. Now, I think as copyright people we tend to think of it in those terms because those are two of the 106 rights. But it also involves the availability to just use the thing to read the book, to listen to the LP, to watch the movie. It also includes the ability to privately display and privately perform things.

Now, these things don't usually come up

in tangible goods because it's not enforceable, it's not a 106 right. When we talk about digital goods, though, those things do become an issue. I mean, I think a lot of the discussion about digital sale talks about well, what are the advantages when we go from physical to a digital medium? What are the things that help copyright holders there? What are the things that help consumers there? What comes with that?

I think there are restrictions that come with that, too. And those restrictions come just with the nature of how digital technology works and the lack of and the fact that the statute has not kept up with that. So that the mere use of a copy of a work involves reproduction. The mere transfer of ownership will involve a reproduction. Private performances, private displays will involve reproductions and all of those things can then fall under the threat of litigation and that's a threat that I think over the past decade or so we've seen is a real one. Thanks.

MS. CLAGGETT: Thank you, and finally,

John for opening remarks?

PROF. VILLASENOR: Thank you very much. I think all of us, or almost all of us in this room are probably believers historically in the pro-competitive and pro-consumer benefits of a healthy secondary market for tangible, physical goods. And very often, arguments in favor of digital first sale start from there and that's a very sensible place to start and basically then conclude that we need to have the same downstream opportunities in digital works.

The challenge when you get past the high level 30,000 foot view, if you actually start to sit down and write statutory language that would allow a digital first sale doctrine at least as I've seen it, it seems to be impossible to do so without creating gaping loopholes that would then be easily exploited to the really grievous detriment of rights holder. One, for example -- example I'll cite is the short term loan problem which was also cited in the 2001 report. If I'm allowed to loan my digital content for two minutes

or two seconds to someone 2,000 miles away, let's suppose you have a song that a million people like and the song lasts three minutes. How many copies of the song would you need in a big loan pool to satisfy all the demands?

Well, in mathematical extreme case, if all million people wanted to listen at the same time, you'd need a million copies. But if you assume a kind of more random distribution you'd only need a few hundred copies of the song and so a few hundred people could buy the song, get paid some small amount of money to put it in this -- to loan it to this Cloud and then a million people could listen to it. And that would obviously be devastating for content holders.

The final thing I'll say by way of introduction is that I am perhaps a little less optimistic than my co- panelist John about the technology solutions. I don't doubt in any, for a minute that ReDigi has very good solutions that are in many ways effective. But my own experience is that the history and I'm sure many of you have

seen this too, the history of digital solutions to secure things is that smart people come up with good security solutions or good ways to lock things up and equally smart people come up with ways to get past those security solutions.

That's just the -- we see that again and again and again and again. And so, I'm not optimistic that we would be able to come up with a scheme the could effectively prevent people from, for example, making a copy of what the system they're using was supposed to ensure that they deleted at the end of the day. So that's a concern I would have.

MS. CLAGGETT: Great, thank you John. I think that you might have some panelists who would disagree with you so I want to kind of back up a little bit and go a little bit high level just with the general question, why is the secondary market so important for digital goods as a policy matter? Should an owner of an e-book be able to share, for example, the e-books with their friends and families? So a general policy question. Is

there a need as a policy matter for a secondary digital market? Allan or who else?

MR. ADLER: Well, with respect to e-books, when I was asked the question of whether or not you're really talking about a traditional secondary market. The secondary market in books has always been used books. It means that these are in the physical world, books whose actual condition and therefore their value has deteriorated over time and that's the premise of the secondary market.

Something that is missing entirely when you're talking about dealing with e-books where at least from our present knowledge, we may find out more decades hence, but currently when you're talking about an e-book, an e-book that would be considered tradable in a secondary market is going to be exactly identical both in condition and substance to a brand new version of that e-book that's purchased on the market. So we're talking about something that in the very nature of secondary markets is different when you're talking

about the digital version of certain types of products.

MS. CLAGGETT: Response, John?

MR. OSSENMACHER: No, I'd like to address it. I think that's an interesting point is one that's often used. But I don't actually believe it's completely accurate. I mean the whole issue of first sale is that the right holders' initial royalty has been paid and that it is now the right of the person who acquired that to be able to dispose of it in a way that they want. Whether that's by reselling, by gifting, by donating and I think the issue of trying to cloud that by saying something has to have been deteriorated doesn't really fall within the scope of the law or any of those issues.

That's not written anywhere that something is now available for secondary sale because it has bent corners. As a matter of fact, it's quite the opposite. The secondary sale, the physical goods that are available for secondary sale that don't have bent corners have higher

value than those that do. So I think that's not a completely viable argument about why a used market should not exist.

However, I do also agree on the book side. I think, you know, the book -- well, I'm going to stop there.

MS. CLAGGETT: Anyone else? I think Sherwin and then Emery.

MR. SIY: Yes, so I think you know the extent to which a, you know digital copies do degrade. And the fact that they persevere really is only in the fact that they can be copied. I mean the media itself isn't going to last nearly as long as paper.

But I think that it's -- the benefits of first sale extend beyond the existence of a secondary market. But the existence of a secondary market means, okay, you can get lower prices, you can have increased access to works, it encourages preservation. There are games and pieces of software that we have today only because people were able to hold onto those copies and

either because no one was around to sue them for it or because they were able to get around some of these issues or maybe claim fair use, that these things exist, that we have them today in archives.

It also ensures that there are new business models that are created. I mean we hear about how preventing a secondary market might incentivize people to create new markets. I think that that's a very limited way of looking at it because those new markets would have to be created by the copyright holder.

Whereas in a case where you have a secondary market, you have new business opportunities and business methods that are developed by other people who might be thinking in ways different from that original publisher. This is how we have rental services for things like movies, for things like video games. It's how Netflix came to be. It's how we have textbook rental services even since that was a vastly underserved market; textbooks being costing what they do and students' budgets being what they are.

So in addition, I don't want to go on too far in just listing all of the benefits of having these secondary markets but they will also include things that aren't necessarily regarded as sort of pocketbook issues, right? They can protect people's privacy if you know -- if you don't have a secondary market, every purchase is the owner's -- every copy that is purchased is a copy that is owned and you can know who is reading what. It can and it also prevents that sort of diffusion of information.

PROF. VILLASENOR: Can I respond to the privacy?

MS. CLAGGETT: Can I let Emery go first 'cause he had his hand up and then you can go next? Thanks.

MR. SIMON: Sure, so secondary markets are good. Let's posit that. Let's move on from that question. I mean there's lots of good things that come out of secondary markets.

But we regulate secondary markets. We regulate secondary markets in used cars. We

regulate secondary markets in lots of areas. So the notion that we have a good, does that mean it's a good without dangers or without further considerations?

So let me just again use a software industry example. Am I doing the right thing with the microphone? Somebody adjusted it before. So we license software. The license spells out rights and responsibilities. It's a contract. There's a privity issue. Who has those rights and responsibilities and how do they flow?

One of the things that we worry about is when you create secondary markets in software is what are the rights and responsibilities of the person downstream? So we have ongoing relationships with people who get our software. We do updates. We do service. We do a whole bunch of stuff.

Does the person -- and we negotiate for all of those things. These are often in mass market licenses we'll do extraordinary amounts of negotiating. So the question does the downstream

person, the second, third person to possess this software, what rights and responsibilities do they have? How do we address those? What can they claim from us and what can we provide to them?

So it's not a simple question of can you transfer possession. It's much more in our minds a question of okay, so now that you've done that, what happens? And that's where a lot of the hard issues I think come up at least for our industry.

MS. CLAGGETT: Thank you. John?

PROF. VILLASENOR: Yes, I just wanted to respond to the privacy issue 'cause it comes up and I think first of all let me start by saying that I think privacy is really, really important and there's something lost when we move to digital. But that really is decoupled from digital first sale.

So for example, I can, of course, go into a used bookstore and pay cash for a book about a medical condition I might have and that's a really private way for me to get information about it. By contrast, even if we had a digital

first sale doctrine, if I were to acquire that same book electronically through some electronic transaction, that transaction would leave all sorts of footprints that would leave the fact that I had acquired that content far less private than it would have been had I bought a used book at a bookstore.

So I think that sometimes privacy is important, incredibly important as it is, is something which is sort of analogue/digital issue in many ways as much as it is -- it's not really as central in my view to the first sale issue because we still have a privacy challenge whenever we're moving digital information around. And that's not going to go away as a problem even if we had a digital first sale doctrine.

MS. CLAGGETT: Thanks. I have another question for the panelists kind of piggybacking on that question. So assuming for a second that a secondary market which I think Emery agreed might be a good thing even in the digital context, is a good thing, is this something that requires a

legislative solution or is this something that we could actually let the markets decide?

For example, by way of licensing arrangements, I know often you are actually able to for example share your e-books already under various license agreements people have with either Barnes & Noble or Nook e-readers. So do you need to actually have a first kind of sale concept in the digital environment in the law or already are you able to see some of the benefits of a secondary market by way of licensing or marketplace arrangements? John?

MR. OSSENMACHER: Thank you. You know it would be nice to be able to say no we don't need legislative or copyright law action to ensure that the rights of the consumers are balanced with the rights of the rights holders and creators. But it's probably not realistic. And the reason I say that is when we talk about whether something is actually licensed or owned, it's kind of nice how the conversation starts to shift. And we believe there's a place for all of those things.

But I'd like to use the example of software in an automobile. You know, maybe make it a little more remote from the things we've been talking about with e-books and music. Cars today are very, very software driven and when I go out to run my new Tesla or whatever it might happen to be, my Ford Fusion, my Toyota, and especially if it's a car that has an electronic component to it or a hybrid component, there's a lot of software that makes that car usable.

And today, it may not be a direct result of first sale but the fact that that car is so software intensive, when I go to sell my car do I now need to go get rights holders' permissions, et cetera. How do licenses work to allow that to transfer?

And so, I guess I would take that and put that back now to a book for example. And I think there's been huge progress actually in the industry between the book publishers and what we're even doing at ReDigi where there's a known benefit and a seen benefit to commerce in the

whole aspect of how this secondary market supports the primary market. I think people are also beginning to see from a legislative perspective that we talk about piracy and oftentimes piracy is the issue that we think is so horrible and the thing that we all want to prevent which we all do want to prevent.

But you know, I put this simple thought before people. If you give them something of value, so if their digital good has value, won't they protect that good as something more valuable? So when we -- when someone actually acquires a digital good and it has let's say zero economic value, it has pleasure value for the moment, but it has zero economic value, what is the need of people to want to protect something that has no theoretical economic value?

And so, by having a viable secondary market I think the data absolutely shows that the primary market is improved but also that digital goods are there for great -- protected by a greater extent by their owners because they

actually have value. Whereas, if they started to use them in an illegal or unlawful manner that value would be diminished, they would then no longer have the opportunity to reap the value that that good has.

So that's what I -- thank you.

MS. CLAGGETT: Anyone else want to respond? Sherwin?

MR. SIY: Yes. I think the extent to which -- I think creating a digital first sale or having a way for there to be a secondary market actually it shows that there is room for additional actors and additional businesses.

I think that what we have right now actually is a restraint on what the market is. Markets are created by individuals trading with each other. And right now there is a lot fewer individuals in that market because the people who have these copies aren't able to do anything with them. There's only that actually limits the number of suppliers and the number of sources for these copies to just a few players. And so, it

becomes actually a much poorer market by virtue of the laws that we have right now.

So I think that actually you would open up a lot more if it created the ability to have a used digital marketplace.

PROF. VILLASENOR: I think it's really premature in late 2013 here to conclude that the market will be unable to offer the kinds of flexibilities that we have in many ways had with downstream transactions. If you look it's only been generously perhaps 15 or 20 years since we've had really kind of mass scale access to digital copyright works and just in the last couple of years as I'm sure many of you are aware we've seen a lot of interesting and much more innovative developments in the market. You know, the e-book loan, the ability to loan e-books.

Many of you may be familiar with ultraviolet which is the movie industry is allowing family members or household members to have shared access to content and to have that content be downloaded simultaneously onto multiple

devices. And it's really early days. We had how many centuries or more to sort of watch how the traditional secondary markets evolved and have concluded that it worked very well. And we've had just really a few years to watch the digital markets develop and I think we'll see a great wealth of higher degrees of flexibility in the solutions that are offered downstream.

And then the final thing I'll come back to is I think those who would argue that we need a digital first sale doctrine, it's incumbent on them to also and those who would argue against it, it's incumbent to actually construct or proposed construct language, statutory language that would accomplish that and then play devil's advocate to see does that actually work. Or does that, in fact, fail? And I for one, for example, would like to hear a proposal for how we can solve the short term loan problem in statutory language.

MS. CLAGGETT: Allan?

MR. ADLER: We also know that in secondary markets traditionally, at least with

respect to physical books, part of the problem, of course, was that in those secondary markets while there's benefit for the users there's no benefit with respect to the author or the publisher or the rights holder. There may be some benefit in terms of exposure of the work but if it's in a used book, presumably the work has already been exposed to some extent.

But the simple fact is, take the examples of textbooks. While students may sometimes think that textbooks are priced too high, they do know that with physical books they're always able to resell those books back to the bookstore, obtain back a certain measure of what they paid for the book in its new form. And then the next person gets to benefit by buying that book at a lower price than they would have paid for the new copy. But in those transactions, while the bookstore benefits, the author doesn't benefit and the publisher doesn't benefit.

And one of the things that we'd like to see hopefully in the digital era with the new

business models that develop is a way in which authors and publishers can continue to benefit from continued commerce in their works. We think that it's a good idea for users to be able to benefit. We note that with ReDigi, we note that with the Apple and Amazon patents in this area there was discussion about being able to ensure that some of the compensation flowed back to the authors and publishers and other rights holders.

Under those circumstances it's a useful discussion to have but if that aspect of this is written out of the equation then it's hard to see why copyright owners and rights holders would entertain the notion of digital first sale as anything but destructive of their marketplace models.

MS. CLAGGETT: Sherwin?

MR. SIY: Yes, briefly I wanted to touch on something that John said in terms of you know whether it's premature to address the issue of digital first sale. Because, you know, Emery was talking about the flexibility of markets and how

markets adapt and adjust to the situation. I don't think that, you know, the technology for digital content has been around actually for a very long time.

And I think the speed with which it has been adopted also has a lot to do with the legal regime. I think it's a bit strange to try and make the law adjust for existing markets when we know that the law moves so much more slowly than markets do. And instead, we can rely upon intelligent, self-interested actors to build usable and viable markets upon a system that does actually account for the various interests.

You know, just the piracy question. I don't think that you're ever going to have, well, first of all I think that people who are pirating content right now are not waiting for there to be some change in the first sale doctrine so they can suddenly claim oh, no, no, no, I got this as a used MP3. I mean that's happening right now.

The level of infringement that we see online is not going to increase because of a

digital first sale. So I think that that's not really going to affect things.

PROF. VILLASENOR: If I can just make sure I wasn't misquoted here, I didn't say it was premature to discuss digital first sale. I said it was premature to conclude that the market has failed to provide flexible ways to deal with content.

MS. CLAGGETT: Because, for example, licensing might be a viable solution?

PROF. VILLASENOR: Well, licensing models are becoming far more sophisticated as content owners are responding to demands. And that doesn't mean there's more -- and there's plenty to be criticized about some of these licenses but they are becoming more flexible than they have been.

MS. CLAGGETT: I wanted to get in a little bit to a technical issue that we raised but we haven't talked about in great detail and that's the issue of ownership versus licensing in the digital age. You know, if we acknowledge that

digital first sale only would apply to copies that you own, wouldn't we have to also expand it perhaps to cover copies that you lawfully possess if there's no such thing as ownership in the digital environment?

So my general question is what do you actually own when it comes to a digital good now and how does that impact the concept of a digital first sale? Do we own our e-books, our music files or even our software on our cellphones and if not, do we to address that in some way?

MR. SIMON: So let me start. So we have been a licensing business from the beginning. And you know, in the physical world you can lease a car or you can own a car. You can rent an apartment or you can buy a house. And when we talk about digital first sale, I think we're sort of -- the terminology traps us because it traps us into a concept of sale or not sale. And I think that that concept is not at least in my mind, the right way to think about this.

We are moving in a world from where

we're transferring possession of physical goods to where you are licensing access. And licensing access is like licensing access to an apartment. And you can have all kinds of restrictions on subleasing, on multiple tenants, on using the apartment for commercial purposes. There's lot of things that go into that lease that may or may not go into a sale.

So I think we need to stop thinking about this is a first sale or a second sale or a third sale. We need to start thinking about the reality of the marketplace which is these are contractual relationships governed by licensing agreements. And the license should be respected. If the license is not respected what you're going to do is destroy a whole bunch of very viable markets which are the ones that we're looking towards in the future to create the much richer diversity of availability of copyrighted works to all of us.

MS. CLAGGETT: Yes, John?

MR. OSSENMACHER: I agree with a lot of

Emery said.

MR. SIMON: Oh, just stop there.

MR. OSSENMACHER: No, I think he's very right in a lot of his points. But I think one of the things that's really, really important to remember when we talk about first sale is this goes back to Bobbs-Merill where as a society we put some rules into place to say we can't contract around first sale doctrine.

And so, when we're trying to use a license as a way to contract around a legal right of a consumer in America, I think it becomes very, very dangerous. So I applaud a lot of what Emery said and I agree that there's a place for everything but when I go to lease my apartment I know I am leasing my apartment. When I go to buy my home, I know I'm buying my home.

And it's not, you started off this conversation in your opening remarks, one of the points you made that I really liked was clarity. You know, I very much believe in society one of the things we need is clarity. And I think

50-page EULAs, license agreements people don't understand or know how they work, they push a buy button to put something. They put it in their cart, they do this, they do that. I spent this.

I have CEOs of companies saying we sold X dollars of and, you know, all this confusion in society of did I buy it, did I license it is confusion that we in the industry have allowed to happen in the digital world. And I think we need to step back and clarify this so that that is not cloudy. And if I as a software seller, an e-book or a reseller of such things want people to be able to buy something it should be clear they're buying it.

If I want them to lease it or rent it, it should be clear that they're leasing or renting it. If I want them to stream it as in a music service or something, it's pretty clear they're streaming it. So I think the issue of clarity is what's really important.

We, in the consumers we represent are not against any of these models. We like all of

these models but what we ask for and I think what's important here is that we get the very first thing Emery said at the very beginning is that we get clarity in what they are and then we don't try to use contractual law to regulate or write around actual consumer law that has its day in court and its rights. Thank you.

MS. CLAGGETT: And related to that, do you think and anybody can answer this as well or respond to John, that the average user or consumer realizes that they might not actually own the e-book that is on their Kindle or the music file that's on their iPhone or are they confused as to what they can do and whether they actually do own that digital good that they believe perhaps that they have purchased and own?

MR. OSSENMACHER: Well, we have real world experience in that area so I can give you real world experience from our user base. And our user base, you know, when we started off we did lots of surveys. We did lots of market analysis and there is a lot of confusion. I think

generally people believe they own it because most people when they're acquiring something digital didn't understand and maybe don't understand the difference between that and the physical world.

When I buy a specific book, I go buy the book and I know that book has certain copyrights that are licensed to that physical book. But when I go pay comparably the same amount of money and sometimes more money for a digital version of that, you betcha I think I own it. And I think most consumers believe they own it. And I think if people want to say look, hey, read the agreement, read the 50 pages, read the EULA you signed, read the user agreement, et cetera; I think in today's society that's not what's happening. And I can say that with a very strong factual knowledge.

MR. SIMON: So, John, you're right.

MS. CLAGGETT: Emery, John and then Allan.

MR. SIMON: John, you're right. There is an expectations gap in the marketplace and

people are -- they behave differently with respect to different kinds of content and how they acquire it. But exploiting that expectation gap doesn't make a whole lot of sense because it creates further confusion. So and I think the marketplace is solving it. And I'll give you an example.

I'm a Netflix subscriber. I don't think I own any of those movies that I watch. I have no expectation of ownership. I do have an expectation of being able to access that particular movie two times, 5 times, a hundred times if I really love it. But none of that is an expectation of ownership.

And I think that's the way a lot of works are moving. That's certainly where the software industry is moving which is subscription models where there -- I think there's clarity now in what people think they can and cannot do with their software. But I think subscription models generally which is a direction that we're all going in is going to do away with whatever that transitional expectation gap is in the

marketplace.

The fact that it exits does not mean one should be exploiting it in ways that do harm authors. So one's got to be careful about not exploiting opportunities that are ill-placed for the moment.

MR. OSSENMACHER: Well, again, I just want to address --

MS. CLAGGETT: I'm going to let -- let me go to John, then Allan, then Sherwin and then back to John and then we'll actually have to turn it to the audience so that people will have an opportunity to ask --

PROF. VILLASENOR: I think there's lots of questions. We could have a whole day session on the tension between contract law and copyright law and to what extent one can overlap or impede on the other. But I think it's a bit dangerous when we start talking about legislatively or judicially upending contracts between sellers and buyers that have licenses.

And in fact, you know, Vernor v.

Autodesk was on exactly this point and it's only binding in the Ninth Circuit but it came to the right decision which is if you have a license and the person getting it agrees that he or she is a licensee then that's really the end of the story. And I found it by contract quite alarming the Court of European Justice in 2012, I'm sure you all know the UsedSoft Oracle ruling where you had something which was provided as a licensed product but then the court basically said, well, you can go ahead and resell it anyway.

So I think we need to respect the abilities of licensees and licensors to go in with their eyes open. I also would agree however with John's comments and I think probably most of agree that there could be more clarity, right? And you know, having big buttons that say buy when you're not actually taking ownership of something is something that is really not ideal. But that's a clarity issue not a fundamental flaw with licenses as a means of delivering digital content.

MS. CLAGGETT: Okay, Allan then Sherwin

and then John and then we're going to open it up. So be brief because we want to leave time for questions.

MR. ADLER: Yes, just briefly to echo some of what John just said, I mean, we talk a lot about various freedoms and the ability of people to do a thing. I mean freedoms of contracting in the market have existed for a long time. There's substantial body of contract law as well as law dealing with questions of fraud or coercion or all of the other elements that may make one's agreement to a contract questionable.

If the question is one of need for education; that's something that is pretty easily served. The fact of the matter is is that those folks who offer goods and services in the marketplace through licenses, their reputations live or die by those licenses. And if ultimately the consumers find that those licenses are untrustworthy or too confusing or questionable in terms of what they actually mean, ultimately they're going to find other vendors of the same

products and services.

In the area of books, for example, books are a highly competitive market. And we're seeing, for example, in the area of library e-book lending an example of where the main players in popular works of fiction and non-fiction all have very different policies with respect to how they deal with library e-book lending. But the fact is they have policies, they are evolving. They have evolved in just a period of a year or two from a point where there weren't all of these publishers offering their books to libraries in this manner to the point where they now are.

And the fact that they are doing so under licenses that differ in their terms and conditions is part of what a competitive market is all about.

MS. CLAGGETT: Sherwin and then John for final thoughts.

MR. SIY: So, you know, we've heard a lot of talk about consumer expectations, and I think it's odd, you won't have to try and

anticipate consumer expectations in the terms of a license if you actually provide consumers with a clear idea of what's happening and a framework that is well understood. The reason we talk about this distinction between a sale and a license, the reason that is so important, is because it has real legal consequences in Section 109, in Section 117.

And to talk about upending contracts, it's an odd thing to talk about upending the expectation of the parties to a contract when what we're talking about is this 50-page EULA. I mean, how many people here, and even granting that this particular crowd is more likely than others, have read the iTunes terms of service, have read the Amazon terms of services -- right? (Laughter) This is an unusual crowd in that people are likely to do that, but I'm still seeing a very small minority of people.

Now, how many of you have that memorized and keep those expectations in mind? Compare that with the general public.

And Emery mentioned something about privity and how important it is for them to maintain -- actually, what's odd is to maintain that sort of -- that connection with whoever is using the product, because it's that issue of privity that really is at the heart of this question of: Is this a lease, or is this a sale?

Bobbs-Merrill was actually about preventing somebody from exercising a right when they had no privity of contract with the eventual owner of the copy. It was about not having a covenant that ran with the channels. If I buy something, a coat, at a secondhand store and the stitching is ripped, I don't blame the manufacturer for that, because I know -- my expectations as a consumer have to do with not just who the manufacturer is but who the retailer was.

MS. CLAGGETT: And, John, final thoughts. And if people have questions, you can start lining up.

MR. OSSENMACHER: Thanks. I'm going to

write a book, and I'm going to publish it shortly after. It's called Who's Kidding Whom? And I think, you know, the only reason I bring that title up is, you know, when we talk about licenses, let's just face it. The copyright owners don't want there to be a secondary market, period. And if there is going to be a secondary market, then the idea of licensing provides control for the copyright owner in whatever other market there may be. Now, is that a good thing or bad thing? I don't know. That's what we all have to decide. But the reason for -- you know, if we ask anybody on this panel that represents any trade organization that's a copyright owner, why not a sale? You know, why because we're in digital now do you not want a sale? Why are we talking about everything being a license? In the end, it will all be about the copyright owner's control, and it won't be about the balance that has always existed or has, for many hundreds of years, existed in terms of that balance of rights. So, I think, you know, one, we should stop kidding

each other that's why that exists, but the last point I want to make is licensing is a really fickle and interesting thing. On one hand, I'll sit and listen to the record industry talk about -- I know there's some people here -- talk about licensing, and when it to artists and musicians, it's a sale, it's a sale, it's not a license. And then they have these big class action lawsuits about artists wanting to be paid as if it were a license, because they make 50 percent versus 10 percent. So, we just have to make sure we're not talking both ways, and we have to be very clear in what our expectation is so this consumer can have clarity and commerce can exist.

MS. CLAGGETT: Okay, thank you. It looks like we have a long line of questions, so let's start.

MR. KUPFERSCHMID: Thank you very much. Keith Kupferschmid from SIIA. As many of you may know, we've been very active on first-sale issues. We've filed amicus briefs in the Vernor case, MDY case, the Kirtsaeng case, et cetera. We,

ourselves, filed a bunch of cases that where first-sale defense has come up, and the Corn-Rum case in the Ninth circuit is a great example of that.

What seems to be happening is certainly technology is moving very, very quickly. Business models are moving very, very quickly. And the issues, at least as we're talking about them, you know, whether an extra copy's being made, and how it's being distributed seems to be already -- maybe it should have happened 5 years ago, this discussion, because as Emery points out and a few others have pointed out, the business models in technology are moving so quickly that we're moving in a particular direction where copyrighted works are more and more like services rather than the traditional copyright offerings. There are more bells and whistles and more updates, this sort of anytime, anywhere access for these copyrighted works, they're being obviously moved to the cloud. So, the issue really -- the copyright law as a whole is really becoming more an issue, not about

distribution but about access.

So, along those lines, I wanted to ask a question to John from ReDigi because there was a footnote in the ReDigi case. In the district court case it talked about the ReDigi 2.0 they called it, okay, the sort of is sort of your new business model that was, I believe, according to the footnote, put in place even before the case was decided, which takes advantage of the new business model, puts the music in the cloud. Can you talk a little bit about that and whether you are relying at all on the first-sale defense in that business model?

MS. CLAGGETT: Briefly. Thanks.

MR. OSSENMACHER: No, thank you, that's a good question. So, just real quickly on ReDigi 2.0, basically what we did is we had that process available to our consumers for a period of time. If a consumer uses our software RRF prior to actually downloading a digital music file or a song for sale, we would allow them to put that directly into their cloud initially. So, the

reason that worked the way it worked was the issue we faced was in ReDigi 1.0 we couldn't even get to first-sale doctrine.

You know, some of the issues Sherwin brought up about the question of reproduction and what is or isn't a reproduction in the digital age, which we all think needs to be defined, we weren't even able to get to a first-sale defense, because we failed on the reproduction defense, you know, with ReDigi 1.0. So, ReDigi 2.0 now could certainly open that up as a first-sale defense, because there's no reproduction involved in the file. So, if a ReDigi 2.0 transaction happens, there is no reproduction at all of that digital good. It is simply a transaction in exchange of title and keys between buyers and sellers. No files are copied, no files are moved, et cetera.

MS. CLAGGETT: Interesting. I know that folks will be interested to see how mobile production occurs. So, that's a very interesting point.

Next question.

MR. BRODSKY: My name is Art Brodsky. I'm fascinated by this discussion between licensing and owning, as I do a lot of work with libraries in Montgomery County, and the fact is that even if a library gets a Harper Collins book, the lease restricts it to 26 checkouts before you have to renew. If you get a Random House book, you're paying $85 for a book that you or I might download for 10. But it's still a lease.

So, here's my question. What is the incentive for any of you who deal in digital properties to allow consumers to own anything? Are we simply condemned for the duration to saying no because a book is, in bits, transmitted over a wire through the air? There's one set of rules. And if it's printed, it's another set of rules.

MS. CLAGGETT: Anybody want to -- Allen?

MR. ADLER: Well, I mean, the market isn't eliminating the ability of anybody to own anything. What they're doing in fact, in the market, is different business models are emerging, which give consumers, ultimately, a choice. The

fact of the matter is the policies that you mentioned were examples of companies trying to essentially meet what they heard from the libraries, which was to try to replicate, to some extent, the traditional library lending of books by doing so in the digital environment. So the policies you mentioned were ones that were attempts to take into account the difference that e-books would have with respect to how often a library might have to buy a replacement copy of a physical work due to it wearing out, something that doesn't seem to occur -- or at least we don't know yet will occur -- as often with respect to a digital version of that.

When you talk about the number of times in which the book is going to be lent out, again, that is an attempt by this company, in a way that differs from other companies, to try to replicate its experience in traditional library lending of physical books.

You know, you get what you ask for in terms of consumer expectations. It's difficult

for consumers, on the one hand, to say that they want all the new bells and whistles, all the new capabilities that come with digital formats but at the same time to say that they want the business model essentially not to change from what was traditionally comfortable for them. The fact of the matter is that in many ways an eBook is a different kind of a product than a physical book, simply because of the capabilities that it has, and that has to be taken into account in this environment.

MS. CLAGGETT: I'm going to go to the next question. I'll say we'll probably have to close off the questions after Brandon, the person who's the last person in line right now.

I think, Sherwin, you wanted to respond, and then we'll go immediately to the next question.

MR. SIY: Just quickly. You know, I think ownership of personal goods is not a convenient part of the market. It's actually a much more fundamental thing. In terms of how much

the market can account for things, whether you have -- you have a number of different publishers, you have very few outlets for the production of digital books themselves, and in terms of what -- I seriously doubt that libraries are the ones that wanted those restrictions on the number of lendings. And, you know, you can contrast sort of what's offered by the publishers with what actors like the Internet archive are doing with their digital lending program in terms of what users actually do, expect, and want.

MS. CLAGGETT: Okay, next question.

MS. McSHERRY: Hi, my name is Corynne McSherry, and I'm with the Electronic Frontier Foundation, and I, too, have found this to be a tremendously interesting conversation. I think that where we've ended with it, which is talking a lot about licensing, is actually required. I think we can have this conversation. We're talking about EULAs, because we can talk all day long about what we want to do with the statute, but, you know, what the statute may giveth, the

contract terms will taketh away. And there's actually empirical research. We don't have to guess about how many people read end-user license agreements. There's research on this, and let me tell you, the number is teeny-weenie, and it's not enough. So, we have these mass contracts of adhesion, to which everyone is agreeing without knowing what they include, without knowing what they're binding themselves to.

The other comment I want to make is I think it's crucial that this conversation be continued with an eye toward the purposes of copyright, and one of the crucial purposes of copyright is to promote innovation. And I'm hearing a lot about consumers and consumer expectations. I'm not hearing -- and secondary markets, which is all fine -- but I'm not hearing a lot about innovation.

The reason I raise this is because many of the license agreements that are attached to software and other copyrighted works that are contained in devices and other goods upon which we

rely include restrictions on things like fair use -- not just for sale but restrictions on any number of things -- and what that does is it inhibits something that we haven't talked about yet, which is the freedom to tinker. And the people that I represent want to not just access goods, they want to mess with them, they want to change them, they want to recreate them, they want to make, they want to do things with them that then in turn will spur further innovation. So, when we talk about first sale and when we talk about licensing, we have to build into the conversation how we're going to protect that kind of innovation.

Thank you.

MS. CLAGGETT: Thank you. Next question. I don't think there was a question there, so I'm going to turn to --

MR. SHORE: Hi. My name is Andrew Shore. I represent a coalition of resellers and secondary-market platforms called the Owners' Rights Initiative.

Question for either John or Emery. Touched on briefly was this issue of embedded software, the idea that cars, refrigerators, all kinds of goods are now are very software heavy. How do you deal with this issue of reselling these goods and separating the software from the good itself, or does the consumer own the entire bundle and they're able to transfer it? Because, in this context, the consumer doesn't really have a choice. I mean, if all cars come with software, then you have no other choice to go -- I mean, you can buy a really old car, I guess, that doesn't have software.

So, I want to sort of remove -- and, Allen, you keep alluding to this issue of consumer tricks -- I want to remove that from the equation, because it's not really --

PROF. VILLASENOR: Well, let me maybe take a crack at responding to that. I mean, I haven't bought a car in the last couple of years, but my understanding is that when you buy a car you don't have to sign a software or license

agreement, you know, that restricts the ability to resell the car and that even digitally delivered content -- for example, my understanding is if I buy digital content and it's on the disk, I'm free to sell the physical disk to somebody else.

MR. SHORE: But what if you need the updates? So, for instance, there is a lot of technology now, like routers, which requires software updates, and so you would have to pay for the updates. You would own the box, but you --

PROF. VILLASENOR: Sure, but again I think to be bound by a licensing contract, you have to have entered into the contract, right? And if you haven't done that, then there's, you know, Augusto's UMG recordings.

MR. SIMON: So, this is a fantastic example of FUD where --

MS. CLAGGETT: Is that a technical term?

MR. SIMON: Yeah, it's fear. It's fear mongering, which is the concept that somehow because technology, which is a good thing, has made products better and more efficient through

the use of software, like cars and what the software does in the car. It makes it perform a lot better. That's a good thing. Somehow translating that into a notion that this was going to restrict resale of cars is ludicrous. So, my car, which is four years old, has had a software update for the ignition system. I didn't pay for that. It has also had a software update for the maps. I did pay for that. So, it varies. It depends. And I knew that when I bought the car that there were parts of the agreement, so the basic running of the car is the running of the car. Add-ons like Bluetooth and Maps are a different thing. It's fine. That's how markets work. And this notion that somebody can't resell a refrigerator because it contains software, a microwave. It's just fear mongering.

MR. SHORE: Okay, so it's your position that what's in the box you should be able to resell.

MS. CLAGGETT: I think he said it depends on the actual circumstance.

But I'll let Sherwin respond, and then we'll go to the next question.

MR. SIY: I just wanted -- we can see the legal landscaping in which those problems may arise, and I think the solution is not to say don't worry, nobody's going to actually sue over that, it's not going to happen. That's the same argument that was brought up and Curt saying, with regard to individual importations of copies, the Supreme Court clearly did not think that that was a worthwhile argument.

MR. SIMON: I'm in no way suggesting that people won't sue over that. People sue over all kinds of things. It's a fabulous country.

(Laughter)

MS. CLAGGETT: Yeah for litigation.

MR. SIMON: What I'm suggesting to you is that positing the idea that because refrigerants contain software it justifies secondary markets in all software is just silly. It's just silly.

MR. ADLER: I think it just bad to try

and look for clarity again. I think that's the real issue.

MS. CLAGGETT: Okay, I think we have two final questions, so let's try to go through those quickly.

MR. COOPER: Mark Cooper, Consumer Federation, and I want to use consumer expectations to raise a question about the claim that creators get no benefit from secondary markets. Let's be clear. When I buy a house or an expensive textbook, my willingness to pay is influenced by my understanding that I can resell that product. Even when I buy a hardback popular book, my willingness to pay is affected by the ability of me to lend it to my neighbor or my kids, et cetera, and so the statement that -- the notion that publishers don't take the secondary market into account when they set the first-sale price seems to me odd, and frankly they need to get a new set of economic consultants, because that is in fact an important influence on the willingness to pay, and the claim that there is no

benefit to creators from secondary market is actually absurd.

MR. ADLER: Yeah, okay, well, we didn't say that there's no benefit, and when you aid --

MR. COOPER: That's exactly what you said. Exactly what you said.

MS. CLAGGETT: Okay.

MR. ADLER: Excuse me, we're talking about a common solution, okay? We're talking about compensation. Not no benefit generally. And there are also some wild cards here, okay? Because, you know, for example, when we talk about -- it was mentioned before, the case whose name we're not supposed to mention on this panel, we woke up one morning to find out that some 40 years of doctrine of national exhaustion had suddenly flipped to international exhaustion, which is something that would have to be taken into account in any discussion about extending first sale into the digital transmission environment, okay?

And we're also talking about the fact that another wrinkle that happened that was not

expected was the fact that a court recently decided that apparently publishers cannot always determine the price at which they offer their goods. And so they can't always figure into that price secondary markets, because sometimes there are going to be retailers who are going to, by the benefit of the government's view antitrust law be able to tell them what those books are going to sell for regardless of whether or not the publishers agree.

MS. CLAGGETT: All right, I think we're going to have to move on to the last question. We've touched upon some very interesting issues so I know that in these multiple panels and series of roundtables later we can discuss them in more detail.

But, Brandon?

PROF. BUTLER: Yes, so I'm Brandon Butler from the AU Washington College of Law, and I just wanted to channel -- I know there are lots librarians watching this right now, and some of them, like my wife, do preservation and when they

hear this idea that digital is going to last forever unlike paper, it drives them insane (laughter), because I think any librarian knows it's actually quite the opposite. Paper -- if you get a good paper book, and as my wife who's a preservation librarian says, put it in a box and leave it alone, it will last forever and ever and ever. And in my experience buying music on all kinds of platforms and trying to move them across all kinds of PCs and Macs, those things disappear faster than you can possibly imagine. I've bought the same record 10 or 12 times sometimes. So, I just wanted to disabuse us of the idea that digital is forever; it doesn't degrade; it never has to be replaced; and so on. I think there is real risk.

PROF. VILLASENOR: Okay, can I -- I think that's a great comment. Can I respond to that?

I think we're sort of in a -- and this is really not a first-sale issue, it's a question of how long does digital last. I think we're in a

transition. You know, 10 years ago we had stuff on our personal devices, and obviously those devices do degrade. I think we are very quickly moving to the place where almost everything we own is going to be in a cloud-based system, and cloud-based systems can last, you know, effectively forever. I expect that the archive from this session right now is going to be viewable in 200 years if somebody wants to -- it's hard enough to find; it's going to be somewhere. I think there's a huge challenge in making sure the cultural memory has access to all of the right things and in managing that. But I think that's really not a digital first-sale issue as much as it is an issue of managing a world in which all of our information is digital and in the cloud.

MR. ADLER: And also I think --

MS. CLAGGETT: I think we have to close with Allen's last thoughts.

MR. ADLER: Yeah, I mean, you have to also understand, we're not talking about the fact that digital is going to last forever in perfect

form. What we're talking about is the practical consideration that when somebody buys a physical book at a used book store, they expect the possibility that it will have some deterioration. Do you really believe that if there are resale markets with respect to eBooks or any other kind of computer program, people will find it acceptable if you say to them oh, by the way, this program no longer does the following things, or you can use eBook but it will no longer deliver these functionalities because it's degraded. No, the reality is the only ones that they're going to be interested in purchasing on resale are the ones that will work exactly the way the new version would.

MS. CLAGGETT: I think we actually have to cut it off, sorry. This has been certainly a lively debate, and I know Sherwin mentioned that this is just the beginning of the conversation. I want to thank all the panelists and thank the PTO as well for hosting. Thank you.

MR. LEVIN: Thank you, Karyn and all of

our panelists and the audience for such a spirited discussion.

We're running a little bit behind, as you can tell from the agenda now, but it's been great. These conversations are fantastic, and we like to have them. We're going to take just a five-minute break instead of the 15.

(Recess)

MR. LEVIN: Folks, just one more request to find your way to your seats.

Okay, I think what we're going to do is we're just going to go ahead and get started and people will make their way to their seats hopefully as our panelists start so that we don't fall too far behind schedule.

I just want to make sure that we're back up and running on the webcast before we get started.

Just a note to the panelists who are in the room, including those upon the stage, if you could -- this is a request from our tech folks who are doing our webcast -- if you could make sure

that you turn on your mic when you're talking and turn it off when you're done talking. Just the big button here. And they've also asked that we not move the microphone around. So, just to help out with our webcast of the event, that would be great.

Are we back up and running? Are we -- not sure. We'll assume that we are.

So, anyway, without further ado, I'm going to hand the mic over for our next moderator, who is senior counsel here in the USPTO's Office of Policy and International Affairs, Michael Shapiro.

MR. SHAPIRO: Thanks, Garrett, and welcome back from out very short break, guests.

Welcome to the panel on Legal Framework for Remixes, the panel that I think you've been waiting for because, of course this is the panel that's at the intersection of copyright creativity and culture. The other panels, of course, were equally fascinating. (Laughter) So, as Gary mentioned, my name is Michael Shapiro. I'm Senior

Counsel for Copyright here at USPTO, and I lead a small copyright team. You've met some of my colleagues already, and you'll meet others throughout the day.

We have an all-star panel this morning, and let me briefly introduce each member of the panel.

First, immediately to my left is David Carson, who is head of the Global Legal Policy for IFPI, and before joining IFPI David served as General Counsel for the Copyright Office for 15 years.

Next, Professor Peter DiCola is Associate Professor of Law and Searle Research Fellow at the Northwestern School of Law. Importantly, for our exercise today, he is the co-author of a terrific book, Creative License: The Law and Culture of Digital Sampling. And for those who've just had an opportunity to sample it, it's deserving of a full and thorough read.

Jay Rosenthal, Senior Vice President and General Counsel for the National Music Publishers'

Association is next in line on the panel.

Josh Schiller. And Josh Schiller, who is an associate in the law firm of Boies, Schiller & Flexner, where he practices law in a broad range of areas, including intellectual property law. Significantly, he recently represented the contemporary photographer and painter Richard Prince in a seminal case before the Second Circuit. We'll be hearing a little bit about that today.

And, finally, last but not least, Rebecca Tushnet, who is Professor of Law at Georgetown University Law School, where she teaches constitutional law, consumer protection, copyright, and intellectual property.

Welcome all. I had lobbied strenuously to have a three-hour slot for this important panel, but I was beaten back by my colleagues, and we only have an hour, and even that time is somewhat truncated. So, I will be relentless in keeping the presentations to two to three minutes. After those introductory remarks, I'll pose some

questions and try to organize the conversation. But without further ado, perhaps the easiest way to do it is to begin with David and move on down the row in sequence.

David, the floor is yours.

MR. CARSON: Thank you very much, Michael. For those of you who don't know what IFPI is, we represent the recording industry internationally. The interests of the industry are generally looked after here in Washington by the RIAA, but I'm somewhat familiar with what goes on here, so we thought it might be helpful for me to come and give you a sense of how the recording industry views the issues with respect to things like remix and UGC and so on.

Let me start this with a personal perspective. When I started working for the recording industry a little over a year ago, I was surprised at the extent to which it had transformed itself. Not totally surprised -- I had quite a few clues or I wouldn't have even considered working for it. But the popular image

that many people have, or at least had, of an industry that forcefully asserts its rights and takes people to court at the drop of a hat is not an accurate description of the recording industry today if it ever was an accurate description. Having gone through a baptism of fire during the last 10 or 15 years as online piracy decimated our sales and threatened the very existence of the industry, we've remade ourselves now and changed our focus to licensing, licensing the rights to exploit the sound recordings that we make and distribute so the consumers can experience those recordings in just about any that they want, preferably in a way that actually makes some money for us, because we are businesses and that's what businesses are in business to do. So, that's sort of the theme that we have when we look at the issues that we're talking about today.

We're not out to try to stop people from doing things. We're not out to sue people. The days of suing users are long behind us, and one can argue in some other form about whether that

was a good thing or a bad thing. That's not what we're to talk about today. What we're here to talk about is what we're trying to do to give people the ability to do what they want to do with our music in a way that doesn't harm our rights and hopefully that compensates us and our artists when they're taking our creative efforts and doing other things with them. And that's what we're doing with remixes and UGC as well. We're not trying to stop them as a general proposition; we're licensing them.

I think the best example of that is the recording industry's licenses with YouTube, and we're not the only industry, certainly, that has licensed YouTube. But our licenses, I think, are a pretty good example of what's happening today. Those licenses actually permit YouTube to make available user-generated content that incorporates sound recordings.

The best way to sort of describe it is to describe in the words of Google in the comment that it submitted in this very proceeding where it

called the licensing solution, which is powered by its Content ID identification system as a win-win-win solution for YouTube, copyright owners and YouTube users. The system has created a new source of revenue for copyright owners as well as for YouTube, and it allows creators to remix and upload a wide variety of new creations built on that existing content without having to independently seek out licenses for it. So, it does work for everyone.

On the other hand, when you're talking about commercial sound recording remixes, our attitude is a little bit different. That is a negotiation. That is a situation where you sit down and you clear the rights, and there's going to be some money passing hands, and that makes perfect sense in the commercial world.

In the discussion that follows I'd be happy to elaborate on how the YouTube license works and the Content ID system that YouTube employs to identify videos that use preexisting content and explain how it gives creators of UGC

more options than first meet the eye to make their UGC available to the public. It also offers a model for other licensing activities, and as an industry we're always on the lookout for new ways to license. If time permits and it's relevant, we might talk a little bit about the new micro-licensing program that we're launching.

Essentially, as I said, we're out there to try to enable people to do what they want to do with our property, and all we ask is that you sit down and actually cut a deal with us and not just go off and do it when it's trampling on our rights.

Thanks.

MR. SHAPIRO: Thanks very much, David, for an initial intervention.

We move on to Professor DiCola.

PROF. DiCOLA: Well, thanks, Michael, and thanks to the PTO for convening this, and thanks to Garrett and Ann for inviting me to be part of this panel.

So, Michael mentioned my book, Creative

License. It's out from Duke University Press. It was written with Kembrew McLeod of the University of Iowa and had the support of the Future Music Coalition, which is a group some of you may be familiar with. It's a nonprofit research, education, and advocacy group that I've worked with for the last 13 years.

The book is based on over a hundred interviews with musicians, both musicians who have been sampled and musicians who do sampling; attorneys; industry professionals; journalists; and scholars. In a nutshell, the book kind of outlines the many competing interests in sampling, aiming to present all parties' perspectives sympathetically. We detail how the sample clearance process works, which is kind of the heart of the book, to try to -- it casts some empirical information about how licensing works.

We take note of some very successful licensing interactions. One of the examples in the book details how an artist -- even though a remix was made that was unauthorized initially,

that artist chose to license it, and it ended up making a lot of money for her.

Despite some successes, though, we note that there are some important barriers and inefficiencies in the system. The barriers I'm talking about are particularly with respect to independent musicians and independent labels or musicians that are just unaffiliated with labels. There's just a barrier to entry in terms of understanding how the system works, how copyright law works. That's a fact of life, obviously, in our legal system in lots of areas, but it's just something we have to acknowledge.

As far as the inefficiencies, we talk about basically three categories of inefficiency. Some of them are just the transaction costs that are involved. Some of them involve just the difficulty -- when we're talking about sampling, when you're negotiating sometimes across generations, it's difficult to get those people in a room both in advance of when the original work is made and in advance of when the sample base

work is made or until someone knows that they indeed want to use the sample commercially.

But of course the other problem is the royalty stacking problem. That would be the third inefficiency, just that what we heard over and over again -- including from people who are advocates of the current system and of the status quo and people who advocate the interest of copyright owners -- we heard universally that if you sample multiple works, it's going to be impossible to license your work, the new work that includes multiple samples, for any price less than a hundred percent of your revenue. So, as you sample four works, 5 works, just the going rates for sample licenses are so high that you would be losing money to release the work commercially. So, collage-based music that involves 15, 20 samples per track is just impossible to get licensed. And everyone agrees with that.

Now, whether you're troubled by that outcome or not is where the differences are, but the empirical fact is that that license can't get

done even by some of the super lawyers that we interviewed, like Dina LaPolt. You know, great lawyers who just, as good as they are at getting deals for their clients, can't maybe get those things licensed.

So, in sum, I think that we have to recognize the problems and the empirical reality, and then there are a number of different policy solutions. I think it's going to take a portfolio of solutions, a set of different things, some of them legal, some of them out in the market place. Some of the things that David talked about are very encouraging, and I look forward to talking about them on the panel.

MR. SHAPIRO: Thanks so much. Jay, do you want to pick up the conversation?

MR. ROSENTHAL: Sure. First of all, the National Music Publishers' Association is the largest trade association representing music publishers and songwriters in the United States on public policy matters and other issues, in particular licensing matters as well with our

industrywide deals. As a matter of full disclosure, and I think it does matter considering Peter wrote his book and interviewed some folks who I know, I have negotiated hundreds of digital sampling deals in my career before I started at the NMPA, and in my prior life as an artist-attorney representing artists like '90s rap icons Salt-N-Pepa and Kid 'n Play as well as more recently go-go artists from Washington, D.C., and electronic artists as well.

A couple of points that I'd like to raise and hopefully we can get into some conversation on this. Regarding digital sampling and mashups in general, we support fair use exceptions like parody and satire that stand as legitimate defenses to infringement, as well as other traditional fair use carve-outs. We do not believe that fair use should in any way be expanded beyond its already accepted contours, nor do we believe the creation of a compulsory license system for sampling is a good idea because of the varied and nuanced ways digital samples are used.

Now, it would be great and much easier for remixers and mashup artists to use samples without asking the original recording artist or songwriter, without paying them, and without providing attribution. However, I don't believe that the copyright law should have a primary goal of ease. I think the primary goal should be the support of the property interests of those creating the work. We certainly should not promote a system that triggers a form of class warfare between old artists and new artists. Instead, we believe Congress should be incentivizing and promoting collaboration between old and new artists, including the licensing requirement that's at the core of the collaborative relationship.

Now, as a practical matter, and I do take a little bit different point of view than Peter, I don't believe there's a problem with digital sampling. It may have taken a few years to get the kinks out of the deals, but after 20 years or so, the contractual deal points have

become normalized and relatively easy to negotiate. You also have businesses out there that have been developed that will help you get clearances, get quotes in all sorts of ways for big and small and newer artists. It's also easier than ever to find authorship and ownership contact information with the vastly improved databases of PROs, Harry Fox Agency and SoundExchange. We have BMI in the back. They could tell you about their wonderful database that covers an unbelievable number of compositions. And you can find the publisher and the songwriters if you really want to.

Most importantly, the cost of the samples has never been lower. In fact, because of the great depression that hit the music industry, this is a buyer's market for digital samples with many sample deals turning not on the payment of exorbitant flat fees or advances but simply on a sharing of the copyright interest in the new work. And maybe we can talk about the point here that you raised, that if you have a lot of samples is

it hard? Yeah, it's hard. Is it done? Yes, it is done. The idea that you cannot do this is really just not true.

Now, while I'm a great fan of Public Enemy and lesser to De La Soul, who you talk about a lot in your book, I really do take exception to the idea that their views on digital sampling somehow represent the majority view in the hip-hop community, a community that I've worked in for over 20 years. They just do not. Others rappers, like Salt-N-Pepa and the legendary producer of Salt-N-Pepa, Hurby Azore, ultimately concluded that unauthorized digital sampling is morally wrong and violates the property interests of other songwriters and artists and also violates the great unwritten golden rule of rappers: Do unto other rappers what you would want them to do to you. So, they decided that they would clear all samples and, if possible, would collaborate with artists, and that is exactly what they have done. In their iconic album, Very Necessary, we cleared all the samples, and for their big hit, "What a

Man," -- possibly some of you in here know this song -- we arranged a deal with the original owners on a 60/40 basis so that the original authors of the sound recording and the original authors of the musical composition are paid.

We also believe there is no compelling reason to change the broad framework of copyright by claiming that sampled work should be considered de minimis or that some do not constitute copyrightable authorship. It's really the antithesis of progress in our minds to promote a free-music culture by adopting loopholes in the copyright law to allow a number of remixers who believe, on a certain level, that they're entitled to use other artists' music for free.

But there are solutions. There are market-based solutions, and we should consider them. For example, the NMPA entered into a deal with YouTube regarding user-generated content. Thousands of publishers have signed up to this deal. So, basically, we have figured out how to do it in the marketplace so that with this

user-generated content, which is a big part of what this debate is all about, is being put into a position where the use is being paid for. And this is a wonderful development in the progress of trying to deal with these problems. We also believe the Creative Commons approach is viable, the idea that an author can grant the right for others to use their work for free and without requiring approval. And they also very much want to sign on to this idea that micro-licensing is a solution to, certainly, the lower level of licensing where you have, you know, not as much use and not as much money involved, but nevertheless you want to promote licensing and we can possibly get to that point.

So, again, as a matter of public policy, we believe it's much better for the copyright ecosystem to adopt an approach promoting collaboration between new and older artists rather than an approach whereby new artists don't ask permission; they don't pay; and they don't even provide attribution. The latter is about as far

away from progress as we and really anyone should imagine.

Thank you.

MR. SHAPIRO: Thanks, Jay. And let's now turn to Josh Schiller. And the floor is yours.

MR. SCHILLER: Thank you, Michael. For those who are not familiar with the decision in the Prince case, I'd like to just give you a little background and then talk more generally about fair use.

We represented Mr. Prince after he had lost a decision in the district court. He is an appropriation artist similar to other artists like Andy Warhol, Robert Rauschenberg. He's regarded and respected in the contemporary post-war modern American artists who have contributed to the growth and the recognition of appropriation as an art form. Mr. Prince took photographs that he found in a book and used those as raw ingredients. You may call them samples. He may consider himself and has proclaimed himself in some sense a

DJ, and in doing so he created new -- 25 of the 30 works that we argued about that the court found to be transformative. We're still fighting over a few. We believe they'll also be recognized as transformative.

But what was very important in the Second Circuit's decision, which I think is a very important principle in fair use, is that the court recognized that a work of art could be transformative without needing to look solely at the explanation that an artist may provide. That rule has been done away with, and I heard Mr. Rosenthal use the word, which does concern me because it evoked the decision that was overturned by the Second Circuit -- he used the word "legitimate" fair uses. There's no such word in the statute. The statute lists a number of examples of fair use, and we can look at cases leading up to the Second Circuit's decision and a few cases following that, which make very clear the kinds of examples that have been recognized as fair use.

One thing that's important and one thing that we advocated strongly against in this case, was that there can be no broad rules, broad line rules in fair use. It's a principle that's been articulated by the Supreme Court and by the circuits. It's a rule that we asked the Second Circuit to follow, and it very clearly did in looking at each work and deciding it couldn't decide whether 5 of the 30 were transformative. This is exactly the kind of effort that we think is worthy of a circuit court and a district court examining a difficult issue in fair use. And I call it difficult, because here there was in some works, still visible, the entire original image. In many works, the entire original image was completely obscured. And when you're dealing with art, you must always look at the original and a secondary work, as the Second Circuit did, and you can't necessarily create rules that would apply to all art works.

Mr. Prince views what he does as very much a sense of remixing things that he's found,

things that have inspired him, things that he uses to create often in a series. The result of the decision that required Mr. Prince to offer up some magic words to the court (inaudible) used his deposition to condemn the art works as not only not transformative but not fair use. The danger in that is that it creates a fine line, and it would limit works of appropriation to those that a court could find to be obvious examples of parody or satire. And we know that Congress obviously did not intend to limit fair use in those aspects.

Now in terms of the perspectives we're talking about here, I think one way I always talk about this case is when people criticize the decision, which a number of people have come up to me and wanted to discuss, usually the criticism is we just don't know what to do now.

Now, the issue for me is not that there's a lack of clarity. The issue is that fair use is operating and always was intended to operate on a case-by-case basis. But, more importantly, copyright applies to so many

different industries that it's incredibly important to the integrity of fair use that it is studied on a case-by-case basis without broad application for artists, for musicians, for film makers.

MR. SHAPIRO: Josh, could we wrap this part up so that we can get everybody's initial thoughts in?

MR. SCHILLER: Sure.

MR. SHAPIRO: And then we'll drill down.

MR. SCHILLER: Why don't I just move along. (Laughter)

MR. SHAPIRO: Okay.

MR. SCHILLER: Thank you.

MR. SHAPIRO: And thank you. Professor Tushnet, opening remarks.

PROF. TUSHNET: Well thank you. So, I'm here on behalf of the Organization for Transformative Works, a 501(c)(3) nonprofit, which was founded to protect and defend noncommercial transformative works and their creators.

Just to give you a little idea of scope,

we get two million hits on our website each week by people who are accessing fan works, and we aren't anywhere near the largest site for fan works. We're a small minnow.

Creative works exist in an ecosystem, and in that ecosystem noncommercial works are the equivalent of the wetlands, a rich source of diversity that can't be replaced by systems of top- down control. In this environment, fair use has an important disciplinary effect on the biggest copyright owners whose works are most often used in remix. It deters them from making the most outrageous claims, and it allows people who are caught up in, in particular, automated enforcement mechanisms to assert their rights, for example, in a Content ID situation. If they find an organization like ours, fair use also allows creators -- and they are creators -- to fight back when copyright owners to try to suppress critical and transformative uses like Jonathan McIntosh's Buffy vs. Edward. Very interesting critical work of the Twilight series, which was actually

specifically cited by the Copyright Office as an example of transformative fair use, which the copyright owner then tried to get taken down.

Robust fair use supports a culture of free speech and reasonable balance as against a culture of suppression speech and the resulting disrespect for copyright, which I know many of us are concerned about.

Licensing is just not a substitute for fair use and fair use decisions across the circuits clearly recognize this. Fair use exists to protect works that copyright owners wouldn't license. We've seen again and again with the licensing schemes offered as exemplars. Despite the claims made here, when you look at them, YouTube, Amazon's Kindle Worlds, which are the two big exemplars, there are substantial contract restrictions and they fall most heavily on the most critical and transformative uses.

Fair use also exists to protect works that simply shouldn't be controlled by copyright owners because of the substantial new meaning and

positive externalities they bring into the world. Positive externalities of course are the value that isn't captured by the creators themselves in terms of monetary return and that can't simply be transferred over to existing copyright owners. In the licensing-only world, that value is misdirected and destroyed.

Licensing schemes also, I should note, promote monopolization of the channels of communication, since only giants like Amazon and Google, who, while being spoken of very nicely so far, if you think -- if you listen to the same people talk about them in other contexts, are giants determined to destroy them. And the more we license, the more the giants have the clout to negotiate broad licenses and lock other people, other competitors out of the market, and that was something that the Justice Department noted, too.

So, a final note, given the composition of this panel, under most circumstances music isn't a good model for the rest of copyright. The legal regime and the business models that are

encouraged are so complex and specific that we should most likely look elsewhere unless we're prepared to adopt compulsory licensing across the board, and I'd be happy to talk about that.

And I think Mr. Schiller's comments also bore this out, that you can learn a lot of stuff about music by listening to the three panelists but not necessarily about other elements of copyright law.

MR. SHAPIRO: Thank you so much. So, now it's time to begin to drill down a little bit more with some questions. So, as an official matter, definitional question. What are we talking about? What is a mashup? What is a remix? The Green Paper defined remixes and mashups kind of broadly to encompass creative new works produced through changing and defining portions of existing works.

But at least one commentator urged us to hone more closely to the Section 101 definitions of collective works and derivative works in compilations. And I think in Jay Rosenthal's

organization's comments, he drew a distinction between remixes; a version of a sound recording such as a dance remix; and other types of subject matter -- mashups.

I don't want to spend a lot of time on this, but, Jay, perhaps you could get us started a little bit on this definitional question before we move on to some of the problems and solutions.

MR. ROSENTHAL: Well, I think that you're right in terms of a lot of folks dealing with this topic kind of mash up all of these definitions into one, and it's tough to understand what you're doing here. But from a musical standpoint, I view the idea of a song that is basically a recreation of the song that would come under the compulsory license to do under Section 115 as one type of derivative work that is allowed, you know, by you going through the steps of complying with 115 to use. But beyond that, the idea that you have a song with certain digital samples in them and then you have a mashup with a lot of digital samples is effectively the same

thing.

I mean, I don't see any difference from a legal standpoint between the two. I think that Peter's point that is it harder for Girl Talk to license -- even though he doesn't, would it be harder if he actually tried? Yeah. Is there a model that I could think of to license it? Yeah, I could. But, nevertheless, I think that we are talking about fundamentally the same thing there. So when you use the term "mashup," maybe it's just a lot of digital samples. That's the way I view it from a music standpoint. It might not be from an artistic standpoint, from visual art, you know, two- or three-dimensional works or whatever, but from music, I see them as pretty much the same.

MR. SHAPIRO: Anyone else on the definitional point? Broad, narrow --

MR. ROSENTHAL: Well, I win.

(Laughter)

MR. SHAPIRO: Okay, let's move onto another kind of fundamental point. Do we even have a cultural production problem here?

Specifically, in Professor Tushnet's comments she noted that there was a vast universe of fan works out there pointing to over three million individual stories on FanFiction, the largest general-purpose fan fiction site. And in another comment, 63,000 Harry Potter stories and 31,000 Star Wars stories, and between 2,000 and 6,000 videos that include film clips and TV sources are uploaded to YouTube each day. So, if an uncertain legal environment is impeding culture production, where's the evidence? Anyone?

PROF. TUSHNET: May I?

MR. SHAPIRO: Yes.

PROF. TUSHNET: So, here's the thing about the digital culture we find ourselves in. It's changed in a lot of ways, and one of them is put it up first, get the legal threat later, which is something that previous business models didn't allow people to do. Absolutely there is a bunch of cultural production, and let me point out the Harry Potter stories, that's off by an order of magnitude. It's actually over 660,000 Harry

Potter stories --

MR. SHAPIRO: Minute. (Laughter)

PROF. TUSHNET: -- which somehow does not seem to have made J. K. Rowling less rich. In fact, they seem to have made her more rich.

The problem that we face is the lightning-strike-like effect of enforcement decisions when often these days it's automated, sometimes it's not. But somebody gets a letter saying your podfic of a fan story that someone wrote is infringing, you're going to be on the hook for $150,000 -- that person tends to run away unless they find us and also tends to pull all their stuff and not participate again.

The other significant problem that we face is institutionally. So, among the things that remix culture is good for is educating people, teaching them skills that are very important across different productive sectors, technological and artistic. And institutions that teach them largely stay away from this kind of stuff, because there is a fear by the

administrator that they'll get a takedown notice and they'll be on the hook. So, I think we have -- we see what it can do. It could be doing more.

MR. SHAPIRO: Thanks so much. We hear that there's a lot of stuff out there but perhaps a chill in the air. Anyone want to take up that point?

MR. OSSENMACHER: I'd like to -- I just -- I think that one of the things that's important to recognize is, you know, a lot of people asked me, well, wait, Girl Talk's music is available, mashups are available, all this fan fiction is available, and they point to the mere availability of it as evidence that there's not a problem.

The issues -- there are two kinds of problems with it. In some contexts it's a problem because it's not commercially available, it's not widely available, and it's subject to a threat to be taken down. And on the other side, I think, with respect to David and Jay's points, I mean, in some cases these are things that we'd like to see licensed. You know, the uses -- there are some

samples. I mean, as I emphasize in the book -- you know, Kembrew and I emphasize in the book -- there are some samples that certainly should be licensed, that that's a better outcome, you know, and to the extent that they're not and to the extent that these remixes are pushed underground with these other derivative works, these broad categories that Jay talked about, that's lost revenue for the copyright owner.

That's a shame on two accounts. You know, it's a shame because there's not more access, and it's a shame because there hasn't been compensation. And so the goal I think should be always to -- you know, there are situations where we're going to be able to -- when it's appropriate, there should be compensation, and we can also increase access in some cases.

MR. SHAPIRO: That's great. David.

MR. CARSON: I think, broadly speaking, the music industry shares that goal, and I think in the overwhelming majority of cases when you have a situation such as those that you're talking

about, the instinct is let's try to cut a deal; let's try to license it. Or, in certain circumstances if you can do it on an automated basis, you don't even have to cut a deal. You've just got the framework in place where the license is there and you can take advantage of it. There are always going to be exceptions. There are, for example, going to be recording artists who just say I don't want my work sampled, end of discussion. And, as the record company, we're going to respect that. We really can't do anything other than that. And there may be occasions when a record company looks at a particular project and says, whoa, we want nothing to do with that.

Larry Lessig in his book, Remix, has a great quote, which I wish I'd read before my flight from London over the weekend, because it actually is reminiscent of something that we'd been experiencing over in Europe. He said, Hollywood doesn't expect to get rich on your kid's remix, nor does it have a business model for

licensing cheap reuse by cash-strapped kids, but it is worried about reputation. What if a clip gets misused? What if Nazis spin it on their website? Won't people wonder why Kate Winslet is endorsing the NRA?

Well, for the last year, one of our poster children -- as we've been talking to European governments about the requirement, the necessity of our being able to control uses in certain cases when there are offensive uses made of our works is a phenomenon that you can find on YouTube, usually not for very long in any particular case, because we do succeed in taking it down -- of Hitler's In Memoriam to Adolph Hitler, which used popular sound recordings. For example, the one that's usually used is the "Theme from Titanic" with all sorts of pictures of Hitler in sort of a laudatory situation. That's something that we're simply not going to be associated with and want nothing to do with and will do anything we can to stop it. Those are exceptional cases, but they exist. So, you're

always going to have the situation where, no, sorry, a license just isn't going to work, because we're really not interested and we're going to stand on our rights. But those are exceptions.

MR. ROSENTHAL: You know, I think that you raise issues that in Europe would be easier handled through moral rights laws.

MR. CARSON: Sure.

MR. ROSENTHAL: If some of these, you know, are disparaged or not, but let me make two quick points about this. The idea that all litigation or most of it is to stop music being used as opposed to getting to licenses. Our YouTube deal resulted from a class-action lawsuit filed by us on behalf of independent publishers against YouTube. We now have an ongoing license with them and an unbelievable amount of cooperation and collaborative work going on, in particular working on the database and making sure that all the information is correct. So, certainly the idea here is not to sue folks out of business or stop them from, you know, making

derivative works or fair use or whatever. We want licenses to be put in place when it's appropriate and to go down that road.

But I also want to really address the point of creativity. There is this idea here that if a producer -- and I lived through the hip-hop, beginning of hip-hop when it was independent before it went to the major labels, and so, you know, I lived through the idea and the age of, you know, do we reach out to folks to get clearances or do we not? I know of no producer who I've ever worked with or other colleagues of mine have worked with when they have reached out, through a company perhaps, to clear a sample when the company comes back and says, oh, the sample is this amount of money or, you know, you can't use it. And just as a good point, never ask Steve Miller for a sample. He's (inaudible) going to say no. That's a perfect example. Not for any good reason, just because Steve Miller doesn't want a to sample. Fine.

I've never known a producer to stop work

and go home. They go on to the next sample. And they work it. They get the baseline from somebody else; they get the musical bed; the get the beat, whatever it is. If they don't get the first one, you know, quote, that they like or they can't use a sample, they just move on. The idea that this stops creativity is kind of crazy, and I think that if everybody looks -- I think there's enough and a lot of music out there. I don't know if anybody could actually say that there is not creativity going on under a licensing regime or not. There are folks in the digital music business who think that there's too much music out there, and that's a problem. But putting that aside, I think the reality is that people create music. If they don't get the rights to certain tracks for digital samples, they'll move on and use the next one, and that's how it's worked in real life.

MR. SHAPIRO: Thanks, Jay. I think I got a signal from Peter DiCola and then Rebecca Tushnet.

MR. ROSENTHAL: I'm sure.

PROF. DiCOLA: So, I just want to be clear about a few things. So, you know, the book is based on over a hundred interviews. We talked to a lot of people. The idea is to collect data in an area where data aren't available. The book talks about situations like Jay is talking about. I know it's fun to have, like, opposition or whatever, but I don't disagree with that. We tell a number of stories where people were happy to substitute a sample, and that's absolutely possible. What we want to focus on are the places where there are, you know, barriers to access, to understanding the system and knowing how to take advantage of the licensing opportunities that might be offered, or knowing who to call or how that call should go. And, you know, the professional music industry folks in the room might be surprised to learn how -- you know, to remember how ignorant of the system that the small and new musicians can be and how different in other contexts as well. Other users just don't

realize what they have to license.

But this issue of the multiple samples and saying, oh, well, those deals can get done. There aren't any examples of someone being able to commercially license something that's got 20 samples in it. That's 40 licenses. There's only so much revenue available there. Everyone wants at least a quarter of the revenue. It is very difficult to negotiate someone down from 25 percent of the revenue, and that just isn't happening, so that kind of work is what I'm concerned about, those kinds of collages. No one thinks that those can be, you know, prepared for commercial license. And when we've talked about this before, you've mentioned, well, that's -- you know, maybe those works just can't be done. That's a valid perspective. I just think that that should be troubling that those works can't be done.

Thank you.

MR. ROSENTHAL: Well, I think that there are very few of those, number one, but besides the

fact, they have been done. I've done them.

PROF. DiCOLA: Sure.

MR. ROSENTHAL: And you can do them on a prorated basis that makes it work for the kinds of numbers that you're talking about here. I'm not quite sure, though, this particular scenario should compel us to change a whole system of licensing because of a small number of folks who want to use a lot.

Let me raise another issue about aesthetics.

MR. SHAPIRO: Can we just make sure that we get Professor Tushnet's comments? Oh, I'm sorry, Rebecca, go right ahead. I'm sorry.

PROF. TUSHNET: So, one thing that this highlights for me is that noncommercial speech works very differently. So, we've immediately switched to talking about business models, about connecting yourself up with someone who knows something. This is not the way that the 16-year-old creator who's inventing video remix or text remix or whatever it is that she's inventing

in her bedroom, which is how art gets invented, even if it gets reinvented, but you're still the one discovering it -- that's how it works on the noncommercial level, and none of this will deal with that.

I also want to point out that that also means that the chilling effects and the effects on diversity of speech are disproportionate. So, the people who are most likely to create noncommercial remix are disproportionately women, disproportionately minorities of various kinds, and they already feel unwelcome in the larger system, and they are disproportionately deterred, and I can see this in my own practice. When a guy who makes a Stargate remix gets a takedown from YouTube, he writes me, even though we've never met. You know, he finds me, and he says I'm just going to counter-notice. This is fair use. Women, if they find me, then we call -- I have a long conversation with them, we talk it over in great detail, and hopefully I convince them that they can counter-notify when they have a valid

fair use defense, which by the way is often, because these automated enforcement mechanisms make mistakes. And most of those people don't actually find me. They just go and do what their default is to do. So, the change in content is one that we don't see but that affects the diversity of the content that we do get.

And I think the saying, look, there's still all this stuff out there is a little bit like saying, look, under censorship, newspapers are still full of stories; therefore, it must not be affecting free speech. It's what's in there that matters.

Another actually very salient example is Gone with the Wind, right? So, there is stuff the owners of the copyright in Gone with the Wind won't license. They will license other sequels. The fact that they've licensed some sequels doesn't mean that they're not exercising censorial control, and in fact the court of Appeals for the 11th Circuit found that that was exactly what they were doing with respect to Alice Randall's

portrayal of homosexuality (inaudible) in her parody of Gone with the Wind.

MR. SHAPIRO: Thanks so much for that. Time is marching on, and I want to make sure that we at least get some time to cover two legal doctrines. Fair use inevitably is part of this discussion, and also compulsory licenses.

So, I wanted to go back to Josh Schiller quickly. You said that the Second Circuit moved the dial on fair use analysis from an artist-centered approach to an audience-centered approach. I wondered if you could say a few more words about that, particularly in light of the fact of whether judges are up to this task, given the Holmes admonition that it would be a dangerous undertaking for persons trained only in the law to constitute themselves as final judges of a work of art.

And then I know that there's also some interest in this panel in discussing statutory licenses, and perhaps then we would have at least a moment for a question or two.

Josh.

MR. SCHILLER: Thank you. I do think that the Second Circuit clarified the position of the importance of court recognizing what an observer can see in a work that's asserted to be fair use. It's very important, because in the context of art, there are readily available opinions that show the transformative nature but also that speak to this issue of market substitution, which I think is an important issue in fair use in one that used to be referred to as the most central issue. Things were viewed in any commercial context at one point in time. If they were for commercial use, they were therefore a market substitute. I think that the analysis has moved a long way since then, and part of the tension between what Jay and Rebecca were just talking about is also a tension about market substitution. And I think if you look at observation and you look at the reasonable observer, it really helps understand the factual basis for concluding whether a secondary work or a

second work is a market substitute, which I think is critical to any fair use analysis.

Jay, it looks I had a signal, but I know that Rebecca also wanted to at least showcase or discuss the recent Canadian exception for noncommercial UGC. Is this something that we should be looking at closely, or any other observations on the panel?

PROF. TUSHNET: Right. Well, let me just say absolutely we should be looking at it. So, it's been around in Canada for a year. It does not substitute for other exceptions or limitations in the law, but what it does is it provides a little baseline guarantee for people who are making transformative noncommercial works, something I kind of prefer to UGC, because it recognizes them as creators, too. There's this weird distinction we make between users and creators, but that's not really what's going on. And as far as I can tell, the Canadian market has not collapsed. SOCAN, in fact, just announced a license with YouTube, so I think it is a helpful

model, sort of as a backstop against those lightning strike things that can actually destroy the lives of people who don't have the fortune to be in this room.

MR. SHAPIRO: Further comments on the statutory license approach before we perhaps have time for a question or two from the audience?

MR. ROSENTHAL: Well, yeah, the idea of noncommercial use. My only cautionary point would be that sometimes it's tough to understand what's noncommercial. You know, many of my clients early in their career would be considered noncommercial, because they're not making much money, but the purpose of what they're trying to do is to turn themselves into an artist that's viable in the commercial marketplace. I'm not saying that there's not validity to what you're saying, but it does bring to the fore the question of intent of the user and whether they're doing something to get themselves into a commercial marketplace or if it's just, hey, it's my hobby, it's fun, you know, I'm a fan -- that kind of a thing.

And I just want to say on fair use, there is a case that was filed two days ago, which is worth following, which is the Beastie Boys case, and I think that that would be very illustrative as to how a court views the issue of commercial, because that's all about, I think, what this case is going to be. And we can follow that.

Just as quick point on gender, last time I looked, Salt-N-Pepa were still females, and I have noticed -- you know, I have mainly represented female artists in my career, and I'm not sure I've ever noticed any kind of a sense that it's harder for them to get licenses than not. As a matter of fact, I think most other rappers would give Salt-N-Pepa rights to their tracks than other rappers. Maybe that's just my little edge of the world, but I will -- I have read your comments on that, and I think they were interesting regarding impacts on gender rights and things like that, but in the rap world it really doesn't kind of pan out that way.

PROF. TUSHNET: Well, of course we're not talking about them asking for licenses and getting denied. We're talking about them getting takedown notices and threats of statutory damages. And there -- although of course there is a bell curve, there is a separation in the bell curve, and I've seen it.

MR. SHAPIRO: I think we have time for one more panelist comment. I think that's Peter who gave me a signal.

Then, Jay, I think your red light is on and should be off.

PROF. DiCOLA: So, I just want to talk a little bit about the issue of statutory licensing and other blanket licensing schemes. I mean, I think Jay's point and David's point is well taken about compulsory licensing. The reason it's problematic when you're dealing with sampling is because you're dealing -- or these other transformative works -- is that you're dealing with transformations of the work that are personal to the creator and potentially to the copyright

owner. So that just makes it -- makes it more fraught. I don't know that that decides the question that's it's fraud, bit it is a difficult issue of control.

I think that everyone seems excited about the YouTube license, and I think that makes sense. I'm a little surprised, though, at my colleagues on the panel, just because I don't know -- the one advantage that a statutory scheme has for allowing permission is that it's public and transparent. And, you know, the YouTube Content ID system, while there are some efforts to make parts of its transparent, there are other parts of it that aren't so transparent. So, when a YouTube clip contains more than one work, how does the revenue get split? You know, I think the parties might know, but I don't know that the public knows in the same way that we would know under a statutory scheme.

So, I mean, I think we should take it -- you know, as we talk about this issue, I think people should take note of the different

advantages, the disadvantages of doing something publicly versus privately. Again, I'm not advocating for a compulsory license in that. We don't advocate for it in the book. But I do think that there are certain relative advantages compared to leaving the system up to just one private entity.

MR. SHAPIRO: It looks like David is going to get the last word on the panel. And then we could probably take one or two questions. My only solace is that the conversation could be continued over lunch. We have a wonderful cafeteria here, so for those who don't have time to pose a question or have it incompletely answered, there will be follow-on opportunities.

But David on the panel.

MR. CARSON: Well, since Peter says he's not advocating a statutory license, I'll make myself very brief. But just to say, I recognize what you're saying about perhaps more transparency when you're talking about a statutory license. But statutory licenses bring with them a lot of

baggage. And there are any number of things I could talk about. Many people who are involved as licensors -- well strange word but it's statutory and required -- and licensees are not particularly pleased with the way statutory licenses work, and I think you're bringing a whole bundle of problems when you do that.

But I'll just go back to something I said earlier. With a statutory license, then whatever falls within the scope of the statutory license may be used. End of discussion. And I think particularly for recording artists, as well as for copyright holders who have obtained their rights from the recording artists and other creators, I think that's probably something that would give us a great deal of concern, because there will ultimately always be cases where you want to say legitimately no, you can't use my work for that purpose. A statutory license simply doesn't permit for that.

That's all I have to say. Thanks, David.

MR. SHAPIRO: We have one brave audience commentator, Professor Menell, and then we'll have a quick response and then to lunch.

PROF. MENELL: Well, judging from the age profile of the room, I feel I need to comment. I get to experience each new generation as students arrive for law school year after year after year. We're now several generations, and I appreciate Jay's experience with sort of the rap industry as it developed, but I will say that I am astounded at the popularity of mashups of the type that Peter's talking about in the culture today. And from my standpoint, this is completely outside of any real market. It is a growing sector. And I think we do copyright a great disservice if we are unable to bring that within a market structure of some sort. And I don't have confidence in what Jay has to say. I'm also troubled, because I don't think you can say to that generation, hey, if you can't get the license from X, don't do that, because they have an interest in using X, because one of the things that happens in these

popular settings is that we in the public attach importance to works. There is a demand side. There's a network effect that happens in these industries, especially music, and to say to the next generation, no, you can't do that, is essentially to say don't think about copyright law, which has really bad effects in terms of all the other themes that we're talking about today. So, I would push, even though Peter didn't take the bait as hard -- he and I are talking about this -- I think we have to look very seriously at the issue that we looked at a century ago when we created the mechanical license. Maybe not for this reason, but the mechanical license has worked pretty well, and I think a mechanical-type license for these works could be the way we can best forward -- you know, we could help the copyright system.

MR. SHAPIRO: Thanks so much. I will take that as a final comment rather than the question. I will thank the panel. You were terrific. And turn the podium back over to my

colleague, Garrett, who will give you further housekeeping instructions on what to do next and where to go. Thanks so much, everyone.

MR. LEVIN: Thanks, Michael, and our panelists. So, what to do now is go eat lunch. We've fallen a little bit behind schedule, but we're going to try to make it back up and restart our afternoon session at one o'clock as the schedule calls for. So, it's going to be a little bit shorter lunch than had originally planned.

(Recess)

MS. PERLMUTTER: Good afternoon, everyone. Welcome back from your short lunch break. I'm Shira Perlmutter, the Chief Policy Officer of the Patent and Trademark Office. And we are now going to disrupt our rhythm a bit and take a break from the panels to hear remarks from Maria Pallante, the Register of Copyrights and Director of the U.S. Copyright Office. We are absolutely delighted to have Maria here to join us and provide insight into the work the Copyright Office is doing on digital issues in particular.

Some of the most important issues identified in the Green Paper as needing or meriting attention today are not actually the topic of any of our panels you might be surprised to hear. And that's because rather they're being addressed already by the Copyright Office through a number of pending studies and reports. They include the critical topics of orphan works and mass digitization as well as potential updates to the library exception in Section 108 and the proposed creation of a small claims process for copyright disputes.

The Copyright Office's role in creating and making available ownership information through its public databases is also a keystone for the development of the online marketplace. And Maria has herself led the way in calling for a balanced and targeted review of the Copyright Act to ensure that it continues to adapt to current technologies, which, of course, is now the subject of ongoing congressional hearings as well.

As stated in the Green Paper, we

continue to support and will provide input into those initiatives as appropriate. So we at the PTO are working very closely with the Copyright Office on the full range of copyright issues, both domestic and international. And we are very pleased to have them involved in the Department of Commerce process and look forward to continuing to share ideas as the discussions continue both here and on the Hill.

So with that, I'd like to turn it over to Maria.

(Applause)

MS. PALLANTE: Thank you, Shira. Good afternoon, everybody. I want to start by thanking the Department of Commerce for convening this very important public discussion. And I also want to congratulate our sister organization, the USPTO, for its work on the Green Paper, which is very comprehensive and, perhaps more importantly, very well documented. And this may have been covered this morning -- I apologize I've only just arrived -- but there really hasn't been a focused effort

on the part of the Executive Branch on copyright policy since the days of the WIPO Internet Treaties in the mid-'90s. And as we and so many other governments around the world are stepping back to review our copyright laws, it is very helpful to have a coordinated agency effort as well as a process that is neutral and inclusive and informed. So I'm delighted to be here.

The U.S. Copyright Office is lending support to the Department of Commerce throughout the process as appropriate and as it works to produce a White Paper. And we are certain that this effort will be very useful to Congress as it continues its comprehensive overview, which you know has already commenced. So I would like to just take a few minutes and briefly summarize some of the Congressional activity and some of the focus of our office in the past few months and in the coming year, so you know what to expect.

So as Shira noted and is noted in the Green Paper many of the issues that are under consideration in the discussion here and in the

discussions to come are issues in which the Copyright Office has been heavily involved through studies and through testimony and stakeholder meetings for many years. And these are also issues that Congress has either begun to study for the most part or actually held extensive hearings on in other cases. These include, for example, the scope of the public performance right; the framework and rights for music licensing; the doctrine of first sale which you discussed this morning; remedies for illegal streaming, small claims solutions; the legal effect of copyright registration, copyright recordation; and, more generally, the responsibilities of the government in the digital age and the role of the government or what should be the role of the government in producing an effective public database of copyright information.

So as you all know, Bob Goodlatte, Chairman of the House Judiciary Committee, publicly announced the congressional review process on World IP Day in April at a celebration

hosted by the Copyright Office. And he said, and I want to quote this because I think it's an excellent summary, he said, "There is little doubt that our copyright system faces new challenges today. The Internet has enabled copyright owners to make available their works to consumers around the world, but has also enabled others to do so without compensation to copyright owners. Efforts to digitize our history so that all have access to it face questions about copyright ownership by those who are hard, if not impossible, to locate. There are concerns about statutory license and damage mechanisms, federal judges are forced to make decisions using laws that are difficult to apply today, and even the Copyright Office itself faces challenges in meeting the growing needs of its customers, the American public."

So in my view, these remarks and the review process that they generated were a welcome and timely act of leadership on the part of the House Judiciary Committee Chairman. And to be clear, and I think everybody in this room is clear

about this, Congress has not committed to a legislative package at this point. I think it's fair to say we're in no way close to something like that, that kind of ordering or even the debate around particular substantive issues. But Congress does have a very clear role in copyright policy and I think one only needs to look at the history of our copyright laws in the United States since 1790 to understand that point.

And, of course, courts have a role, too, an important role, and voluntary agreements are important and can lead to normative behavior. But in my view, neither of these functions alone will necessarily protect the public interest. So Congress weighs the equities of everybody, it considers the fundamental principles of the law, it considers the relationship of one statutory provision to another, and then, in its wisdom, it decides whether to act or, if the better course, not to act. In my testimony back in March, I asked Congress to step back and consider the larger legal framework, that is the issues that

are both large and small, how they relate to each other, to the larger statute, and to international developments. I also noted the obvious fact that more and more people are affected by copyright law and that as a matter of constitutional law the copyright interest of authors are intertwined with the interest of the public and the advancement of progress. Of course, we all know that the interest of copyright owners cannot be absolute and, therefore, as we move further and further into a world where consumers want to access and share creative content online, including through mobile devices, we have some things to reconcile.

On the one hand, the public performance right is of paramount importance in the digital space. And how to ensure its viability and the general ability of copyright owners to make their works available to the public is critical. There are no criminal remedies for the public performance right as there are for the reproduction and distribution rights and, therefore, that is a gap in the statute. There

should be a way to craft such a provision to address only its intended targets.

On the other hand, not every performance is a public performance and there has to be room in the digital space for private performances. We have underlying provisions from the '76 Act that are still in analog form. This includes the Chafee Amendment and library exceptions. And we need to reconcile the prospect of an orphan works solution, both in the context of isolated cases and also in the context of mass digitization. These are a complement to the fair use doctrine, but we cannot, in my view or the view of the Copyright Office and I think it's fair to say many members of Congress, have a statute where exceptions are left in analog form.

The Copyright Office will be convening further roundtables in the spring on these issues. And we will also be releasing some related drafts of legislative proposals.

So I believe, also, that Congress needs to address the state of compulsory licenses, some

of which we've studied, some of which need to be repealed. At the same time, it needs to consider new forms of effective and efficient licensing, including collective licensing, blanket licenses. And with this in mind, it needs to review the interaction of existing consent decrees to these policy objectives. No small thing.

In 2014, the Copyright Office will be studying the landscape of music licensing, which has so many interconnecting parts. We've talked with many of you about this and we'll be calling upon you to participate. And music issues will continue to be a major point of focus for the Congress.

Under the House Judiciary Committee there have been 5 copyright hearings in the past six months, and I just wanted to review them quickly with you and also give you some of the highlights from some of the witnesses in case you didn't make all 5 hearings.

So in May, the first one was a case study for consensus-building with members of the

Copyright Principles Project; in July, "Innovation in America: The Role of Copyrights"; in August, "Innovation in America: The Role of Technology"; in September, "Innovation in America: The Role of Voluntary Agreements"; and in November, "The Rise of Innovative Business Models: Content Delivery in the Digital Age." So just to summarize, that was consensus, innovation, innovation, innovation, innovation.

Witnesses have offered many cogent bits of advice to Congress during this hearing process. Without identifying them by name or even the hearings that they testified during, I would like to just share some of these points. So as one witness said at the beginning of the process, the basic structure of the Act -- definitions, rights and reproductions, ownership duration and formalities; that's formalities with a small F -- is sound. So what we need now is a set of balanced changes to existing provisions.

Another witness said Congress should prioritize above everything else the recordation

of transfers. Perhaps certain remedies could be tied to a subsequent copyright holder's recordation of transfers of title.

Another said copyright laws should do more to encourage copyright owners to register their work so that better information will be available as to who claims copyright ownership.

Another said copyright laws should remain rooted in technology-neutral principles. This above everything else is what Congress needs to keep in mind.

We believe copyright laws can and should protect and encourage creative content as well as it protects the technology and technology companies that assist in distribution, said another.

A copyright system should foster an environment of certainty for its businesses.

And by the way, as I go through these, these themes were also themes that were brought out in the question, so -- and many of them came from the members and not simply the written

testimony of the witnesses.

One witness said I've thought long and hard about how to solve the problems that libraries and archives and museums and educational institutions encounter in dealing with digital works as copyright owners increasingly attempt to lock down their works with restrictive licensing provisions. For these institutions just trying to comply with the current complicated statute is expensive and possibly cost-prohibitive.

Another said fair use may offer much of what libraries need, but for front-line employees of these institutions, fair use is indefinite, fails to provide immediate guidance, or answer questions about whether a particular activity is likely to be infringement and doesn't answer questions from any particular user who needs a quick answer.

Another says fair use was never intended to be relied upon so substantially and it is likely overused today.

Another says but digital technology has

changed the way that courses are taught and the way that students learn and how they access and interact with material.

Another says the lack of clarity around reasonable and ordinary personal use has contributed to the declining public reputation of copyright law and a lack of respect for the law among some consumers.

Another said Congress should keep in mind both the economic contributions and the motivations of creators. Non-economic goals of the Copyright Act are important and for many creators works will not be broadly disseminated unless the creator feels safe doing so on non-economic grounds.

Another says fair use is important, but DRM gets in the way of legitimate uses and needs to be addressed.

Another says open source is very valuable. There's a reciprocal benefit of having things open, so that businesses are able to build and benefit from each other. If copyright law

were to make sharing more difficult, it would, in the end, be discouraging new business models. The point is there are all types of business models and content creators, and the copyright laws should not discriminate.

At the same time, there needs to be wider dissemination, which is why we have compulsory licenses sometimes and also fair use. The point is we do need copyright, but we need to respect the boundaries of the law as well.

And then on the last couple of hearings, voluntary initiatives illustrate the importance of multi-stakeholder, market-driven solutions to address the problem of digital piracy. These initiatives are a key component of making sure that new, legitimate, and authorized technologies are not undermined by those engaged in illegal activity.

Voluntary agreements are being given considerable market power, however, said another witness, and care must be given so that they do not mislead Americans.

And finally, illicit trade online poses a threat to consumer confidence, which has driven the partnership with the financial industry.

So that's all, innovative certainly in there, there's consensus. And the question now is what's next? So Congress has -- or the House, I should say, has announced three more hearings. There will be others, but the next three are the scope of exclusive rights, the scope of fair use, and the DMCA notice and takedown provisions. So those will all be in probably the first quarter of next year.

Also of interest will be one and possibly more hearings on the Copyright Office itself. And that's the point that I'd like to close on.

So many of you know and many of you have participated in a process that we ran about the Copyright Office and the next generation of services that all of you have been calling for. And some of that involves inefficiencies in technology, but also some of it involves new kinds

of roles for the Office and new ways to do the things that it has been doing for the last couple of decades.

We learned a lot. We greatly appreciated the participation of the copyright community. And we are now in the stage of trying to order and prioritize the things that we can do under our own authority, the things for which money might be able to solve, and the things that may require statutory changes in the long run. So those are some kind of large buckets.

And I will point you to a speech that I gave a couple of weeks ago at G.W. Law School. It was a Christopher Meyer lecture called "The Next Generation Copyright Office." And that was really a reporting mechanism by which we really went through in great length all of the different kinds of considerations and ideas the copyright community presented to us about what you need. And as many of you have observed, and it came in in many of the comments that we received, the Copyright Office sits at the center of a very

dynamic marketplace, a very increasingly sophisticated copyright system. And as the principal administrator of the copyright law, we have got to keep pace with the law itself. And so it makes sense to us that as Congress continues to assess the state of the law for the digital age, it needs to also look at the Copyright Office and what role it should be playing and what it'll cost to do that, what kinds of technology we need, what kinds of staffing we need, what kind of regulatory authority that we should have.

Some of this is financial. We need flexibility in our spending authority. We need to be able to plan for long-term cost in a way that may not necessarily be tied to short-term budget resolutions. And we need to be able to have a reserve account so that when our fees fluctuate we have some money that we can draw on. This will all sound extremely familiar to the patent community and to people from the Patent Office.

Many of the improvements that we're looking to raise legal and policy questions, some

of them are technological. We will be releasing in the next couple of months a major rewrite of the Compendium of Copyright Office Practices. The compendium will address many of the digital issues related to registration, but it will also commence the beginning of a very intense period of rulemaking for the Office as it considers all kinds of issues from group registrations to online content. What should be the deposit for content that changes frequently, like websites? What is the security of the deposits? How does it relate to the Library of Congress and its collection needs? And many other related issues.

It is certainly clear to us that registration needs to become less cumbersome, more efficient, and more flexible in the digital age.

On the recordation front, I would say that the Copyright Office and the Congress also have some legal incentives that we need to consider for how to incentivize data. But there are some things we can do in terms of streamlining the process, making it more automated. And this,

too, will be a major regulatory focus in 2014. You can expect to see a Federal Register notice on that early in the new year. That will be run by our Abe Kaminstein Scholar in Residence, Professor Brauneis. The registration component with the rulemakings that I mentioned will be run by our General Counsel, Jacqueline Charlesworth, and our Director of Registration, Rob Kasunic. Everybody will be very busy.

And let me just summarize in general what the comments that we received basically say. Stakeholders consistently called for a new generation of services, including data standards that are interoperable with the commercial world, commercial marketplace. Better security for files, less cumbersome practices, and more public-private partnerships. The staff of the Copyright Office shares this vision for the Copyright Office and we look forward to working with all of you to make it come true. I want to note how much we appreciate the Green Paper's mention and support of our needs in the

registration and recordation areas because they are at the pinnacle of the copyright system.

So thank you for your attention. Thanks again to Commerce for inviting me. And I look forward to our continued conversation. (Applause)

MR. LEVIN: Thanks so much, Maria. That was great.

We're going to turn it over to our next panel, which is our biggest and the longest panel of the day. And it's going to be about our -- talking about our multi-stakeholder process for improving the operation of the notice and takedown system. It's going to be moderated by our colleague from NTIA, our collaborator on the Green Paper, John Morris, who is the Associate Administrator and Director of Internet Policy at NTIA and who has been very involved in NTIA's multi-stakeholder process in the consumer data privacy sector. So I'll turn it over to John now.

MR. MORRIS: Great. Thanks, Garrett. And I've been asked to remind the panelists when you start speaking you're going to need to mute

and unmute your mics. And just to remind everybody this is being recorded, so don't ask any questions you wouldn't want everybody to see.

So as Garrett said, the focus of this panel is on the Section 512 notice and takedown system. Just as a brief aside, a little bit of breaking DMCA news which maybe some of you have heard, but if you recall a few months -- earlier this year there was a dispute about cell phone unlocking and DMCA exemptions for cell phone unlocking. And I can report that this morning FCC Chairman Tom Wheeler testified in Congress that today, this afternoon, he's announcing a voluntary agreement among wireless companies to address the cell phone unlocking problem. So that's, I think, one issue that we probably don't need to solve here today.

But turning back to Section 512, you know, if we polled the room I'm sure that we would find 50 different legislative proposals to amend Section 512. And I urge you to take those to Chairman Goodlatte because that's not what we're

going to be talking about today. The goal here is not to really try to get into, you know, what fundamental changes would we make to the notice and takedown system, but instead look at -- you know, take 512 as it is and see if there are areas where we can improve its implementation and really, frankly, just make it better as opposed to go back and ask Congress to change it.

But this panel is also a little bit different than most of the panels that you're hearing today because most of the panels have really looked at, you know, a specific topic and immediately got into how do we improve this specific topic? How do we make remixes work better within the system? And this panel is going to -- is really starting at one level higher. The proposal in the Green Paper is to convene some one or more multi-stakeholder dialogues to see if we can make progress on ideas to improve the notice and takedown system. And so this panel is really focused on not figuring out what the answer is to fix -- or to improve notice and takedown, but

figuring out what the topics are. What should we be discussing? What's worth discussing?

So that's what we're going to try to do. We have a great lineup. Let me just kind of quickly run down the line here. I think I can get it in order.

Victoria Sheckler is the Senior Vice President, Deputy General Counsel of Recording Industry Association of America. And among other things, Vickie helps RIAA develop and implement voluntary initiatives from intermediaries to address -- with intermediaries to address online privacy.

Next we have Fred von Lohmann, who's Legal Director on Copyright for Google. And Fred is Google's Global Lead on copyright matters and coordinates Google's anti-piracy efforts, including DMCA notice and takedown efforts.

Next, Corynne McSherry, Intellectual Property Director for EFF, where she specializes in both intellectual property and free speech issues. And she'll obviously be bringing insights

from a user perspective and certainly information drawn from the Chilling Effects site that EFF is involved in.

Next we have Susan Cleary, who's Vice President and General Counsel of the Independent Film & Television Alliance, where she really runs the full gamut of intellectual properties. Probably she could have been on most of the panels here today.

Troy Dow is Vice President and Counsel for Government Relations and IP, Legal Policy and Strategy for the Walt Disney Company. And he's responsible for IP policy and strategy for Disney, but in a prior life he was counsel to the Senate Judiciary Committee and was very closely involved in drafting and enacting the DMCA. So we can blame Troy for anything we're unhappy with here.

Christian Genetski is Senior Vice President and General Counsel of ESA, the Entertainment Software Association. And one of his many focuses is on intellectual property. And I think in a past life for him, he did prosecute

IP cases at the Department of Justice.

And then last but not least is David Snead, an attorney here in Washington and a co-founder of the Internet Infrastructure Coalition, and he chairs the coalition's Public Policy Working Group, which does work on the full gamut of online policy questions, including copyright.

So that's the panel. We're just going to launch right in and, you know, try to kind of skip over opening statements and go straight to a question, but there'll be a little bit of opening statement, you know, certainly in the answers. But what I'm going to ask the panel is to just give thoughts about -- give us sort of thoughts about, you know, what areas might be fodder for multi-stakeholder conversations? And I'm going to run through all seven of the panelists, just probably do it just straight down the line here. And then we'll come back and we'll dig into some of them, you know, both some of the ideas that the panelists put out on the table, but also some of

the ideas that were submitted in the comments.

So basically, you know, I think the opening question really is, you know, given where you sit and the notice and takedown, you know, ecosystem, can you suggest a topic that would be ripe for discussion among stakeholders, you know, a topic where we might be able to make some progress? And so let me start with Vickie.

MS. SHECKLER: Thanks for inviting me here. We appreciate it. As John mentioned, I'm with Recording Industry Association of America. As we think about what topics might be useful in thinking about a voluntary initiative to improve notice and takedown, let me tell you a little bit about our background.

In 1998, when the DMCA was enacted, our industry was a physical world. Virtually all of our sales came from physical formats, primarily the CD. Fast forward to today, nearly two-thirds of our revenues come from digital sources. Today there are over 500 authorized licensed services worldwide with tens of millions of songs

available.

We, like others in the creative community, are working hard to create new services to enjoy music and to give consumers engagement with music; to drive new technologies; and to create partnerships and licensing every day. Unfortunately, our work is being impacted by illegal activity by online infringement.

One tool to address online infringement is the notice and takedown system. Again, that system was developed in 1998. If you remember, in 1998, less than 30 percent of Americans had access to the Internet and only 3 percent had access via broadband. We fast forward to today, about 70 percent or at least 70 percent of Americans have access to broadband.

In today's Internet any file can be instantly repopulated all over the world. Any file that is subject to a takedown notice can immediately come up on the same site over and over again. One example that we gave is the song Katy Perry's "Roar," which came out in August of this

year. We have sent over 300 takedown notices for that song on the same site and to Google for their search engine capabilities. The song's still available today.

In fact, we have sent over 38 million copyright removal requests to Google in the past -- I'm sorry -- in the past couple of years as well as millions more notices to the website operators themselves and the technical hosting providers. I give you this to suggest that the current notice and takedown system is outdated and simply isn't working in today's environment.

What does that mean? That means we have an opportunity today through volunteer initiatives to try to address some of these issues. And to your question, John, I'd like to give three options which I think are worth discussion.

One is the role of search. Google has said that it does not want search results, and I quote, "to direct people to materials that violate the copyright laws." We applaud that and we appreciate what Google has done in this regard.

But we'd like to figure out meaningful ways to make this happen. Can we talk about promotion of authorized services? Can we talk about more meaningful demotion of authorized services? Are there other, you know, possibilities, like an icon to identify authorized services? Let's see what can be done to direct users to the content they want in an authorized manner.

Second, let's address the notice and takedown whack-a-mole problem. As I've just described to you we do send millions of notices to websites on the same tracks and they continue to be pop up. And this is an unnecessary and undue burden on both the website operators, the technical hosting providers, and on the content community. Let's see if we can find a better way to address that issue.

And then third, with respect to the repeat infringer condition of the DMCA, there's been inconsistent treatment on what that means and how it's implemented. Let's talk about what makes sense. What is a reasonable, practical,

commonsense approach to think about repeat infringer policies?

We're encouraged by the growing awareness of the utility of voluntary initiatives and we appreciate the recognition the Task Force has brought to these issues. We know that voluntary initiatives are not a silver bullet, but we think they make a difference. We also know that there are concerns about abuses and inaccurate notices. We agree that those issues should be addressed as well.

We look forward to talking about these things today and in future panels. Thank you.

MR. MORRIS: Great, thanks. Fred?

MR. VON LOHMANN: Thank you, John, and thank you to the Department of Commerce and to PTO and NTIA for convening this effort. I guess from Google's perspective the most important thing when talking about notice and takedown and what we can do together to make progress short of the now well-rehearsed arguments over potential legislative changes is to focus on what's been

working. And in that connection I really want to highlight what can be accomplished with, number one, transparency; and number two, cooperation.

And on that point I want to just give a brief story of something that Google's been doing that has been working, we think, very well. And that has been really the combination of transparency around notices, who's sending them, for what, you know, the stuff that we have published on our transparency report for the last year or so. And also, our trusted copyright removal program, which many of you in the room know about because Vickie, for example, is one of -- her organization is one of the members in that program.

And that stemmed from a recognition on Google's part that there were a lot of takedown notices that were being submitted by a relatively small number of submitters, including, for example, the RIAA, motion picture studios, Microsoft, the adult entertainment industry. And many of them actually were very good, reliable,

high-accuracy submitters, and we thought we could figure out a system where we could do better for those notices based on the fact that these are folks who are sophisticated, accurate, really take the trouble to make sure their notices are high quality. We thought it was something that would be -- it was a shame that those notices would be delayed as we processed the very large number of notices which are not from sophisticated submitters and which often include a lot of both abusive and erroneous takedowns as well as takedown notices that were simply incomplete or otherwise not ready to be processed.

So we built the TCRP program with the cooperation of copyright owners to see if we could do together something better to make the process more efficient. Today TCRP members submit 95 percent of all the takedown notices we receive for Google search, which today, if you look at the transparency report you'll see today's number, and over the last 30 days we have received and processed more than 24 million takedown notices

for a search just in the last 30 days. That would not have been possible but for the efforts we put in place in TCRP to make the system more efficient, to hear from rights holders. How could we get the turnaround time to be quicker? How could we get the unnecessary obstacles out of the way?

And on the transparency front, what we've also found is this has been a great effort to improve the accuracy and accountability of the notice and takedown system and industry. There are now many independent enforcement vendors that copyright owners from all industries rely on to search the Internet for infringing works, to prepare takedown notices on their behalf, and submit them not just to Google, but to online service providers of all kinds.

What we found is some of those entities were poorly behaved. They were not sending accurate notices, often without the knowledge of the copyright owners that they purported to represent. The ability of our TCRP process and

our transparency report, that has, in combination, allowed rights holders to police their own vendors. I have heard from a number of rights holders to say it has helped them to weed out which of their vendors were doing a good job or to contact their vendors about concerns that were surfaced because they could now see on a real-time basis what was being submitted, by who, and for what.

We've also heard from the vendor community that they appreciate it because it allows the ones who have always put in the effort to be accurate to get credit for it, to be able to say we are members of TCRP, we really prioritize accuracy. You can see right here in the report that we do that and we have, you know, great metrics to prove it.

And, of course, for users, it's a great thing to be able to see that transparency. We've had a number of mistakes in the notice and takedown process brought to our attention by regular users using the transparency report to

check their own websites, to say I used to have no way of knowing who was sending takedowns for my website. But now thanks to the transparency report I can see that and, because of that, I've been able to catch notices that Google missed, right. We try our best to catch the errors, but with 24 million a month we're not going to catch them all. The transparency report has helped the public, website owners, journalists, to catch mistakes as well. And as a result, we ejected last year two members from the TCRP program for their persistent, repeated failure to submit accurate notices.

And so this has allowed us, again, through a voluntary set of cooperative measures, to create a system that goes above and beyond what the DMCA requires. And I think that is important because we only have the ability to punish folks who misuse the system because we are above the DMCA requirement. Therefore, when people misbehave, we can eject them from the program without ending up violating the requirements of

the safe harbor. That combination of cooperation and transparency has worked for Google. It has made the process better for all parties concerned.

So from my perspective, I really would love to get more stories from other OSPs and rights holders about similar efforts that have worked; cooperative measures rather than the ongoing debates that have characterized this area for so long.

MR. MORRIS: Okay, thank you. Sherry?

MS. McSHERRY: So thank you, also, for inviting EFF and inviting me here to participate in this conversation. A lot of times these conversations don't involve the perspective of the users and I think it's fantastic that this process is not going to run that way. So that's great.

So I'm going to start by saying that from the perspectives of the folks that I represent, the sort of ordinary Internet users and small innovators, startups, and so on, the notice and takedown system, or more specifically the DMCA safe harbors, have been tremendously beneficial

overall. I think they've offered tremendous benefits in terms of providing the possibility for extraordinary innovation and also for the development of extraordinary platforms for expression of all kinds. And I think that it's crucial that as we have any conversation about what to do about the notice and takedown system and how to improve it that we keep firmly in mind what the important part of the purpose of the DMCA was, which was not just to provide enforcement tools and new enforcement tools, but rather to -- and not even just to provide safe harbors for service providers, but ultimately to make sure that the Internet could flourish as a platform for expression.

So all that said, the notice and takedown process has a lot of problems. It's repeatedly abused to takedown lawful speech and the statute really doesn't provide enough remedies for that. Now, in a variety of contexts we're working to fix that in the courts, but, in the meantime, we have a problem. I see improper

takedowns all the time and they include everything from home videos of dancing babies to lectures by prominent academics like Larry Lessig, with whom I'm sure many of you are familiar, entire YouTube channels devoted to political commentary and reporting. And that's just my current docket right now. There's lots, lots more. And it's really a very significant and enduring problem. And when these kinds of takedowns happen, they call the legitimacy of the whole process into question.

And what I hear a lot from major rights holders and from service providers is they don't want to see these kinds of improper takedowns, that it's not helpful to them because it calls the legitimacy of the system into question, so they don't want those either. So what I would like to put on the table for discussion is why don't we all put our money where our mouth is and create a set of meaningful best practices for fair use?

With respect to rights holders, a few things that might include would be building in

strategies to flag potential fair uses, right, the ones that really should qualify as obvious fair uses. And I think those do exist, despite what some people would like to suggest.

Avoiding takedowns that are based solely on keywords. So I'm thinking here about EFF Fellow Cory Doctorow, who's an author and a blogger, has a book called Homeland. And it's a very widely reviewed book and very popular, but he saw a series of takedowns targeting reviews of his book, targeting Google and attempting to get Google to eliminate search results for his book because there also, it turns out, is a TV show also called Homeland. And Fox was sending out mass takedown notices based, as far as we can tell, solely on the existence of that keyword. So that's a problem and it's embarrassing for Fox and it's not appropriate.

Another possibility would be to create sort of alternative dispute resolution processes. So, you know, we can get into this in more detail, but as Professor Tushnet outlined, the

counter-notice procedure isn't really good enough for folks who are targeted by improper takedowns. So major rights holders could create processes by which folks could reach out and say, you know, I think you made a mistake here. Could we have a quick review?

But also, I want to be clear, there's a lot that service providers can be doing as well. This is not solely on the backs of rights holders. I think service providers, including Google, can do many, many things, simple things, like forwarding DMCA notices to users. Constantly I am contacted by folks who said I've been hit by a DMCA takedown. And I say, well, who did it? What's the basis of it? It's very hard to evaluate whether it's even a DMCA- compliant takedown when the user doesn't even have a copy of it in the first place. Simple things like that.

Systems like Content ID could be a lot more transparent. Again, I get calls a lot, or e-mails more often, from folks who just don't understand how to negotiate the Content ID process

and don't know what to do. I spend a lot of time advising them.

Service providers can adjust their repeat infringer policies, which actually I think this has already been raised. I think it's quite important, so that it's not possible to automatically shut down someone's account by sending just a flurry of takedown notices and then suddenly an entire account is taken offline within 24 hours without any opportunity for the person who has been targeted to counter-notice.

There could be trusted users. They're going to be trusted content removal partners, there could also be trusted users who might have an extra opportunity to appeal if they've proven that they really aren't pirates.

So those are just a few ideas. I have lots more and I'm sure others do as well, but I want to put that right on the table. I know we talked a lot about best practices. Let's include best practices for fair use.

MR. MORRIS: Great. Susan?

MS. CLEARY: Good afternoon. I'd also like to thank all of the acronyms and the people that work behind them: USPTO, DOC, NTIA, and, as I said, the fine people running and organizing the hearing.

IFTA, Independent Film & Television Alliance, represents small- to medium-sized enterprises. We represent independent production and distribution companies in 21 countries around the world, and we have a unique financing model that collateralizes exclusive distribution agreements with banks who loan before the production's even made. So we were talking about secondary markets and reuse, and for independent producers who can be as large as Lions Gate or as small as a company that has three or four employees working at it, we collateralize our exclusive distribution agreements. We get the production financing by ensuring that our distributors around the world, which are quickly becoming OTT services and ISPs, are acquiring product they're engaging in production themselves.

And we need the protection of a strong legal framework in place, and notice and takedown in this country and then notice and takedown or notice and notice in other countries are one of the only tools that independent rights holders actually get to exercise.

And even that is, I believe it's already been said, it's a whack-a-mole game. And as much as people love to play the game whack-a-mole, when the game is that you might not be able to get your production financing together to produce an Academy Award-winning film such as The Hurt Locker or Crash or Million Dollar Baby, you have no lost revenues because you haven't even made your film.

And so we need notice and takedown to be more efficient. It was a very modern way of setting up the framework in 1998, as we said. But in a 4G world it's not. And independent rights holders don't have the money to use and utilize this very expensive technology. The vendors and the major rights holders, you know, they're also spending a lot of money and probably in some areas

more than their licensing revenue is to protect product. Independent rights holders, they don't have this time or money or staff. And so what we do need is we need a legal framework that gives ISPs and these new OTT services, which are just going to be other OSPs or ISPs, the cover they need to do what they need to do. So we do need a legal framework.

IFTA does support voluntary agreements, but we need them to be transparent. We need all stakeholders at the table. And we need the government convening it because without the government and without the path that they would create and the framework for these discussions, as Corynne just said, certain people are left out. And voluntary agreements are terrific, as I said, and we've been successfully participating in the Copyright Alert Program since February of this year. Independent rights holders in both music and audiovisual are involved, and that is a breakthrough because we don't have litigation programs at our trade associations. We don't get

powers of attorney and go litigate for our members. Our members are on their own. And so we don't want them in a land where they can't operate Content ID and that's the only option. It's not very transparent.

They also need search engines to step up and point to legitimate product. And they need them to come to the table. After all, independent producers, their financing and investment partners are their exclusive distributors, and they partner to bring the product to the consumer. And so, as I said, the ISPs, the OTT services, they are our distributors. They're our partners and we need to start working together so that we can take on some of the obligations you might not have now and be able to reach out to all rights holders and make the systems to work for them.

And we believe that, you know, quite honestly, we do need the government. We do need the threat of government action in order for people to voluntarily act in a good faith manner, in a transparent manner, and in an inclusive

manner.

MR. MORRIS: Great, thanks. Troy?

MR. DOW: Thank you, John. And I also want to thank you the PTO, the Department of Commerce, NTIA for inviting me to participate. As John mentioned, I've been around these issues for a very long time and having been there when this ship launched, I still believe in this ship and I think I have a certain stake in trying to help make sure that it continues forward in a successful way.

As I think Corynne indicated, there's a number of challenges around Section 512 of the DMCA. And among the biggest challenges are how to make sure that it achieves Congress' goal in enacting Section 512 that it provide a meaningful mechanism for dealing with infringement in the online space.

I think we could have quite a number of discussions, quite a number of lengthy discussions about ways in which we might make the notice sending and receiving and response process more

efficient, more effective, less prone to error and to abuse. And I think all of those conversations are worth having. Certainly notice and takedown has a significant role to play in this space, and Congress placed high hopes in its utility as a tool for dealing with infringement in the networked environment. But I think we'd also do ourselves a great disservice if we allowed this discussion to devolve Section 512 into simply a notice and takedown regime.

I think that, again, notice and takedown was an important part of the package that is Section 512, but I think it's also clear that Congress intended it to be much more than just a regime for how to send notices and have them be responded to. And I think that we see that it was with good reason that Congress saw it as something more than just that as we see an increasing level of dissatisfaction with the day-to-day operation of notice and takedown as an effective tool for dealing with infringement.

But Congress did intend Section 512 to

be a framework that would provide strong incentives for copyright owners and online services to work together, to cooperate, to detect and to deal with infringement in the online space. And Congress also made clear that, in its view, technology would play a significant role in providing solutions to these problems and intended Section 512 to be a vehicle for providing incentives for copyright owners and service providers to work together to develop and implement those kinds of solutions.

So there's a lot of challenges and I imagine we'll hear about a lot of them today in areas in which people will feel like Section 512 isn't working. I think there are some success stories as well. And I'm with Fred in saying that there ought to be more cooperative efforts to see what we can do together to elevate the practices above the bare minimum of what the DMCA might be read to require.

One of those areas I think that we can look to is in the user-generated content space,

and specifically at the user-generated content principles, as an example of where you had a Section 512 framework where notice and takedown alone was not up to the task of dealing with the magnitude of infringement that was occurring in the user-generated content space. And there were a lot of routes that people could have gone and, in fact, a lot of routes people have gone in trying to deal with infringement in that space. But the one that's proved so far, I think, to be the most productive is the one in which rights holders and leading user-generated content services came together to develop and implement cooperative technological solutions that were both effective and commercially reasonable to deal with infringement in that space. And as a result, we've managed, to some extent, to take those significant infringement issues in the user-generated content space and at least for those who follow the principles outlined in the UGC principles to put those issues aside and to see some level of success.

So I think -- the issue, I think, is ripe for discussion is where are there areas and to what extent can we find ways to engage rights holders and online services to figure out ways to give effect to Congress' intent that the DMCA be a framework for shared responsibility and cooperative efforts, to provide for meaningful and effective enforcement of copyright in the online space? Giving birth to legitimate speech and to electronic commerce and to the full promise of the Internet, all of this was involved in Congress' attempt to legislate in this area.

And I think, again, there have been some areas in which we've seen some success, some areas that provide us some promise. But I think that there's a long way to go and there's a lot of areas where notwithstanding some effort to develop cooperative solutions, we still haven't found a way to actually come to a solution that provides for an effective framework for enforcement in those spaces. And so I think if we could do one thing that would make a huge difference it's to

figure out how to facilitate those discussions with an eye towards how do we give effect to that policy.

MR. MORRIS: Great, thanks. Christian?

MR. GENETSKI: So Fred's idea that he presented was very similar to mine. And since he got it to market first I'll try to express it a little bit differently.

The Entertainment Software Association represents the video game industry. And we, in a certain sense, straddle the DMCA divide. Our membership and the broader video game industry is comprised not only of companies that are producing what we call AAA game titles that require, you know, $100 million investments to produce some of the most sought-after content in the world, but we also operate an array of online platforms, online networks, and increasingly are seeing companies in our industry operate their games and their content exclusively in a cloud-based environment.

So because of the nature of that membership, the balance that the DMCA is aimed to

strike and the clarity it's supposed to provide are very important to our membership on both sides of the bargain. Certainly our trade association plays a vital role for our industry on the content side by sending many millions -- perhaps fewer than Vickie, but many millions -- of takedown notices a year to protect our industry's content. But most of our members also have DMCA agents and they receive and process notices as well. And we take seriously our responsibilities on both sides of that equation.

And I think given that perspective what's important to us and what I think is critical to having a multi-stakeholder process be fruitful is that -- and I'm glad to hear it echoed by many people on the panel, is that we get past having all the voices in the room talking past one another, you know, exchanging rhetoric just about what they don't like. And I think what we should do is ask what does the data that we already have in hand tell us? Because I know speaking from our perspective and looking at our content protection

program over the last -- even just the last two to three years, we're constantly looking at how we can improve what we're doing, you know, both to make sure we're not making mistakes in sending takedown notices, making sure we're getting it right, but also in looking at the sort of array of practices for the different types of entities in the online provider space and how those different -- how we as a content owner can leverage those practices, make them work best for us, you know, within the notice and takedown process operationally, which is, I think, the intended focus of this process.

And, you know, there are very different experiences and I think it's incorrect to say that there are sort of bad actors and good actors. There's a continuum of practices and the implications aren't always clear.

To give one example, we ran an analysis looking at a couple of different hosting sites that were hosting content and one, over a 30-day period, one of them we sent 22,000 takedown

notices for different URLs for infringing copies of the same game title. So obviously there were repeated uploads if over the course of a month there were 22,000 in sort of a rotation. That was a site that had allowed us to have API access through a vendor to do very rapid takedowns.

Contrast that with another site, same title, we sent 10 to 15 notices in a month for that title. The reason for that was it was taking two to three weeks for those DMCA notices to take effect in the second instance. So you can look at that data and you can draw a conclusion that the burden and the cost and the resource intensiveness is certainly greater in the first instance, both on the rights holder in having to identify and sending 22,000 notices, presumably also on the provider in having to process those notices. And maybe there's a better way to get to the same result. Lesser burden in the second instance on both. We didn't have to go looking, it was just sitting right there, we'd already found it. Provider wasn't hustling too quickly to get the

content down, so not a great burden there. So lower burden, lower cost.

But I think if you look at the ultimate aims of the DMCA to reduce the availability of illegitimate content and foster an online ecosystem where there's ready access to legitimate content, the first instance was achieving that end better. Because even with more links going up, because of the rapidity of the takedown, less time for the titles to populate, for people to find them, for links (inaudible) to link to them, for them to show up in search results, those sorts of things.

So I think, you know, much in the way that Fred and some others have said, focusing on the data, that's one little story. We have a lot of stories to tell. Others have more experience than we do on both sides of this equation. But having a frank discussion about what we've learned and what is the most cost-efficient way to achieve sort of the end aims we're all shooting for, I think if we do that in this process we can at

least do a couple things as sort of threshold conclusions.

And, you know, one is we can identify within that continuum a range of sort of norms that the actors that are trying to get it right are kind of within certain parameters. And at the same time, you expose outliers on both sides. As Corynne has talked about, you know, problems that they're identifying. I know they have a Wall of Shame or a Hall of Shame or something like that. We could certainly construct a similar -- we don't, but we could construct a similar sort of Hall of Shame for providers that have -- purport to have DMCA practices that don't seem to really take them seriously. But I think exposing those outliers is helpful.

And then the harder challenge is the second part, which is within those parameters and within those norms taking a close look at what's working best. And where someone's optimum solution is suboptimal for someone else, how do we at those margins sort of dig away in a frank

discussion about trying to get, you know, if not perfect, not letting perfect be the enemy of the good, and through voluntary practices try to really, you know, move the needle to get us in a better place?

MR. MORRIS: Great, thanks. David?

MR. SNEAD: Okay. So we're also very, very appreciative of being here, particularly to the USPTO and NTIA. The i2Coalition is a group of about 90 infrastructure providers. And in all this discussion it's really interesting to me because, first, the discussion of the DMCA makes me feel very old, the length and period of time. When I first started thinking about the DMCA, I really thought that infrastructure providers didn't have a dog in the fight. And honestly, that tends to come up in a lot of discussions about the DMCA. It talks about -- the discussions involve content creators and content providers and these bad actors and Google or very large providers. The reality is that the infrastructure provider or the infrastructure industry in the

U.S. is made up of about 30,000 small- to medium-sized businesses. And the Internet Infrastructure Coalition represents these small- to medium- sized businesses. So if you ever wanted to know what small- to medium-sized businesses were doing in the U.S., they are creating jobs at 50 employees or less, facilitating the content that everybody's talking about here. And so we really do have a dog in this fight.

And here's what the DMCA does, the DMCA and other statutes like this do for infrastructure providers. They provide a high level of certainty that allows infrastructure providers to create processes that allow their customers to do business. Most infrastructure providers' customers are not content providers. They're not Disney. And most infrastructure providers are also not Google. They're not large businesses that have significant resources to devote to understanding the nuances of copyright. They're not going to understand what fair use is. Most of

them don't even know what Section 512 is. They know what the DMCA is, but they're not going to know the little nuances here. So that's one of the issues that I think is important to keep in mind is when you're talking about creating processes under the DMCA, it's important to realize that you have a lot of businesses here that are supporting the Internet that don't have a significant amount of resources. So that's my first point. My first point is when we're talking about these voluntary arrangements, the voluntary arrangements need to keep in mind that the people who are going to be implementing them aren't going to have a significant amount of resources.

The second point that I think is really worthy of discussion here is the DMCA, or Section 512 in particular, is a relatively plain statute. From my perspective, it's really relatively easy to understand. What's happened in the notice and takedown process is that the providers or the people who are participating into it have really muddled it and made it much more complicated. The

notices and takedowns, they've made them much more complicated than they need to be.

So an infrastructure provider's perspective, the most important thing that could come out of this discussion is kind of along the best practices concept, creating a way so that small- to medium-sized businesses, both creators of content, distributors of content, and infrastructure providers, can understand what these notices say, so that they can respond appropriately and to take away a lot of the static that has been introduced into the process over the course of these years. So those are our perspectives.

MR. MORRIS: Great, thank you. Well, we spent about half of our time and I think we've heard a lot of really worthwhile ideas and I think we've actually heard a lot of consensus on a number of the ideas have come up.

What I'd like to do is come back to some of those ideas and then toss out a couple of ideas that we haven't heard, but came from the comments

and ask the panel really, really quickly to just kind of react to the ideas. I mean, some of them that we've already talked about, I'm not sure that we need to explain them further, but I'd be really interested if folks on the panel had concerns about them. In other words, is this a bad idea? Or did we only focus on one aspect and you really want to highlight that there's another aspect of the issues?

So let me just go back and I'll start with actually the very first idea we heard from Vickie. You know, Vickie is proposing that we have a stakeholder conversation about meaningful ways to -- especially in the search context, to promote authorized services and to demote services that have a track record of infringing. So can you guys jump in?

Fred, go for it.

MR. VON LOHMANN: Since I think search was mentioned and since I think we're the only search engine provider on this panel, let me just respond to that by saying, of course, first,

Google has already taken many of those steps. Last summer we announced that a motion signal in our ranking algorithm that would take a number of DMCA notices into account as one signal. As far as I'm aware, we're the only member of the search industry that has taken that step.

But I think the larger issue here -- and here I want to echo the point that was just made -- there are over 66,000 registered copyright agents in the Copyright Office's database. That is 66,000 companies, individuals, bloggers, you know, that's not just big companies. And so, as I understand the mission here with this effort with the USPTO, it is to convene a multi-stakeholder discussion. And to talk about search, I think, is not really doing justice to those 66,000 small and medium businesses who have a dog in this fight, as was just described.

That's not to say that search is not interested, that Google is not interested in having those discussions. We meet with Vickie regularly. We meet with other members of the

copyright industry, both large and small, on a regular basis, both directly with respect to search and also with respect to YouTube. So we are very actively involved and I've just described in my opening comments some of the work we've already done. We're going to keep doing that work.

But for a multi-stakeholder discussion about how to get best practices -- practices that, quite frankly, are being, as Christian pointed out, are being developed by different service providers, but whether in search or in hosting or what have you. We need to get some of those processes out in the open, get some data about them, get some transparency, so that the 66,000 other service providers can learn from those examples.

So, from my perspective, a focus on search, with respect to this PTO process would be very counterproductive.

MS. McSHERRY: Can I? Oh --

MR. MORRIS: Sure.

MS. CLEARY: Corynne, do you want to go first?

MR. MORRIS: Go ahead.

MS. McSHERRY: So I just want to pick up on a couple of things that Fred just said that I think are quite important and I want to make sure that we cover them today. The other -- if we're going to talk about who should be part of the conversation, the issue of search in particular raises for me a very important missing constituency or missing voice, which is the technologists.

It seems to me if we're going to start mucking with search and, for example, we need to really understand what that's going to do in different context in terms of what people's expectations are going to be from search and how that might end up modifying their behavior. It might end up modifying their security behavior and so on, so we really can't have this multi-stakeholder conversation and just have rights holder, service provider, or even EFF. We

need to talk to security researchers, we need to talk to technologists of various kinds and get their input as to the potential impacts of particularly any sort of technological solutions that we might explore.

And related to that I want to thoroughly endorse what I hope that I'm hearing here, which is many people saying we need more transparency. And I think that's really absolutely crucial. The public needs to be able to evaluate what its service providers are doing. It needs to be able to evaluate what rights holders are doing so that then the public will have an opportunity to meaningfully participate and comment on the best practices that we might develop.

MR. MORRIS: Susan?

MS. CLEARY: I just wanted to point out that while we think it's important that searches bring up a point to legitimate product that, especially for independent rights holders, to find space. People think the Internet is unlimited space. Well, it's not. There is definitely

amounts -- you know, YouTube aside with its millions of videos at less than 10 minutes, for commercial services there is not unlimited space on the Internet. And so we must be careful that when we're doing this is to understand that a rights holder has the right not to release and not to make available and to control their distribution and to control their windows of availability to consumers. And so we really need to be mindful that not every product content has a legitimate space out there in the World Wide Web. So, we've just got to keep that in mind.

Pointing to legitimate products, great, if you happen to be a major rights holder and lucky enough to have an exclusive deal with one or more ISPs that market and float up to the top your product. But for independents, that's always a struggle. So we also need to be mindful that copyright owners should have the right to exclusively distribute or not their product.

MR. MORRIS: Go ahead, Troy?

MR. DOW: I was just going to note that

there's -- I don't remember the figure, 66,000, is that the number we just heard -- online service providers in the Copyright Office database. Disney is one of those and probably most of the people in this room are affiliated with one of those. But there's not 66,000 search providers registered in the Copyright Office database. And I think the notion of having a multi-stakeholder dialogue around these issues that would lump all pieces of the ecosystem into one room and try and build a conversation around that is not a very productive discussion.

I do think that there's a need to try and break this out into pieces to some extent and to understand that there are different categories of players in the ecosystem, and that different categories of players may have different roles to play and to talk about how we might build conversations around that in ways that would yield a meaningful --

MR. MORRIS: So Fred, you get one sentence.

MR. VON LOHMANN: Very briefly. As Troy knows because he was there when it was drafted, there is no DMCA safe harbor for search engines. There is a DMCA safe harbor for information location tools which covers all linking activity. So, when he says there aren't 66,000 search engines, that may be true, but I guarantee you there are far more than 66,000 entities that rely on the ability to provide links. And so the idea that you would -- as I say, Google is happy to continue these discussions. We've been actively engaged. I think, in the search community, we have done more than anyone to address these issues and we will continue to engage in that dialogue. But if you want to have multi-stakeholder discussion about improving DMCA notice and takedown procedures, I would suggest that singling out search somehow is not true to the goals that were set out by the Green Paper.

MR. MORRIS: Okay, I'm going to cut this off, but also just to emphasize that what I think Shira and everyone have been saying all day, that

this is the beginning of a conversation. So I think every single conversation we're going to have for the next 20 minutes on different topics is going to leave all of you frustrated. And that's just -- you're meant to come back and further pursue this conversation.

So let's turn to another issue. There's been a lot of discussion of transparency, so kind of one or two sentences each. You know, we've heard a lot of suggestions that, oh, certain people need to be transparent, other certain people need to be transparent. I mean, who do you want transparency from? It seems to me it's a good idea, but where would you like some transparency, if it hasn't been mentioned already?

MS. SHECKLER: Going back to the conversation of search, there is transparency that would be useful in that environment. Google has done a great job of letting us know how many notices or copyright removal requests it has received for search. And Google has been laudable in its public statements of having a demotion

tool, but we don't know how it's working. I'd like to see some transparency on how it's working and have a multi-stakeholder conversation about that.

MR. MORRIS: Okay, anybody else looking for a specific transparency that hasn't been mentioned?

MS. McSHERRY: Yes.

MR. MORRIS: Go for it.

MS. McSHERRY: So I actually also just want to applaud -- I think the Google transparency reports have been tremendously helpful for my community in terms of trying for better understanding with the notice and takedown system is looking like. It's been really, really helpful for any number of reasons. We used to rely on the Chilling Effects database and that just was not useable enough.

The place where I would like to see a lot more transparency would actually be on the rights holder side -- major rights holders, but also smaller rights holders. It is sometimes

difficult to understand how to intervene effectively and make good suggestions on how to make the process work better so that you have fewer improper takedowns. When you don't really have a window into how rights holders go about deciding what is infringing and what is not infringing. And when you don't have a window into how their agents decide what is infringing and what is not infringing. And so I think it would really further the conversation if more of that information was made public because we know it's not perfect and it can't just be like, well, we just identify infringing activity and that's it. We know that's not how it works.

There's more to it and again this is part -- in order to foster a productive dialogue, not to be critical of it, but just say, how do you go about exactly identifying what to takedown? So that, from a user perspective, we can help you make that process better.

MR. MORRIS: Christian?

MR. GENETSKI: Yeah, one quick comment.

I don't disagree with any of that, in principle. I think one of the best ways to do it is to incentivize the transparency. I mean, when you're talking about entering into voluntary agreements or voluntary best practices that are going to elevate the end result in the eyes of people on both sides, they're going to be much more willing to share data.

So if you're talking about some kind of verified rights owner program in some form or another that's going to expedite removal of content, perhaps prevent content from ever appearing in the first place after some level of proof, I think you'll find many rights holders happy to provide greater transparency and to set higher burdens and higher thresholds than would be legally required under the contents of a notice and share insights into how they've arrived at the conclusion that this is infringing activity.

If the reward for that investment is sort of commensurate in getting a better result and I think we certainly have a willingness to be

transparent about our practices anyway, but I think, as Fred was saying, when you go above and beyond it, you tend to get folks more ready to share.

MR. MORRIS: Sorry, one sentence -- or two sentences.

MR. DOW: Two sentences. I agree and part of the agency principles was based on that sort of cooperative relationship that it was sort of a shared approach in which information and efforts could be shared.

The other thing I was going to say, my second sentence is I think there's a fair amount of room for transparency on the side of the sites and services that are the recipients of the notice. Too often we don't know what's happening on the back side. We don't know how to impact the processes. We're not sure exactly what goes into, for example, algorithms for pushing search down. That understanding, how those things work, it's hard to understand why what we see isn't working. It might be able to be made better.

MR. MORRIS: Okay.

MR. VON LOHMANN: Two sentences.

MR. MORRIS: Go ahead.

MR. VON LOHMANN: First sentence: We need more transparency from a group that is absent from this panel, which is the enforcement vendor community.

MR. MORRIS: Right.

MR. VON LOHMANN: Second sentence: We need to understand their cost structure, their business models, and the technical procedures they have in place for generating notices and ensuring accuracy.

MS. CLEARY: I have two sentences, too.

(Laughter)

MR. MORRIS: All right.

MS. CLEARY: What Maria said before about technologically neutral solutions needs to be heeded. We don't want transparency to get lost in this when you talk about certain technologies. Independent rights holders got left behind when ISP started blocking P2P. P2P software and

distribution software and independent product and content was being distributed via these P2P software applications. And so we really need to make sure that it is technologically neutral and that copyright protection addresses actual illegality under the current law that is in place and that it's narrowly tailored to meet that, so IFTA has always in its filings provided that.

We need copyright protection, but it can't be a guise for preferring other rights holders' products or mucking up the pipes so that we can't get access to those pipes in the first place because we need distribution as producers.

MR. MORRIS: Okay, moving on. Let's try a different topic? I think it was Corynne who was urging essentially a dialogue to discuss better ways for the notice and takedown system to kind of recognize and accommodate and acknowledge fair use. So let me toss that out as a -- anyone want to jump in and say that's a bad idea?

MS. McSHERRY: I think when -- do you want to go ahead? Troy, go ahead.

MR. DOW: So I'm not going to say it's a bad idea. I think I just want to put it into perspective. I think Corynne is right that we don't like to see bad notices in the system. It undercuts the system and it undercuts the confidence in the system and its utility and so, you know, we as rights holders set very high standards in terms of the notice that we sent to try and address those very issues.

I mean, our interest is not in -- we have limited enforcement resources. Our interest is not in enforcement in the areas, I think, that rub up against those issues. And so our experience has been in the millions of notices that we send, we have almost no counter-notifications because of the approach that we take. So I think it's fine and it's appropriate to have a conversation about how to make sure that practices are adhered to in this space that are useful and not abusive.

I also think we have to put it into perspective and understand that those problems,

while not justifying them, fit into a broader framework of problems in terms of Section 512 where even if you solve for those problems, you would have gone nowhere in terms of solving the bigger problem about how do you actually make sure the system works for the aims for which it was intended, which is providing a meaningful and effective framework for enforcement.

MR. MORRIS: Okay, David?

MR. SNEAD: So I'm not going to argue against fair use either. I think everyone would probably say that fair use is a good thing. What I will say that the discussion about fair use raises is, there needs to be a meaningful way for the targets of takedown notices to communicate with the entities who are sending these notices.

All too often what we find is that there's virtually no way to get in touch with a lot of these outsourced notice providers. So if you have someone who wants to communicate with them and say, I have the right to provide this technology, this particular type of content. Even

if it isn't fair use, there's no way to get in touch with them to discuss it. There's not an individual at a lot of these outsourced notice providers who's following a case. There's not a phone number, not an e-mail address on any of the notices. So there needs to be a way and the notice providers need to incent their outsource providers to have this information.

MR. MORRIS: Anyone have one sentence to add? All right.

MR. VON LOHMANN: Amen. (Laughter)

MR. MORRIS: All right, good. So I have this long, long list that we're never even going to get remotely close to getting through, but there's one item that was number 8 on my list and then a little conversation and it's now number 7 and then it got moved to number 6. I'm just going to move it to right now, which is not so much a topic for a suggestion, but kind of a structure question.

I mean, do we need to have different conversations for small providers or big

providers? Are there some issues that should be discussed overall? This should apply to all notice and takedown. Or are there any particular tools, any particular ideas that we should be talking about that really are trying to target smaller entities.

Now, smaller entities being smaller service providers, but also smaller content owners. So is that something that we should be thinking about doing?

MS. CLEARY: We should have breakout sessions, but any time you put the big guys in a room behind closed doors without all the players there, you're opening yourself up to say that there's a non-transparent process going on. And I certainly, for one, representing independent rights holders who produce 80 percent of the feature films in the United States, so we might be independent and small rights holders, but we produce the most feature films and television programming. So we're responsible for that production. I want to be in the room and I don't

want to be put off. Me and David and Corynne go into a room and then all the majors go into another room. That's just not a way to run the process.

MS. McSHERRY: Unless whatever we come up with is what we all adopt. (Laughter)

MS. CLEARY: Or whatever. Well, we might be the cool club.

(Laughter)

MR. MORRIS: Go ahead, Corynne. Sorry.

MS. CLEARY: So I would tend to agree with that. I think that, again, we can have breakout sessions. I think that that is a practical thing to do, but at the end of the day you really need to have a fully inclusive process if we're going to have a meaningful outcome to this that has real legitimacy. I think that one thing we've learned in the past few years, I hope, is that Internet users aren't going to stand for backroom deals. And so if we don't want it to look like that, there has to be lots and lots of opportunity for participation. And I would

reiterate, including participation not just by rights holders or even ISPs, but by technologists because this is too important to leave to lawyers. I think we can please agree on that.

And another community that we need to consider including, or at least hearing from, is the international community. There are a lot of activists around the world that rely on the service providers that are located here, that are governed by the DMCA. They rely on those platforms for expression. And they should at least have an opportunity to weigh in and share their perspective on any potential changes to the system.

We represent major rights holders that are majors in their countries outside the United States. And our number one question as we travel around the world is, how can I get some attention and some rights enforcement in the United States?

It's the largest pirated market in the world for me. So we need to be completely aware that 90 percent of the world is outside the United

States and they're looking for enforcement, too.

MR. MORRIS: David?

MR. SNEAD: So I'll answer your question and then I want to follow on Corynne's question.

Absolutely, I don't think that this is a process that should be divided into the big guys and the small guys. What we see with the DMCA is that it largely works for the small guys. It's just that there's some tinkering that needs to be done along the edges and I think that that's what this process is designed to do.

But I do want to follow on Corynne's comment about internationalization. It's very important to remember that the U.S. is largely at the center of a lot of Internet infrastructure. There's more than a significant amount of traffic that comes through the U.S. and it benefits U.S. Businesses. So any consideration of what changes with the DMCA necessarily has to take that into account, otherwise you're actually going to be driving businesses away from U.S. companies.

MR. MORRIS: Okay, anyone have one more

sentence to add? All right. So let me toss out a different issue which I'm not sure has been talked about extensively, but a bunch of the comments from a lot of different perspectives in the conversation did suggest fairly mundane conversations about, you know, should we standardize formats? Should we standardize the actual delivery systems for notices to essentially allow all of you players to communicate better and more clearly, to promote accuracy. What's your reaction to that? Is there -- go ahead, Susie?

MS. CLEARY: With the voluntary agreement for the payment processors that the IPEC office helped facilitate, after the agreement was done there was -- you know, every payment processor had their own way of handling the complaints. And what we did is we went around to each one and said, give us a form that's good for you and I'm going to take that form to MasterCard after you, Visa, look at it and I'm going to take it PayPal and I'm going to take it to American Express and I'm going to try to figure out what my

form needs to look like for all of you. What ticks off all of your boxes? What do you need? And within a week and a half, we had that form and our members have used it successfully.

MR. MORRIS: Troy?

MR. DOW: So I think that to the extent that that kind of conversation can help facilitate and streamlining and effectiveness, that's a conversation worth having. My concern is that if that's the conversation we're having, that we may be setting our sights way too low. I was looking at some data that the MPA filed in Europe on an inquiry on notice and takedown data and there they reported that one of the vendors for one of the studios in 2011 had sent requests for 39 million infringing files.

Those 30 million notices were only for 87 titles, film and television shows, and those notices went to primarily 25 sites, right? So, essentially, what you were looking at was 58,000 notices for every show or movie being sent to only 25 sites and, as a result of all of that activity,

all of those titles remained available on those sites, right? So you have a huge problem here of inefficiency and ineffectiveness that streamlining the notice process and harmonizing what the notices say is not going to solve for.

So I think to the extent that that can help the process, we should have that conversation, right? We should look for sort of low hanging fruit to make the system work better, but we need to set our sights higher than just that.

MR. MORRIS: Fred?

MR. VON LOHMANN: Let me just echo something that Christian said earlier in his comments. Big numbers alone don't actually tell you anything you want to know, right? The question is data. We need more understanding of what the experiences of OSPs and rights holders both in these policing efforts. As Christian's example pointed out, sending 22,000 notices can often turn out to be much more effective than sending 12 notices if those 22,000 notices are

getting responded to fast enough to actually take those files down.

So I think what we have here is a real lack of knowledge and data because we have a lot of different service providers who are doing different things and rights holder and their vendors, who are pursuing different strategies. And I think a lot could be gained by sharing some of that knowledge and so I guess I disagree with Troy to the extent that he's suggesting there is very little to be gained by looking into what data standards have been working for which service providers. What APIs are being used? What technology standards? What's been working? What's the actual turnaround time look like? What helps, what doesn't help?

I think that gets us a lot closer to a world where you might still have to send 22,000 notices, but they actually make a difference, as opposed to a world where you send 12 notices, but maybe they don't.

MR. MORRIS: Vickie, go ahead.

MR. SNEAD: Thank you.

MR. MORRIS: Sure.

MS. SHECKLER: We agree that looking at the data is useful and thinking about the different industries and the different categories of works that we're talking about helps to inform the process. That being said, at least from where we sit, for one example, we have sent 2 million notices to Google and to a site called mp3skull.com.

That site has received thousands of notices for the same track. It's across the board, there's thousands and thousands of tracks that are sent to this site. The music is still available on that site the very next hour. That's the problem that we're facing. We'd love to know what others are doing differently and where they see impact and where they don't? We'd like to think about, is it loud music is different from games? Maybe it is, maybe it isn't? So, yes, I think data will help a lot, but let's keep our eye on the ball and the goals that Congress intended

with the DMCA.

MR. MORRIS: Okay. Quickly, let's go to David and then Christian and then --

MR. SNEAD: So I'll agree that more data would be good, but I disagree that continually regurgitating these very large figures really accomplishes anything. What I would say about the notices is we already have data that will help rights holders and people who are targets of these notices take action. And that is a very plain and simple statement under the DMCA that is not designed to instill fear or confuse the people who are participating in the process. That's really all that needs to be done to let people know their rights, excluding all extraneous material that simply just serves to confuse and put fear into people and that's a very easy task to accomplish.

MR. GENETSKI: Very quickly. I think the original question that Troy answered had to do with should we do more to expand what's contained in the notices. And I think David makes a good point. It's a pretty simple, direct -- there may

be abuse of what you're supposed to put in that notice and if there's improvements to be made, I think people will. But I think Fred's point was to talk about the other side of the equation and I think that's where there's actually far less -- I mean, Google should be applauded for their transparency, but across the other 66,000, which is a number we've thrown around, that's where I think there's the greatest lack of transparency.

And why is it that RIAA is having an experience where they can send that many notices and still have an hourly availability of the same content they're noticing? That suggests there's a real flaw there, right? That's a lot of effort. If those notices are actually being processed and the content being taken down, it's an incredibly inefficient system. And so I think what we're all saying is let's look at that. Why is that? And what works better? What's happening that works better, and let's drive the practices towards that.

MR. MORRIS: Okay, one sentence.

MS. CLEARY: I would also say that if ISPs have exclusive programming that they're actually employing content protection on that's above and beyond their obligations under the DMCA. If they are offering that, then they need to offer it to all rights holders.

MR. MORRIS: Okay, let me -- we're really kind of running out of time. I'm going to throw out the last topic, but it's one of the most contentious and we don't have any time, so you only get two sentences each to express any opinion on this topic. And that's the really difficult whack-a-mole problem. We've heard about it a lot. Is there focus conversation that we can have on that problem to try to make progress? Two sentences.

MS. McSHERRY: Okay, I'll just be the first one to say it: The best answer to the whack-a-mole problem is to provide people with legitimate alternatives that are easy to find, easy to use. You're not going to police them all. You're not going to be able to take them all down.

I would suggest that instead you take those resources and invest them in more productive arenas.

MR. MORRIS: Anyone else? David?

MR. SNEAD: Okay, so the first thing that I would say is the way to deal with a whack-a-mole problem is to provide as much information as you can possibly provide to the recipients of your notice.

The second thing that I would say is let's have a statistical or get more information on whether the whack-a-mole problem is an actual problem.

MR. MORRIS: Anyone else? Troy?

MR. DOW: So I was going to say two things. One, I think we long for the day where we're back to a whack-a-mole problem in which the mole actually goes back into the hole for some period of time. Right now I think the problem is the mole doesn't ever go back in the hole. And we're in a situation where the content is just pervasively there and so I think there is a

discussion to be had about what sorts of technological solutions might be employed to address that issue.

There are all kinds of things that we can talk about that could be done that aren't being done that might actually affect that and they don't involve near notice and takedown, they involve technological solutions. But things that we think can be done in a way that's commercially reasonable and effective and accommodates the legitimate interests of all of us.

MR. MORRIS: Okay.

MS. CLEARY: And we need to look into metadata fingerprinting identifiers like ISAN and EIDR and we need to put all of that technology to use to stop this whack-a-c game. We need to make sure that it stays off.

As I said, again, independent rights holders may not get the chance to have the legitimate product up there, so Corynne's solution for them might not be good enough. And we really need to look at a way that if the goal is to

reduce the number of notices sent to ISPs -- I thought the goal was to reduce online piracy and so that legitimate commerce could flourish, including those that are exercising fair use to access and to do UGC.

MR. MORRIS: Okay, we're going to -- okay, you get the last word.

MS. SHECKLER: Thanks. We believe that whack-a-mole is indeed a problem and you've just cited several of the statistics that we believe show that. We believe with the framework and the goals of the DMCA. It provides immunity for ISPs and in order to provide incentives to seek cooperation to deter online infringement. Let's work on that.

We look forward to working with the Task Force and with NTIA and with the multi-stakeholders here to talk about what are the right ways to deal with that? What are the options that are available, both the search engines and with the ISPs and the user community.

MR. MORRIS: Okay, we're going to go

into a lightning round for a moment, but if you have a question yourself, why don't you gather at the microphone now if you want to start? If no one shows up, maybe we'll take more time, but if you have a question, go to the microphone. We'll get to you in a moment.

So lightning round, one sentence each. So, a key question is who is missing? Who's not on this panel that needs to be? And I've already heard vendors, the enforcement vendors. I've heard technologists and security researchers and I've heard the international community. Anyone else you want to add?

MS. CLEARY: We have the independent ISPs. What are the major ISPs?

MR. DOW: I think there are a number of different rights holder interests who would also be interested in the conversation, small and large, that are represented here and we can identify them if need be.

MR. MORRIS: Fred?

MR. VON LOHMANN: I think the small and

medium OSPs are some people -- they're the ones who are resource constrained, I think, as was mentioned. I think we need a lot more understanding of their experience.

MR. MORRIS: Corynne?

MS. McSHERRY: I think that there's any number of Internet user communities that would have things to say about this. Remix communities, various folks who take advantage of platforms who are creators themselves and take advantage of things like YouTube channels to communicate with the world, I think they have a perspective that should be included.

MR. MORRIS: Anyone else? Okay, so the next lightning round question -- and I'm sorry to the panel that I didn't actually preview this question to you in advance -- but it actually comes up on the consumer privacy multi-stakeholder conversation. How much do we need to start with a focus on kind of a factual foundation? In other words, do most stakeholders who would come to the room already understand

enough about what we're talking about to be able to engage or do we have to spend the first meeting of some multi-stakeholder process getting a factual foundation? What's your quick reaction?

MS. SHECKLER: I think we've heard here today that we would all benefit from additional data and additional insight from the variety of stakeholders here.

MR. MORRIS: Okay. Anyone else want to?

MR. VON LOHMANN: No.

MR. MORRIS: Sorry, Fred.

MR. GENETSKI: I mean, obviously, that's been a point of emphasis for me and I think that the hard part is how to take what can quickly become an unwieldy process, particularly when it obviously a good thing to have everyone involved, as we've seen on this panel alone. That creates less opportunity for everyone to be able to say as much as they may want to say, right?

So to get what's going to be useful with the data is to really drill down and have everyone sort of show their cards and really be able to

share their analysis of their own data and then compare that. And I think that will be challenging in a process like this. Maybe not impossible, but I think we have to acknowledge that there will be difficulty there. And particularly folks like vendors who exist to represent their clients and have different agreements and confidentiality agreements, there could be some real constraints. They are a very important voice, I agree, but there could be some real constraints on what they're able to contribute.

MR. MORRIS: Okay. Anyone else?

MS. McSHERRY: So, plus one to that. And I think that part of why we need data that I just want to put on the table. Part of what we need to understand in terms of what's working is understanding what the current system is facilitating, in terms of innovation and expression. So that any improvements that we might make don't cause too much collateral damage to those productive uses.

MR. MORRIS: David?

MR. SNEAD: So I'll amplify what Corynne just said. What I would suggest, data points that need to be focused on is actually what's working and not what not working with the DMCA process.

MS. CLEARY: Agreed. And a lot of that has to do with us understand technology. Who really understands the algorithm for the search engine for Google? I don't.

And so we really need to -- we all might be higher level thinking and understand policy and understand copyright law, but we all need to understand each individual technology and what it can do and how it's employed and who is it available to and how much it costs.

MR. MORRIS: So I have one more lightning round question and then we'll get to the two folks, Mark, so just hold on a second.

So, final question is picking up on that. Is there any entity out there that's doing a good thing that you want to give a shout out to. And I'm kind of in particular asking if the

content community has some service provider who has some creative ideas, let's hear about it, or at least let's hear about the idea, and vice versa. If the service provider community -- so if there's anyone you want to give a shout-out to? Fred?

MR. VON LOHMANN: I'm going to do it just to shock everyone. Microsoft. (Laughter) Microsoft has been speaking publicly about their strategies and practices as rights holders using the notice and takedown process and I think it's been some of the most enlightening and useful information that I've heard from that perspective.

MR. GENETSKI: Fred stole my answer.

(Laughter)

MR. VON LOHMANN: It's more surprising when I say it. (Laughter)

MR. SNEAD: So I'll give a shout-out to those outsourced enforcement vendors who are doing three things. They have an individual who is following their cases, they have a working monitored telephone number, they don't use a

proprietary method of communication, and when they're identifying material that needs to be taken down, they identify it by URL.

MR. MORRIS: Troy?

MR. DOW: So I would just go back to where I started, which I think is that we should look to the UGC principles as an example of ways to move forward in this area; as an example of ways that people can use technologically effective and reasonable measures to prevent infringements from happening in the first place obviates a lot of the problems that we have with notice and takedown. If you can avoid the need to send a notice and if you can use technology in a way that's done cooperatively so that you can address the issues of concern both to rights holders as well as to platform providers and users, and I think there's a lot to be learned there.

MR. MORRIS: Okay.

MS. CLEARY: Equally shocking, I'm going to give a shout-out to the 5 largest U.S. ISPs because they worked tirelessly since 2011 to work

with rights holders, large and small, to implement the Copyright Alert System. We've also worked with Public Knowledge, other consumer groups, other public interest groups, in order to make sure that all of the boxes for everyone were checked off and it's been two long years, we've had our first year of operation. I can't report on stats or anything -- I'm not that person -- but I'd like to acknowledge the hard work and that the system is encouraging and it looks like we've set up something that is improving conditions online.

MR. MORRIS: Anyone else? Corynne?

MS. McSHERRY: So I want to give a shout-out to Google actually. I have to say the transparency reports have been important and so I just wanted to endorse that again because more people should be following suit. And I agree that the Microsoft discussions have been interesting.

I also want to add one other service provider that deserves a shout-out and that is Automatic, which you may know of as Word Press. And the reason why I just have to express

appreciation for them is that they are one of the few service providers who have joined in a Section 512(f) lawsuit to challenge DMCA takedown abuse. And I think if more service providers did that, we would see a much more effective takedown abuse policing system. Thanks.

MR. MORRIS: Okay. Let's turn to the audience. Mark, do you want to have the first question?

MR. COOPER: Mark Cooper, Consumer Federation. I've got a quick question for Fred and I think it's in a really important big number. You told me that you received 24 million notices to takedown search results in the last 30 days. How many search results did you put up for which you did not receive a takedown notice?

MR. VON LOHMANN: I guess I'm not entirely clear. You mean how -- what's the size of the --

MR. COOPER: Yes. I mean, 24 million sounds like a big number, but I think the number that you put up that people don't ask you to

takedown is an awfully big number and there's a lot of value there.

MR. VON LOHMANN: Yeah, I think -- you know, for any who don't already know, there are more than a trillion web pages on the web and that's just counting the World Wide Web without counting all the other resources and things that are behind pay walls and whatnot. So I guess I assume most people in this audience know, but despite the large number of takedown notices that we receive, it is a trivially tiny infinitesimal percentage of the total number of things we index, as it should be. And so that's -- yeah.

MR. MORRIS: Next question? And identify yourself.

MS. RUSSELL: I'm Karen Russell from the American Library Association. I feel like I'm like I'm going to sing or something. (Laughter) I think Fred was getting at this, but I think another group that you have to think about when you're talking about the 66,000 people who have identified themselves as agents to receive online

service provider notifications are a lot of nonprofits like universities, public schools, public libraries. And they might be also very valuable in getting their feedback. And perhaps even at the university level, if the takedown procedures have had any negative effect on research and teaching.

MR. VON LOHMANN: Yeah, I just would echo and say that there has been very little research, I think, or analysis done of the 66,000 registered copyright agents that I'm aware of. Actually I think it would be very instructional to figure out who are they and what's the breakdown. Because as Troy correctly points out, many of them are themselves actually content owners as well. So I think that would be an interesting area for exploration.

And I've always assumed, and I think the data bares it out, that the 66,000 that are registered actually understate the number of service providers who rely on the DMCA because there are a large number of smaller service

providers who don't even know that they're supposed to register a copyright agent, but who nevertheless do maintain active notice and takedown policies because they know -- to return to the point you made, David -- people know that they're supposed to do notice and takedown. They may not always know that they have to send a form.

For any of you listening on the webcast, do register a copyright agent. Here's your public service announcement. Send it to the Copyright Office.

MR. MORRIS: All right. Well, to my surprise we only had two questions. This is your last chance, otherwise I think we're -- oh, oh. We were close.

MR. KEELEY: I'm Joe Keeley. I'm with an inconsequential House Judiciary Committee with minor interest in IP. (Laughter) I want to take the moderator's question that he asked earlier about differentiating between small and large ISPs in a slightly different perspective or way.

I wonder if anyone could comment on the

thought that some have expressed of treating the notice and takedown system differently for full copies? Presumably, less likely to be fair use versus less than full copies of files, which presumably are more likely to be fair use potentially?

MR. MORRIS: Anyone want to take a crack?

MR. VON LOHMANN: Well, I'll just note that this is a great question because it really illustrates that technology is actually moving quickly, right? Content ID, for example, has the ability to do exactly what you suggest. You can say, as a copyright owner who has a work, a reference file, in Content ID you can say I treat something where it's the entirety of my work differently from something where my work comprises only a small portion.

Or, for example, if the audio track is different from the video track, which is again sort of a hint that maybe some remix activity occurred, so those tools are becoming available

which would enable the nuance that you're describing. And of course, it's an imperfect proxy for the full four-factor fair use analysis, but I do agree that a lot can be done. And I don't want to speak for those who aren't on this panel, but I do know of major content owners -- movie studios, for example -- who are very responsible about using those tools in order to avoid targeting the kinds of things that are more likely to be of fair use. And I think a discussion about those practices -- I mean, I personally think those movie studios deserve credit and I think others should learn from that example as well.

So the more of that exchange of information happens, I think the better.

MR. MORRIS: So we're out of time, so very quickly, anyone want to jump in?

MS. McSHERRY: So I think in terms of protecting fair uses online, there really isn't a substitute for human review, but I think that technology can take you a long way towards

flagging what is likely to be of fair use and what is not. And so I do think that that's a very important way of using filtering mechanisms of various kinds to save everybody time and energy.

For example, if you've got something where you see that it's a match -- it's a full copy and it's video and audio and it's also even been taken down before, so it's got a match -- well, I think you can slide through. That's not going to be a fair use, right?

And on the flip side, though, you can employ mechanisms that allow you to identify that usually relatively small percentage, but the important percentage, that are more likely to be fair uses. And then, for those, you could take the next step to do the human review.

MR. MORRIS: One sentence.

MS. McSHERRY: But you have to be careful, too, that you're dealing with not a piece of time, Joe, that there could be webisodes that are three minutes long and so you think it's a trailer, but it's not. It's the full episode. So

just with the new digital media formats and things being shrunk, shrunk, shrunk, shrunk, and episodic. You just have to be careful about how you judge what's full and what's not.

MR. MORRIS: Any final words? Troy?

MR. DOW: I guess that I would just say that I think that these tools are important and they are being used by rights holders to take into account these kinds of things and should be. And I think that's a useful development and I think, at the same time, those same kind of technological tools can be useful on the enforcement side, as well, that in the same way some of these technological tools can help flag what's more likely to be a fair use. They can also be used to flag what's more likely to be an infringing use and can be used, in example, for a cyberlocker context where we send notice after notice after notice and all we see removed are the links to files.

The same kind of technologies can be used actually to identify the same exact file

across the service that's unauthorized and help make that takedown process more efficient. So I think technology is a good thing and we ought to look at the ways those tools can be used to help this process all around.

MR. MORRIS: Okay, well, I think we're out of time -- or past time, but I think we've heard a lot of great ideas here. So let me ask you to give a round of applause to them.

(Applause) And Garrett's about to cut short our break. I can Predict that.

MR. LEVIN: That's true. It's true. That's what I'm here to do. Let's cut short our break, although John would have won an award if he had actually not opened it up to that last question because he would have finished under time and he would have been the only person that moderated to do it. But instead, we're running a little bit behind schedule, so we're going to take a shorter break. We'd like to restart on the next panel at 10 after 3:00. So please try --

(Recess)

MR. LEVIN: So folks, we're going to try to get started here on our last couple of panels. If people can make their way back to their seats, that would be great.

All right, so for once, I'm up here to not tell you that the break is going to be shorter, but instead, to moderate one of our final two panels. For our last two panels, we're going to take a look at whether and how the government can help the continued development of the online marketplace for copyrighted works.

As we noted in the Green Paper, the online marketplace has developed dramatically in recent years, with numerous industries fully embracing digital distribution and new services, providing never before seen access to a huge variety of creative works. Yet, it's also clear that the market has not yet reached its full potential.

We're interested in figuring out what role, if any, the government can play in helping

to reach that potential. So, we've divided this larger issue into two subtopics that are going to be the subject of our last two panels. I'm going to start with a discussion of increasing access to rights information, and my colleague from the PTO, Ann Chaitovitz, is going to then moderate a conversation about online licensing transactions. There's, to be sure, overlap between the two issues, but we think that each one is deserving of significant attention.

I want to be clear from the outset and reiterate a point we made in the Green Paper. Building the online marketplace is fundamentally a function of the private sector, and that process is well underway. A large number of commenters both leading up to the Green Paper, and then, in the first round of comments filed in November, stressed the importance of ensuring that development of the online marketplace remains in the hands of the private sector. And we agree.

Yet, there may be an appropriate and useful role for the government in facilitating the

process, whether by removing obstacles or taking steps to encourage faster and more collaborative action. To talk about this issue, we've assembled two fantastic panels.

I'm going to ask each of the panelists up here right now to make a brief opening statement after I introduce them. Our first panelist is Colin Rushing, who is the General Counsel of SoundExchange. Colin?

MR. RUSHING: Sure. Is that the button?

MR. LEVIN: Yes, that's the button.

MR. RUSHING: Hi, there. So as Garrett mentioned, I'm the general counsel of SoundExchange. For those who don't know, SoundExchange is the organization whose main job is to collect and distribute the royalties that are owed by basically digital radio services like Pandora and SiriusXM under a statutory license.

And the royalties are owed to record companies and recording artists. And because this is a statutory license, it's a sort of blanket license. It's one size fits all rates, but it

also means that what SoundExchange gets each month from a couple thousand services is, you know, a check, and then a list of what songs were played.

And then, it's our job to take the money and divide it across all the sound recordings and get the money into the right hands; you know, into the hands of the correct rights owner and the correct artists, which means that sort of keeping track of ownership information is at the very core of what we do.

We're actually in the middle right now of several initiatives related to this. As a result, we're building a repertoire database, which is something that the industry doesn't have at this point. We're working on trying to make the ISRC system, which I suspect we'll talk about later on, work better. And we're also working with our counterparts around the world on better systems and processes to help the flow of data and money between societies like us and you know, and other countries.

So, this whole issue is really at the

very core of what we do day in and day out, and I'm glad we're having this discussion.

MR. LEVIN: Thanks, Colin. Our next panelist is Professor Pam Samuelson from the University of California, Berkeley School of Law.

PROF. SAMUELSON: In April of this year, Berkeley hosted a conference on reformalizing copyright, and many of the speakers at that conference talked about the importance of rights information being more accurate and being more up to date.

And four of the papers that will be published in the Berkeley Technology Law Journal about this do focus on improving rights information in order to facilitate licensing. And the consensus that emerged among the people who address this question was that there needs to be more information available through recording transfers, and that people who record transfers right now do so voluntarily, but the incentives are not good enough.

We don't have as much information and we

don't have up to date information in the way that we would like. And so, the speakers at the conference gave several examples of things that one might do to create more incentives for this information to be -- the transfers to be recorded.

And so, I thought I'd just mention a couple of those. Again, I'm not endorsing any of them. This isn't actually my main thing that I do, but I thought that the information might be useful.

So, Stef van Gompel, Daniel Gervais and Jane Ginsburg mentioned the possibility of making a transfer of copyright not valid or enforceable if it's not recorded. That's one option.

Another, which Maria Pallante and Stef van Gompel talked about was conditioning the availability of statutory damages and attorney's fees on recordation of the transfer. I think that's something worth considering.

Another idea was to condition availability of other remedies imprint, possibly even on junctions on recordation of transfers.

Stef van Gompel mentioned recordation as a precondition of a right to sue for the exclusive license or other transfer that might have been available.

The most intriguing idea, I thought, came from Jane Ginsburg, who suggested that an unrecorded transfer of copyright would accomplish only a non-exclusive license rather than an exclusive license or an assignment. This would be a pretty strong incentive, it seems to me to get those transfers recorded. So, these are at least a few of the ideas that came out of Berkeley conference in April.

MR. LEVIN: Thank you. And our next panelist is Matt Schruers, who's the Vice President, Law and Policy at the Computer and Communications Industry Association. Matt?

MR. SCHRUERS: So, the CCIA is a trade association of Internet and technology companies, and like my co-panelists, I appreciate Commerce's efforts to organize this.

I've said before in sort of various

forms that really, this panel and the next panel are the answer to the previous panel. I've characterized this as carrots and sticks. And all of the sticks in the world driving people away from unlawful access to content are not going to be effective if there isn't lawful access to content.

You know, you're not going to sort of litigate your way to prosperity unless you're a lawyer. And so the mechanisms that we need to talk about are ones that are more focused on compensation, and lawyers, I think traditionally focus more on control. In fact, or sometimes I think we're inclined to sacrifice compensation on the altar of control, and really, control is simply the modality by which we achieve compensation, and thereby, the incentive that underlies the whole system.

So, the question is how do you get to more yes? How do we get more carrots and have to worry less about sticks? I think this is obviously a lot less sexy than the very sort of

polarized fights about notice and takedown, or even the more sort of intellectually interesting questions about first sale -- that this is very technical. And so, the answers tend to be rather technical.

I think some of them have been hinted to. For example, I know SoundExchange's comments have some very interesting discussion about standards. There's some references to standards in the Green Paper. And unfortunately, those issues come like around page 97, you know, three pages before the appendix, when really, that issue should be sort of front and center.

The Berkeley conference that Professor Samuelson referred to, there's some really interesting discussion there that took place about how to facilitate this. So, specifically I would say moving towards standards in the registration and recordation process could be a really important thing to explore, and I'm happy to talk about that more.

So, that's standardization around how we

store information. We also want standardization around how we access information. And by that, I really mean APIs. And we see the APIs all the time in the technology space.

Just a sort of brief digression, a lot of folks probably saw this piracy data web site get attention in the news earlier in the year, and basically, their strategy was mashing up data from Torrentfreak about what are the most pirated sites. To line that up with APIs from another service called Can I Stream It that identified what content was available and where online.

And it was sort of interesting, because their finding was that a lot of the most pirated content is not actually commercially available. But I think it's relevant to this conversation, because it shows that when you have services thought want to sell stuff, whether that's Hulu or Voodoo or Google Books -- or I'm sorry, Google Play or Netflix, you can make that information available in an interesting way, and that is useful for the end user to sort of easily figure

out what they can buy and where.

And the problem is that we don't really have that same functionality at the industrial scale. There's no API that someone can plug into, whether it's from the Copyright Office or from vendors and licensors in the marketplace to sort of launch services. And so, I think we need to get there.

MR. LEVIN: Matt, I think I'm just going to cut you off there.

MR. SCHRUERS: Oh yeah, sure.

MR. LEVIN: Just to make sure we hear from everybody and get into the questions.

MR. SCHRUERS: Yeah.

MR. LEVIN: Sorry. But next is going to be Jim Griffin, who is the Managing Director of OneHouse.

MR. GRIFFIN: Interesting topics bring us in the room together, and they arise together in a funny kind of way. The practice of writing using clay tablets and reeds was originated in order to record land ownership. In other words,

in order to create a registry of property.

In the book, "The Story of Libraries," Fred Lerner says the writing may have been invented to record land ownership and keep track of debts. It was not long before poets, priests and prophets found other uses for it. And so that's what gets us here, is that we love the arts and writing was created to keep track of property.

And while I have lots to say about this, I'm just going to try to make one point in my introduction. And that is that our job is to make it faster, easier and simpler to pay in hopes that when it is, more people will.

And to my mind, the way to do that is to make a market in registry services; in other words, in short, to make it profitable to engage in registry services. And I think the role of the government in doing that is to create wholesale registries at the core that incentivize retail activity at the edge.

And in other words, what I'm saying about this is that we should take notice of the

best database in the world. It gives single digit millisecond answers all over the globe. It's the domain naming system that brings about the problem we confront with technology. In other words, every computer and user is registered; it's the content that isn't.

And the Green Paper is really positive about registries and databases for everything except content; meaning it's happy to keep track of every service, happy to keep track of every different way except to get content registered. And I think that is the key, and I think that will only happen when we make it profitable to do so.

And so it is that our content industry sees registration as a cost and something that is a risk, because you might know you don't have to pay for it if the registry is accurate. And there are any of a number of other things that the industry is wary of, but technology loves databases and it makes them profitable, and there's all manner of investment into the domain naming system because KKR and others know that it

is profitable to do so.

But in our own industry, we see it as a cost and we tend to avoid a great deal of that. And so it is that my suggestion, and I'll leave it at this, is that we need to make a market in registry services such that it is profitable to engage in every element of the value chain of getting content registered, and that when it is profitable, we will see advertising, even on the Super Bowl, as we've seen in the domain naming system. That kind of outreach is what we need in order to get creative claims registered, recorded and enumerated.

MR. LEVIN: Thanks, Jim. Our next panelist is Jeff Sedlik, who is the President of the non-profit PLUS Coalition and a Professor at the Art Center College of Design. Jeff?

MR. SEDLIK: Thanks. Well, Jim, can you get out of my head, please (Laughter), because that sounded like a script for my life for the last 10 years. So, I'm here to talk about images, identifying images, communicating rights

information associated with images.

And you know, we hear a lot about music. There's a lot of muscle from the music industry here; a lot of people from the book industry; a lot of people from the motion picture industry, but I don't see but a handful, if that, of people who are involved in image licensing or representing rights holders for images.

And the fact is that visual creators are the smallest of the small businesses. They are not able to represent themselves effectively. There are some fantastic trade associations in that industry, but they struggle, because it's a disenfranchised industry. You have a number of major players who are minor by the standards of the music industry or the motion picture industry or the book industry, but nevertheless, the major players in the images are but a handful, again, several dozen.

And then, you've got everybody else who are the individuals, the photographers, the illustrators, the painters; these people creating

visual works attempting to make a living at it. But the fact is, that despite their best efforts, the moment that they release an image through publication, and actually, publication is a release of an image, it's like releasing it into the wild.

No matter what efforts you make to mark your image, that image is going to be introduced into the global network where it's going to be shared, where it's going to be virally distributed beyond your control. Despite any effort for DMCA takedown notices, you can't stop the use of your images.

And you know, visual creators might want to share or they might want to reserve their images in order to make a living. And increasingly, they're having a difficult time doing so, primarily because of the inability to provide information to deliver that information to the viewers of the images. That information is lost almost from the moment that an image is published. It's stripped out. It's removed by

technical measures, screen captures, et cetera.

When that metadata is separated from the image, the visual creator -- that connection between the image, the rights holder and the rights information is broken, and what you have is an instant orphan. And there are millions of instant orphans being published every day.

This inability to monetize images is plaguing the visual -- the community of visual creators. As was mentioned, I'm a Professor at the Arts Center College of Design, and my students, some of whom are fantastic artists -- a whole generation of emerging artists are deciding ultimately not to pursue the arts and not to create, because they can't support themselves, despite the power that copyright law gives them, because they can't enforce their rights and they can't control their rights, because the information can't get through.

On the flip side, publishers making use of images are drowning in images, and they can't identify what rights they have and what rights

they don't, despite the best digital asset management systems, again, because of the fragility of that metadata that is connected to an image through technical measures.

Then, you have services such as search engines, which can't identify the rights holders or the rights for images, and thus, just can't pass that information on effectively to people who are using the search engines, who then either are hesitant because of liability issues to make use of the image, and therefore, an image that is shared -- is supposed to be shared, doesn't get shared, or they go ahead and use it and violate copyright.

Of course, then you have people who, in the cultural heritage sector who want to preserve images -- a very difficult time, very ineffective in terms of -- or inefficient in terms of the amount of time it takes to find out who owns what and what can be done with an image. So, you end up with works not being preserved or, if they're put out there purposely by a museum, an archive or

a library, people then hesitate to make use of those images, even though they should be used by the public, because the --

MR. LEVIN: Jeff, I'm going to use the same -- previously undisclosed four minute rule that I used on Matt, and ask you to reserve some of the rest of this for --

MR. SEDLIK: Sure.

MR. LEVIN: -- for some of your answers, so we can hear from Lee Knife who is the Executive Director of the Digital Media Association.

MR. KNIFE: Okay. I'm going to buck the trend here for the day and try to stay brief in my opening comments. And I'm also going to be uncharacteristic for myself in that regard (Laughter). I am Lee Knife, the Executive Director of the Digital Media Association, which is a nonprofit organization here in Washington that represents consumer facing digital media services like Google, YouTube, iTunes, Microsoft's Zune Network and others.

As that -- as my members engage in that

activity, it's incredibly important for them to be able to have access to unified licensing information both to launch and to run their services and make payment. Ideally, the typically DiMA member needs to license entire catalogues of work. Indeed, the true ideal would be to be able to, in one fell swoop, license all of the songs or all of the media available at once. And that's not possible under today's data standards.

An observation that I want to make about what we're talking about here is, Matt had said earlier that this panel kind of might help to solve some of the problems that were discussed in the previous panel. I would actually expand that a little bit further and note that proper database management and access to rights information would actually go a long way to solving a lot of the problems and addressing a lot of the issues that were brought up in the Green Paper; things like the orphan works problem all but goes away if we have a decent database of all of the works that are out there, what's owned, what owners we can

contact and what uses we can make.

Other things. DMCA issues, enforcement problems, issues about damages. All of these things, at least, would be impacted positively by some type of centralized or at least cohesive data access system. And probably most importantly, the big thing, it would move us towards a unified licensing system. It wouldn't provide it, necessarily, but it would move us towards it.

So, I think the ideal, obviously, would be to have an absolute centralized database where all creative works, all copyrighted works were available to be polled, and you could find out very, very quickly the existence of the work, the identity of the owner, what rights are available to you, and then, move on to licensing or otherwise acquiring the work.

That's not possible for a lot of reasons we're going to get into in this discussion, and I won't belabor here. But at the very least, hewing to the purpose of this panel, I think one of the ways that government can help inspire that is by

enforcing -- at least nominally enforcing data standards with respect to things like Copyright Office filings, registration and the maintenance thereof.

So, getting all the way back around to the -- again, I think the central purpose of this conversation, I think that's one of the ways that our government can help facilitate otherwise largely free market resolution of this issue is by at least demanding, on the governmental level, a certain data standard that is recognized as usable by everybody in the environment, and thereby, kind of driving the user community and the private entities towards using those standards.

MR. LEVIN: Thank you, Lee, and actually -- that's kind of actually where I want to start, because you know, we don't have a whole lot of time. So I really do want to dig into what the panelists see the role of us and the government doing.

I think it's pretty clear, based on what the panelists have said that you know, there are

issues here. There are obstacles facing users. There are obstacles facing right holders. I'm going to throw this out to Colin, because SoundExchange actually discussed standards in its comments.

And you know, I would like to hear from the other panelists who would like to comment on this, but you know, really drilling down, how do you think the government could be helpful in promoting the adoption of standards? What kind of standards are we talking about here? And why would that be beneficial overall?

MR. RUSHING: Sure. So, I'll start with what kind of standards are we talking about. There are a number that are, you know, either or in existence or in process or in actually, some combination of those two states.

So, one example is ISRC. I referred to it when I first talked -- stands for, I think, International Sound Recording Code or -- and it's intended to be a unique identifier for a sound recording. So, if you have that number, it sort

of works like the VIN, the Vehicle Identification Number for that sound recording, and it has been around for a while.

It's used sort of imperfectly, and it does not -- and one of the things that does not exist is actually, a list of all of the ISRCs and the sound recordings that they're associated with, which makes this system a little bit sort of tricky to use effectively.

So, what are some possible ways to address this? Well, the industry is addressing that first problem, which is the fact that there's not a registry, and we're part of that effort. And there is an effort to try to create a registry that's actually going to be useful and usable.

What role does the government play or might the government play when we're looking at standards like ISRC? And this is what we wrote about in our paper. It's when the industry produces these standards and they become a true standard, the government has an opportunity to support their adoption at those times when the

government is participating in the industry.

So, two examples jump out. One: Copyright recordation or registration. One of the things that we suggested in a filing with the Copyright Office a few months ago was that ISRC be part of copyright registration -- that that actually be a field, and so that you can actually have this way to connect copyright records seamlessly with record company and digital service records of what sound recordings are associated with ISRC.

Another area, and we wrote about this in our comments, as well -- so I mentioned the fact that we administer this statutory license. So, what that means is that the relationship between rights owners and the digital services kind of goes through us by operation of regulations instead of contractual.

You know, typically, when you have a free market relationship between a record company and a digital service, the contract specifies the way that sound recording information is shared.

And one of the standard provisions is the record company, you know, provides ISRC, and the service agrees to report that back.

In the regulations that we operate under and that you know, Pandora and SiriusXM and the other sort of statutorily licensed services operate under, ISRC is not even required. It is optional, but it's not a required field. That's something we've asked the Copyright Royalty Board to revisit and to require going forward, again, on the ground that this is an industry accepted standard.

And so that's another, you know, type of way where the government, you know, we believe, can really provide -- play an effective role in helping these standards become true industry standards.

MR. LEVIN: Thanks. Any other panelists?

MR. SCHRUERS: Yeah.

MR. LEVIN: Matt?

MR. SCHRUERS: So, it actually -- it

wasn't until I read the SoundExchange comments that I know that ISBN and ISRC were actually associated with ISO standards. And so I went and looked them up.

So, we actually do have some international standards for datasets associated with certain classes of works. Now, I am not -- you know, since I didn't even know that these were ISO standards, I can't opine on whether they're -- which one would be most effective or whether the proper standard would exist for a lot of classes' works.

I can imagine you know, sculptural works. You're not going to have a standard, but for a lot of the works that are being associated with digital media, we may well. And seeing that those are associated with the registration process -- right -- that when the government is saying, we are going to dispense these rights associating information with those rights that make them more economically viable is not a burden.

I mean, it may be a burden in the

increment, but in the aggregate, it's actually going to increase the value of the entitlement that the government is handing out. And so figuring out some way to do that by I think as Colin said, building it into the registration and recordation process when people come back is really important.

And then, so that's, as I mentioned, that's standardization about the information itself. And then, I also think there's a second level that we can also talk about maybe later, which is standardization on how people access that information, because the government isn't the only place where one might want to go.

You might want to go to a PRO or a licensing entity or someone and say, you know, I want to a license for the following works. And if you have to do it on a work by work basis, that's functionally the same as saying, talk to our lawyers. Right? You want to be able to access that information in the aggregate through some sort of API-like interface.

MR. LEVIN: Pam, did you want to add something?

PROF. SAMUELSON: So, one thing, building on Jim's comments a little bit earlier that would, I think be quite interesting is a kind of feasibility study about a distributed registry system that actually might be standardized in the data that it collects and is able to be interoperable, and to some degree, that information needs to be publicly available, or at least some information needs to be publicly available.

And a feasibility study about sort of how a domain name system registry type of arrangement might work is something that I think is worth doing. I think something like the Copyright Office could develop and participate in the development of standards so that interoperability happened. But I think it's an exciting idea, partly because it also would allow different types of creators to have communities that they are serving -- that these registries are

serving, where they feel more connected to that than they do to the Copyright Office itself.

And the Copyright Principles Project of which I was a convener, recommended the feasibility study for these interoperable registries, and I think that's an idea that's really exciting. And I think given the state of technology now and the likely state of technology going forward, that's actually something that can be done.

And so, while I don't want to say that's the only solution to the problem, I think we have reason to think that these distributed registries actually might serve the creative communities better than some of the things that are centralized where it's a one size fits all.

MR. LEVIN: I think I saw Jim's light on right when I called on Pam, and then Jeff after Jim. Go ahead, Jim.

MR. GRIFFIN: Yeah, I just want to add to that, that the goal is what's called a database with hierarchical inputs but non-hierarchical

outputs. And what I mean by that is because copyright is sovereign, every country, in essence, decides in the domain name case what domain names are allowed, and then they're broadcast back out to the world without regard to which country they came from, so that anyone anywhere on the globe can get a response very quickly and then find the computer that they're looking for.

And that's essential that it truly be global, and that it respect every country that contributes to it. But to the point, photographs, music, et cetera, we're all in this together. To exploit a musical work requires the graphical elements that were on the album cover.

You know, it requires also the text and the writing that was put on that album cover. So, in so many ways, these works feed one another. So we need a photograph registry to help music, and likewise, we need text. So they have to come together.

And the one thing we know that's working with super speed, and I mean, you do want speed on

this thing, because if you're going to use it for purposes like filtering or for quick answers in order to take action, you need a model that works and works fast. And that's why the distributed registries that are being used for domain name systems are delivering us just those kinds of results, and the investment is pouring into them precisely because there is a delta of difference between the cost of entry into the wholesale registry and what can be gleaned at retail.

And that difference is essential to drive outreach in hundreds of different languages and character sets across the globe. And I think the only way we'll see that kind of outreach that we need to make creators aware of their need to register -- and that really is the biggest part of the task.

I mean, if you gave me the choice between government mandating registration, turning its back on Berne in a global way or making it profitable, I'd take the latter every time, because I'm sure that this one, if it's

profitable, gets the job done all around the world, according to market principles.

But this other one, I have no idea how every country will enforce it or fund it or whether they'll treat it as important or not. So, I think there's a lot of things about runs the Internet that need to look to, to figure out how to run our registries that take advantage of the Internet.

MR. LEVIN: Jeff?

MR. SEDLIK: You're very right to look at it, Jim, as a global issue. If you just attempt to solve something here in the United States, you're not going to solve the problem. Images and other content are available all over the world, and you would have no idea which registries to search, so the answer is to connect all of the registries.

And PLUS, the organization that I work within, is a good example of this, and it's also an excellent example of public private cooperation and a perfect answer to the question that was just

posed, because initially, Marybeth Peters, former Register of Copyrights and I were having a discussion, and she mentioned, you know, if your industry doesn't pull together with the users of the visual content and the distributors of the visual content and the creators and come up with standards and a registry system, you're not going to do well in the future.

I think she used some other terminology, but (Laughter) it's very interesting that -- you know, at the Copyright Office, at the Department of Commerce, at the NTIA, there is a unique perspective that people who work there get from hearing from all of the different stakeholders, and we were fortunate to benefit from that perspective, and now, going forward with Registrar Pallante.

So, we went out and pulled all the stakeholders together, the book publishers, the ad agencies, the design firms, the educational institutions, photographers, illustrators, museums, libraries and others, and formed a

coalition that's entirely neutral, and set about building standards for the communication of rights information associated with images and completed that first version within 5 years, and then, went on to build a hub for rights information for images.

It's at PLUSregistry.org. It's under development right now by a company called RightsPro. It's non-profit, and it's controlled by all the stakeholders together, and its only purpose is to serve up rights information and to issue IDs. If the IDs are lost, you can search by image recognition or by a digital watermark and find who owns the image.

And it is entirely API-based so that you can be a machine or a person and access that information very rapidly, in addition, tying together all of the registries of the world of visual images, so that a search of any one registry will search all of the registries.

In closing, there are a couple of initiatives that you should keep an eye on.

Europe is ahead of the United States on some of this, and that was correctly identified in the Green Paper. There's one called the Linked Content Coalition, which is looking at how rights information is communicated for various different kinds of media and tying that all together so that all the systems can talk to each other. I think it's at LinkedContentCoalition.org.

MR. GRIFFIN: The only tough part I have with LCC -- because I've been watching what they do, is that they started out with this notion, and I've heard others express it, which is that you need to embed the data within the file. And I think that's trouble, I say, because it allows others to then change that information as the files passes around.

And I think what's critical is that we have a roughly centralized -- and I use that word because I agree with Pam -- we should look at how we distribute the database for speed. But you roughly centralize that data so that it can't be tampered with. That would be my only concern.

MR. SEDLIK: I would agree entirely, and I think that what you'll find, Jim, is that the position of the Linked Content Coalition with respect to visual works -- there is no other way to communicate rights information currently other than embedding it.

And so that coalition -- I can't speak for the whole coalition, but we are a founding member -- will transition to pushing the use of identifiers that are linked to remotely stored information. That gives you not only a robust way to link the content with its information, but also, you can have both public and private metadata associated with whatever content it might be. And it's definitely going to go that direction.

MR. GRIFFIN: Agreed on that.

MR. LEVIN: And I think that you know, the Linked Content Coalition is something that we identified in the Green Paper, something we definitely want to hear more about going forward. Lee, I just want to give you the chance -- you're

the only one who hasn't had a chance to say anything about the standards. If you have anything to add on this, I think --

MR. KNIFE: I have nothing to add.

MR. LEVIN: Okay. Matt, you had your red light on?

MR. SCHRUERS: Well, let me just add, there's some additional benefits to metadata which I think could, you know, obviously down the road, deal with a lot of the other problems that you see. And I think the music industry is one, but I imagine we'd see this in others, which is where it's not necessarily clear that the people who are collecting for uses of works are authorized to collect for that.

And a database that has metadata associated with the rights could identify that. And so I just -- when you look at disputes about digital media services, you have the sense that there are sort of two realities.

On the one hand, you see music services -- digital media services at large paying out

billions of dollars. And then on the other side, you have artists who are complaining, I'm not getting paid. Well, where is that money going? In some cases, I mean, SoundExchange is rather transparent about how money is distributed, but that's not the case for a lot of institutional licensors. You know, money is kind of going into a big black box, and one can't see how that's getting distributed to artists. And metadata could be a solution to that for sort of creating a painless accountability.

MR. GRIFFIN: Yeah, and it's essential. And I'm going to talk to music, but it applies to other things, as well, and in fact, in some ways, more so. You know, I think we've got to declare that the day of using the artist name, the album name and the track name is over. And I say that because we're moving into many different countries with different languages and different character sets, and even in English, there's probably two dozen ways to write the name Bee Gees (Laughter). You know, just as one example of one band.

And the problem is -- and you know, I'm sure there's those who would ascribe motive to this, but the black box into which this money falls is divided by market share by the direct members of the societies. And that money arrives as unattributed income, and that's the best way to get cash in the rights business, is to be told you don't have to share it with anyone else. It can go straight to your bottom line.

And so, I think we'd all agree, if we did a survey, that black boxes, orphan works, these are things we want to put an end to the right way, not through exceptions, but through finding those who deserve the money and the credit and giving it to them; giving them the attribution and the money that they deserve is essential to effectuate the purposes of copyright.

And yet, we're really a long way from it. You know? I mean, just to reemphasize the point Colin made, for over two decades, the music industry has been giving out ISRC codes, Industry Standard Recording Codes. And we still don't have

a database of them. Literally, we did not record a single code that we handed out.

Now, you know, in defense, they are unique numbers, and the point wasn't to build a database of them at the time. But here we are two decades in. It's essential that we have that. When I ask music services, why don't you report with the ISRC code to Colin -- and I think Colin will agree -- you get less than 5 percent of your (inaudible) carrying ISRC code. That means more than 95 percent of the money you receive does not have an ISRC attached to it. And the reason that they give me when I ask them, why don't you report ISRC code is, there's no database of them. We can't verify them, so they're unreliable. That's got to come to an end. And if we're waiting for the market to solve it, well, we've waited two decades.

And so, I believe the role of government, to get back to the key question, is to build a wholesale market around which profit making activity can occur that includes outreach

and that includes answers to these key questions, because profit motivated operators would not allow this to continue.

MR. LEVIN: Well, let me ask another question about something that has come up in the discussion of standards. And I think Matt also brought it up in his opening statement, so I'll raise it to you, Matt, first.

What role can the government play in terms of facilitating interoperability, both in terms of interoperability between public and private databases, and to go to Jeff and Jim's point, interoperability across different kinds of databases for different kinds of works that may be needed for a given use?

MR. SCHRUERS: So you know, I think there is -- anytime one is choosing technology for the future, it's always fraught with risk, and it's difficult to know what your future needs are going to be. And so, I think you know, you necessarily need to accept that technologies can be maybe outgrown.

But I think the government's role has to be, at least as far as promoting the uptake, leading by example. All right? And so, altering registration and recordation processes so that the data sets sort of match the frameworks of what the perceived best standards are now would be one way to do that.

I've sort of mentioned APIs, having APIs and then going out to the industry and saying, why aren't you guys using this, too. Right? Sort of talking to other users of the system licensors and trying to evangelize that will, even if it doesn't necessarily generate uptake, it might generate alternatives which could prove superior. And you know, that's all sort of soft encouragement or a nudge (Laughter).

MR. LEVIN: Pam. Yes?

PROF. SAMUELSON: So, I think one of the challenges here is that something like the Copyright Office and possibly also, the Patent Office, doesn't have that much experience trying to figure out how to facilitate interoperability.

And so, one of the things that Maria has said sometimes when she's talked about updating the Copyright Office infrastructure is that it's going to be necessary to have some resources here, and have some resources where you actually have some people on staff who know a lot about technology, and not just how to fix your servers when they go down, but somebody who really -- a team of people who really understand how to think about this in this kind of new ecosystem and environment.

And that's not an expertise that the office has now. The technology infrastructure that they have is not really up to it right now, and so it seems to me that while we can all talk about stuff, unless there's some resources that will go behind really making this possible, then it's not going to happen.

MR. LEVIN: Lee?

MR. KNIFE: Just a couple of points building on that. First of all, as Matt was talking about, the idea of it -- you know, at

least the government leading by example, I would premise that without turning our back on Berne, we could actually do just a little bit more than just leading by example. Right?

We could have a requirement, not necessarily to get copyright protection, but to enjoy all of those extra benefits that come with registration. Those could have attached to them, the requirement that you comport with certain datasets and those types of informational requirements.

Going off of that, I think in terms of you know, what standards should be adopted and you know, whatever -- should it be a Copyright Office regulation, or should it be in legislation, I think that would be a mistake. And going to the true essence of what is a public private partnership, you know, we talked a little bit here over the last few minutes about how the ISRC code has finally really developed.

And I worked in the record industry while the ISRC code was kind of considered this

red-headed stepchild that no one really wanted to deal with. But it certainly has emerged over time being used by the private entities, that as Jim points out, have a market motivation to solve these problems that has been identified as a problem solver.

If we could do something like put in regulations or legislation or whatever, the idea that a responsible entity like the Copyright Office or the USPTO or whatever would review that every once in a while, then we wouldn't be locking ourselves into a particular technological standard that's good in 2013 and might not be the ideal in 2017.

But yet, we would also be motivating people to consistently register their works with that dataset that would be compelling and that ideally, would bring private entities to start to use that dataset as well, because it becomes the common language.

MR. LEVIN: I think Pam, you wanted to respond to that? And then Jim, go ahead.

PROF. SAMUELSON: Just a couple of words about the Berne Convention and flexibilities within the Berne Convention. Several of the papers that were prepared for the Berkeley Conference on Formalities actually talk about the flexibilities in the Berne Convention.

Jane Ginsburg and Daniel Gervais both wrote very interesting papers on that subject, and basically, agreed that especially for recordation of transfers, that formalities are actually not a problem under Berne, and there is more flexibility on many things in Berne than has previously been recognized.

And so, I don't think we should start a conversation by saying, oh Berne's out there. We can't do anything on formalities, because we need to do what's right. And what's right will actually mean looking into those flexibilities and not just saying Berne basically is a cloud that won't let us do anything.

MR. LEVIN: And Jim, just before you go ahead, we're coming up on about 10 minutes left.

If anyone from the audience has questions, feel free to make your way to the microphone, and we can get to those. But until then, Jim?

MR. GRIFFIN: Pam, you're right. Brazil requires registration, and it's not violative of Berne the way they do it. I mean, I do agree. Government has a huge rule, and I think it should principally be around governance and helping bring people together.

But I want to outline just the enormous depths of the problem that's in front of us, because we're not keeping up with the databases we need now. But creativity is moving from the center of the network out towards its edge with the result that societies around the world are reporting a surge in people who are joining, expecting to get paid, and an enormous surge of works on the edge of the network.

TuneCore, for example, reports that they are more than 10 percent of the 55 million iTunes catalogue. And yet, the best registry I know is the 8 million songs at SoundExchange. They've

done an amazing job.

The two unions that take 5 percent of the money in toto have a database of only 800,000 songs to use to allocate 5 percent of the money that goes into the fund, and there are others who report databases around 1 to 1.5 million tracks which they claim to be very, very impressive.

What we're going to need just to get up to where we are now is databases of 250 million and more works globally for musical sound recordings. For photographs, it's truly astronomical. The number is in the trillions, and they don't even have a solid GUID yet, Globally Unique Identifier that the industry recognizes --

MR. SEDLIK: Shortly.

MR. GRIFFIN: But you'll have one, I hope. But the point is, is that if we take the numbers that we're looking at now and shoot for them, we're going to miss the mark dramatically. We've got to be ready to grow databases that encompass trillions of works going forward in a global way, no matter which part of the industry

we're looking at.

And that, I think, is going to require public private partnerships. It requires that the public take a role in governance that these things are fair, but I think it's going to require a private capital and outreach and advertising in order to get the word out to the large number of people who need to be well represented and who need to know that if you don't have one of these numbers and you aren't in this database, you're not getting paid, and you're probably not getting credit through attribution, either.

MR. LEVIN: I think, Jeff, did you have something to add to that? Or I know Colin --

MR. SEDLIK: Yes, I mean, I --

MR. LEVIN: Let's have Colin, next.

MR. SEDLIK: With a complete lack of standards or registries or databases in the visual works arena, we are fortunate to be able to look at how the music industry has developed its databases, and have people advise us from that industry, and also from the book publishing

industry, et cetera.

And in doing so, all of the stakeholders agreed that we should keep the licensing of images separate from the database, and that we shouldn't rely on government to create this global registry hub, but that we should instead have the stakeholders make a non- proprietary solution that's controlled by its users, and then allow any sort of system, for profit or non-profit to connect to it, and also have connectivity with the Copyright Offices of any country.

We are -- right now, the PLUS registry is the visual works registry associated with the UK Copyright Hub, and we have participants in 130 countries. I think the solution has to be global.

MR. LEVIN: Colin?

MR. RUSHING: Yeah, I was just going to -- sort of building on what Jim said in particular about the enormity of the problem, and just to add another sort of layer of complexity that we haven't -- we've been talking about ISRC. Right? Which is what's the number to identify the sound

recording.

Well, the next piece of information is, okay, who owns it? And that turns out -- or who has the right to license it? And that turns out to be unbelievably complicated, because within the same country, you can multiple entities controlling different rights. We see this all the time, where there's one record label that has the distribution rights and another one that has the performance right. You know?

And then, you start crossing borders, and everything gets even more complicated, partly because the rights are different in all the different countries, and you'll have different record labels owning rights to certain recordings, you know, that they have -- you know, they might have the right to Adele in one country and not in another. And all of this just changes country by country.

And then in some countries, artists have freestanding rights that are independent of the record companies, of the rights owners. And

keeping track of all of this is an unbelievably complicated thing. It's just one of the challenges our industry faces, both on the you know, sort of terms of the people like us who try to make sense of it, the rights owners, and the services.

And it's hard to envision a sort of single database that captures all of that information, but it is one of the sort of great challenges and opportunities.

MR. LEVIN: Lee?

MR. GRIFFIN: I've pursued, let me say --

MR. LEVIN: Jim, hold on. Lee, go ahead.

MR. GRIFFIN: All right.

MR. LEVIN: (Laughter) Lee, then back to Jim.

MR. KNIFE: Yeah, I just wanted to say, that was one of the things that I was alluding to in my opening statement, is that for a lot of reasons, a truly central database is not possible.

Not all of those reasons are attractive, by the way. Some of it has to do with the fact that there are people -- there are entities that control certain pockets of this data that -- and I think Matt was talking about this a little bit before, or maybe it was Jim who was saying, you know, the control sometimes seems like a more financially attractive thing than actually giving access to the information about the rights and the data about the rights.

And so, you know, Colin's point is well taken, but at the end of the day, when we realize that you -- okay, so we can't have all of that housed, say, in one spot in the Copyright Office or whatever. The truth is, of all of those rights, how disparate they are and however scattered across the globe they are, they are all owned by somebody.

And eventually, if you want to you know, enough time, you'll get somebody on the phone who will say, yeah, I'm the one who controls the rights to do that in, you know, whatever -- Upper

Botswana.

What we're talking about is not having all of that stuff in one central place, because again, for a lot of reasons, that doesn't seem to be doable. What we should be talking about is at least being able to access all of those things on a distributed level so that the information -- that information is out there. Right? The fact that rights exist and that they're striated like that is out there.

We need to collect that information and create access to that information, even if we don't centralize the actual information itself.

MR. LEVIN: Great. Matt and then Jim.

MR. SCHRUERS: Yeah. So I mean, Jim said, I think right when we were starting about how a lot of -- well, some constituencies view registration as a cost. And I think this is really important, because the folks who are inclined to view it as a cost are also the ones who can navigate the system absent registration.

There are serious distributional

consequences to a complex system. It advantages the established incumbent players and it freezes out the people who can't carefully navigate it. Right? If that sounds like the practice of law, well, then it's similar. Right? Complex systems help those who are sophisticated.

And so you know, I would be wary of a certain amount of -- you know, like potentially kind of concerned trolling about decomplexifying the system, because that is going to advantage smaller competitors who could then participate and compete and possibly get a larger share of what they may be entitled to, because things become simpler and more transparent.

So you know, I think this whole system actually -- you know, simplifying the system may have a democratizing effect as well as a sort of pro-commerce effect.

MR. LEVIN: Jim?

MR. GRIFFIN: Yeah, I just wanted to quickly observe that this is exemplary of the problem in the sense that to say government or a

centralized system, you say, oh, wait a minute. That's a problem. There's 30 songwriters. Oh boy, you're also -- you want to record the band's name, too, and maybe even the instruments they played, because that's part of our history, our culture? That's a problem. That's complex.

Whereas, the entrepreneur sees that and says, wow, there's more people who could pay. There's more ways to distribute the cost across a broader group of people. How great it is that there are so many who could register their claim to being involved with a work, and how they can fill in its history and how they can inform us greater.

And so the point is, is that what one person sees as a problem and a huge complexity, another looks and says, what a grand opportunity to both lower the cost and increase the amount of information that's available. You would not, for example, see someone in the domain name business complain that there were still more domains to register. Quite the opposite.

They're trying to increase the number of domains to register at an incredibly rapid pace, to the point where I think everyone will have a hundred domains at some point in the future (Laughter). And by the way, they do. People I know, they do speculate and they're encouraged because there's advertisements that say, hey, if you've got an idea, register it with us.

We will know that we are successful in our registry efforts when those kinds of outreach efforts are in front of us. When we watch the Super Bowl and we see an ad that says register your involvement in a creative work, it might get you paid, and more importantly, it'll give you attribution and credit. Because when that kind of outreach is occurring, we'll know we're doing it right.

But without that kind of outreach, we know that it's not going to happen. People will not be aware of how to register their rights in any of a number of different languages across the world. So, we need the profit motive to get it

done.

MR. LEVIN: And on that note, I'm not going to commit the same mistake that John made and ask if anybody has any questions. Instead, give myself the award for finishing with one minute left (Laughter). Thank you to all of the panelists for a great discussion (Applause). And now, I'm going to turn it over to my colleague in the Office of Policy and International Affairs, Ann Chaitovitz, who is going to lead a discussion on online licensing transactions.

MS. CHAITOVITZ: This is our last panel, so please try and stay awake. We'll try and make it interesting. The Internet Policy Task Force wants to learn what role the government should play, if any, to improve the environment for online licensing transactions.

Now, the comments that we received generally agreed that this should be a private marketplace, developed and maintained by the stakeholders. This panel will pursue whether the government should facilitate the further

development of a robust online licensing environment, and if so, how.

Now, we're the short panel. We're the last panel, so we don't have much time, and I apologize, because I have all these distinguished panelists, and I'm not going to give them an opportunity to make an opening statement. They just get 30 seconds to introduce themselves.

(Laughter)

MR. KAUFMAN: She threatened us (Laughter). So, my name is Roy Kaufman. I'm Managing Director of New Ventures at Copyright Clearance Center. For those who are not familiar with Copyright Clearance Center, we're a Danvers, Massachusetts based global broker of rights, aggregator of rights and collective management organization. We focus primarily, but not exclusively on text, and we are being dragged by users more and more into other media.

Additionally, our markets tend to be corporate, publisher to publisher and academic, because I'm going to stop there because I'm afraid

of you (Laughter).

MS. JACOB: Hi. My name is Meredith Jacob. I'm currently at American University, Washington College of Law which houses Creative Commons United States, which is the United States affiliate for Creative Commons. And Creative Commons, briefly, for anyone who doesn't know, maintains a set of standard online copyright licenses.

MS. CHAITOVITZ: Thank you.

MR. LAPHAM: Hi. I'm John Lapham. I'm the General Counsel for Getty Images. We have a sizeable stack of pictures that we license out around the world. Thanks (Laughter).

PROF. BUTLER: I don't know if I can beat that. My title is longer than that. (Laughter) I'm Brandon Butler. I'm the Practitioner in Residence at the Glushko-Samuelson Intellectual Property Clinic at the American University Washington College of Law (Laughter).

And I'm here today representing my old friends, the Library Copyright Alliance, which is

a group that consists of three major library associations; the American Library Association, the Association of College and Research Libraries and the Association of Research Libraries that collectively represent 100,000 libraries with them around the world, and over 350,000 individual librarians. Thanks.

MS. CHAITOVITZ: Thank you. And so, we're going to start. I'm going to ask some questions, and there will be time for questions at the end. And I'd like it to be interactive, so I'm going to want questions at the end. And if there aren't any, maybe I'll go back to law school and call on you guys or something.

So, my first question is to each of you. What do each of you see as the key obstacles to developing a robust, comprehensive online licensing environment? And can the government do anything to remove the obstacles? So, two questions: What are the obstacles and can the government help to remove them?

MR. KAUFMAN: Okay. So I would say the

key obstacles are that it's very hard to develop really robust databases. It's hard to develop taxonomies for licensing purposes and to have a taxonomy for licensing that works from one media to another. So you know, brief example, what Brandon refers to -- what we would call a library is a place where you'd read a book or a journal, but in the picture licensing space, a library is a licensor of images of third parties. So, that's a very basic, simple example of where the same word can mean a very different thing.

So, the obstacles are you know, that different rights, different media, different markets have different rules and different norms. On the other hand, they can be brought together, because within each of these markets, there's a lot of solutions. The last panel talked a lot about different database and different data solutions.

These things are out there, and I think the role that the government can play is to sort of encourage and foster the collaboration,

particularly across media and across sectors and across markets; users, rights holders, authors, photographers, creators, to try to get these things talking to each other through APIs and other things.

I do think that you know, we can very easily silo ourselves, but the users in the rights holder community; users don't want to silo. They want to know how to get the rights that they need for images, for text, for music. And I think the government could play a role bringing us all together, and I think there are some examples, which I'll talk about later, happened, where that's being done quite successfully.

MS. JACOB: So on the obstacle side, which was talked about briefly last panel, just the sheer volume of creative works and the fact that many people who create, don't necessarily think about the registration, the licensing part at all. And so, I think it's going to be very hard to have a system that really explains to people why they should do that. So that group, I

think is going to be hard to reach.

And I think, also, that the range of people's intent when they create -- so you know, we talked about users versus creators, but one thing we see at Creative Commons is that almost everyone who is a user in that parlance, is also a creator. People use Creative Common materials because they are creating things. And so, I think that trying to have a -- sort of have a user side - creator side is going to be a problem.

And then, I think on what the government can do, it can not reinforce systems that assume that all creators want the same thing. And you know, in Creative Commons, we see that people want attribution and that they want distribution for the work; they don't necessarily want remuneration. And I think the other thing to do is not assume that all transactions should be licensed.

MR. LAPHAM: So, I don't think there are a lot of obstacles to having a robust online marketplace for creative works. I think it's

never been easier to create and then to disseminate your works than it is right now. And I think that the advent of new strong companies coming up all the time, whether it's in music, motion picture, in imagery, like Getty Images does is testament to that.

I think that the challenge, the obstacle is being properly compensated for what it is you create, and not demonizing the creator's ability to try to be properly compensated. And I think right now, the obstacle that has arisen is more a tendency right now to sometimes publicly shame people for wanting to be compensated for creations in a way that just being seen, ought to be good enough. So I think that's an obstacle.

I think that as far as what the government can do, I think keeping up is key. And I think that by keeping up, I mean things like what the Copyright Office did last year and is doing right now in trying to develop a small claims process that recognizes that we have a different digital economy today, and we have

different needs than we did a few years ago or a decade ago or even 18 months ago, I think is critical. I think likewise, not being overly in love with the status quo is critical. I think that looking at things like the DMCA and recognizing that at the time it was implemented, we were really concerned about whether or not the Internet was going to be up and running properly. And I think that probably, those days are gone, and we've seen that people can, in fact, make a good living off being a search engine.

And so, I think keeping up with the balance of powers is critical, and then, just keeping up with the need to compensate.

PROF. BUTLER: So, I'm going to agree with John, that in sense, there's really not much to do for libraries in terms of facilitating licensing. Libraries are already licensing more or less, wherever and whenever they can, and whenever they see that it's necessary and appropriate. So I know, for example, for the Association of Research Libraries, they keep

really detailed statistics on this stuff.

And ARL members spend about $1.4 billion on content annually, new content for the libraries, of which $850 million collectively across ARL libraries is spent on licensing. And that's 60 percent; a little more than 60 percent. And so, we're licensing like crazy, spending a lot of money on licensing, wherever, frankly, and whenever we feel it's appropriate.

And so you know, we're not really seeing a lot of barriers to finding people that are willing to take our money. On the other hand, I think -- so what should government do? Well, one thing that actually is interesting that government could do to make licensing work better for libraries, is there are -- I think, folks in the audience are probably aware that licensing terms can and often do trump the kind of default rules of copyright. Right? And you can sign away as a user, your first sale rights or your fair use rights as part of a license.

And so, libraries, in acquiring these

huge portfolios of licenses for journals, databases and things like that, are acquiring huge thickets of rights that they often are not qualified or capable of parsing, when it comes right down to the time to decide which uses are appropriate or not. And so, one thing that I think government might be able to do to make licensing work better is to ensure that those default user's rights that are in the Copyright Act can't be licensed away, at least by groups like libraries who need those rights to do their basic jobs.

MS. CHAITOVITZ: It's interesting. And from those of you who have been here all day, you'll see the overlap with his comment from the discussions this morning on the digital first sale. That topic was discussed there, as well.

So, now I'm going to turn to you, Roy, because you discussed -- you were one of the -- it was evenly split. Two people saying there were obstacles, two people saying there aren't too many obstacles. So, first I'll turn to you. You said

there were some obstacles. And I know the CCC has been involved in the development of the UK Copyright Hub.

MR. KAUFMAN: Mm-hmm.

MS. CHAITOVITZ: So, I was wondering if you could tell us what you think the U.S. could learn from the UK's development of the Copyright Hub; if you think a hub of this type would be useful in the U.S. If so, what you think a U.S. hub would look like, and if there is a role for the U.S. government in the creation of such a hub.

MR. KAUFMAN: Okay, thank you. So, the UK Copyright Hub came out of a copyright review that was done in the UK. And what they looked at was a lot of the issues that I think we're looking at here in the U.S. both you know, here today and in the Copyright Office.

And they were looking at, you know, very broad-based -- again, like this -- users, creators recognizing, as Meredith said, and I appreciate it, that there's really very little difference between you know, users and creators very often,

because you know, they are both. And looking at whether licensing in the UK was fit for purpose for the digital age. They have that great phrase, fit for purpose, which I love.

And the gentleman who did the review, Richard Hooper and it was a woman who worked with him, Dr. Roz Lynch, they concluded that there were some things that could be improved to make it easier to find information about licensing. Now, UK -- you know, there was plenty of licensing systems up there. There are plenty of companies that have very good licensing data, but not every user, not every -- you know, and a user here could be a publisher or the BBC, or it could be an individual wanting to do a mash up, knew where to get it.

So, what the UK government thought they would do is take what was out there. Because you know, as John pointed out, there is a lot of really good stuff out there. The capabilities exist, but putting them together in one place is a very useful function.

And by dint, I believe, of this being a UK government effort, they were able to get music, text, media. It's international. We were a member of the Copyright Hub, and with the sort of recognition that the Internet and copyright -- it's not really limited by borders, even if the laws are.

And they were able to get people together. It was you know, definitely what I would call a public private partnership. Recently hired a CEO. Right now, it's sort of a signposting site where you can go and figure out where to get text permissions, where to get music permissions. It will develop over time to become more and more robust. It's definitely the sort of start where you can and then build on from there approach.

Similar efforts going on in the EU, and of course, EU separate from the UK -- you know, we have the Linked Content Coalition, some other efforts that are really all designed to get at this. I think the U.S. government should be doing

this. I think it's -- because these other efforts are going out there, are going on now, we can coordinate with them. I know it's not starting de novo. It's working with those efforts that exist.

And I think there's a real opportunity here, and I think the U.S. government will be especially well placed to do that.

MS. CHAITOVITZ: Thank you. I'm going to turn to you now, Brandon. When I say I'm going to ask -- based on the concerns raised on his comments, but they were actually the library's comments. But since he's representing the libraries here, they're based on the concerns raised in your comments.

How do libraries see the relationship between online licensing and fair use?

PROF. BUTLER: That's a great question. So probably -- and thank god you asked it, because I was sitting over here thinking, I didn't say fair use in my opening statement, and that's terrible (Laughter), because fair use is extremely important to libraries. It's absolutely central

and crucial, and licensing does not and should not undermine fair use. Right?

So the availability of a license in many, many contexts, and especially in the kind of transformative context where libraries and the institutions that we collaborate with operate -- the existence of a license doesn't trump fair use. And so, the -- in theory anyway, the fact that more and better licensing might come online wouldn't be a threat to us, except that the folks on the other side don't always see it that way. Right?

And so, we've already got, for example, Roy's company is suing some of our members over a misunderstanding about what constitutes fair use in the educational context. And part of that argument on the side of the publishers in that lawsuit is, well, there's a license. You can go and pay. And so by proliferating licenses, there is certainly a fear on the educational side that fair use will then you know, be expected to shrink accordingly, when it's very clear in legal

doctrine that that's not the case.

Another example is text and data mining, where we've got now two cases saying, you know, both Google Books and Hathi Tea granted two cases about the same corpus saying, you know, this is a transformative fair use, even though Google's doing it for money and making money on the proposition. It's still transformative because it's a different kind of thing that you're doing. Right? You're helping people find books and you're helping people do a certain kind of research.

But I know that the CCC is working on a market for text and data mining. I mean, they've said so, and they're doing it in Europe where that thing is not as clearly protected. I think, for libraries and the people that we work with who do research on the corpus's that we help them create, that could be a terrifying prospect. Right? Because we've got courts telling us that this is a clear, fair use.

But once there's a market created, what

is that going to mean for us? So, we don't think that anything that comes out of this process in terms of the government facilitating the creation of licensing mechanisms should be seen or portrayed as taking away from fair use. But it is a deep fear that we have that it will be seen that way.

MS. CHAITOVITZ: Thank you. Roy, I'm obviously going to let you respond.

MR. KAUFMAN: Well, the statement that my company is suing your members is misleading, but also kind of off topic. To argue, look, I mean, someone said this morning, licensing is not a substitute for fair use. And I'm completely good with that concept.

You know, fair use is a recognized legal doctrine, and you know, to argue that we shouldn't have efficient online licensing mechanisms because somehow, that will have an impact upon fair use, I just -- I don't see it. I don't see it. I'm sorry.

MS. CHAITOVITZ: Now, John, I'm going to

ask you about Getty. Just recently reached a deal with Pinterest concerning user posted images. So, I was wondering if you could tell us about that arrangement and how or if the government could help foster those types of commercial arrangements.

MR. LAPHAM: Thank you. I don't actually think the government can help foster those arrangements. You know, I think that we're really at a great spot right now, where technology companies, and I would include Getty Images as a technology company, you know, we have the ability to work with other partners of ours in the private sector or in the government sector to make more and better content available to more people.

And an example with Pinterest was our looking at their site, finding that a healthy percentage of their content belonged to Getty Images contributors. And rather than having a slap fight about you know, what should and should not happen with pictures on their site, to say as pictures are moved around, you lose the metadata.

You lose the attribution.

And instead of yelling at each other about whether or not you should be licensing pictures or not, let's reattach the metadata, the property that belongs to those images, and let's have our contributors, in turn, receive the royalties that they are due for the use of their content. That was the goal in reaching that type of arrangement.

And I think there's ample opportunity to do more arrangements like that where you can still have the end creators of content you know, follow their hearts and dreams in terms of what they like to create and still be compensated for that, regardless of whether or not it's being used on social media sites or otherwise.

MS. CHAITOVITZ: Thank you. So can I -- just to clarify my understanding, you reattach the metadata. Was there also a kind of a payment, or was that for -- they would be tagged for future use as they would have the metadata?

MR. LAPHAM: The arrangement works so

that as we have a database, an imagery database that contains, you know, tens of millions of pictures, not only of ours, but of competitors, of other companies, and we can match that database of images up against the web site to find out what the matches are.

And so, using that image recognition technology, we can say you know, looking at the USPTO web site, for instance, that you have 110,000 Getty Images photos on there. And those images no longer have their metadata. We'll reattach that metadata, and the fees that can be charged for that can be based on a per image, per month basis, so that the individual who created that work is, in turn, being compensated back for that.

MS. CHAITOVITZ: Thank you. And Meredith? The Creative Commons -- basically, you are ahead of the game here, because your license enables creators to grant particular types of licensing permissions in advance, which is, in effect, providing online licensing, because

everything is done in advance.

So, do you see a role that initiatives such as the Creative Commons might fulfill in the creation of an online marketplace?

MS. JACOB: So I think -- one role Creative Commons, I think fulfills is providing -- in addition to the options that might be available through traditional paid licensing -- so I think it's important -- oh, sorry.

MS. CHAITOVITZ: Sorry.

MS. JACOB: I think it's important for me to talk into the microphone (Laughter). How about that? So I think that having Creative Commons licenses as an alternative is important, and I think another aspect of the Creative Commons licenses that is valuable is that they don't require renewal and they don't require people to sort of maintain this long-term engagement with the process.

So I think that Creative Commons licenses are valuable to some of the people who use them, because it's something that you can do

at the creation of the work and that you don't have to update. And so, I think that the ability not only to license once, but to then have it be something that can function for the duration of the copyright protection is also important. And that's something, I think, to consider for other online licensing solutions.

MS. CHAITOVITZ: At another time, I'll ask you how that termination would work with those licenses, then. So, I have another question that I'm going to actually want for everybody. And we're going to have to make fast answers, because I'll want to open it up for questions, and we're running out of time.

So, if the government were to encourage systems for the development of a robust comprehensive online environment, and I know that you're split about whether we should, but if we were to, what existing projects and efforts within the U.S. and abroad would you think the government should look to as part of those efforts?

Now, I know that you already said CCC,

LinkedIn, I think GRD --

MR. KAUFMAN: Yeah, Linked Content Coalition --

MS. CHAITOVITZ: Linked Content.

MR. KAUFMAN: That's RDI, which is Rights Data Integration, which has just launched this week, this is EU, I think partially funded, also industry funded effort, which is part of the Linked Content Coalition to put the rights information so computers could talk to each other. So that's a big thing. I think Creative Commons is huge. It's out there. It gives creators this flexibility and freedom to set terms that can be read quickly by humans and machines, so never exclude that.

There's stuff going on -- well, there's the digital object identifier, which is used in science publishing. There is something called ORCID, which is a researcher identifier, but researchers are authors. And so this is an identifier that attaches authorship to articles and helps disambiguate.

But there are all these things that are going on, and each one has a purpose. Most of them are being created now. A lot of them have open APIs, so that they can be integrated into each other. You know, we certainly at CCC have tons of you know, metadata which people don't have to give us. We get data feeds on all books and things like that.

So, there's a lot out there, and I think you know, probably the first step would be gathering up what all of these things are, deciding how they're going to play with each other, because it becomes an acronym soup. But it's out there, and there is stuff, and there are people who can help you get there and it's going on now, so you can learn from others.

MS. CHAITOVITZ: Thank you.

MS. JACOB: So, I think Roy covered a lot of the technical parts, but one thing I wanted to also add is just to make sure that Creative Commons license content, but also, public domain content and content created through federally

funded research is incorporated into these databases, so that when you go out and when you create this great, easily searchable, comprehensive database, that you can find content that is either public domain or open licensed or Creative Commons licensed, in addition, so that you don't create a division there.

MR. LAPHAM: So, I'll confess, I'm shamefully low on acronym knowledge (Laughter), but I think that in the UK, for instance, we've participated in the process with Hargreaves Report, and we think that one of the spots that can be useful for a pairing is if technology companies can work with the government in terms of creating these imagery registries or databases, so that if, whether you're working on an orphan works project or otherwise, I think it's a mistake to sit and wait for the government by itself, to do that for us or for content owners.

And instead, to have there be a partnership where we can provide services or other technology companies can provide services to work

in order to meet the objectives of what a government initiative might be, whether it's orphan works or otherwise. But then, lend our services or another company's services in order to create those facilities, I think is a great idea.

PROF. BUTLER: So, I would also recommend on the sort of learning lessons how not to do it, there's an article that Jonathan Band and I put together that's a series of stories about collecting societies and sort of alleged issues where they operate all around the world.

And so, you could look there and see the different kinds of problems that have plagued other efforts to establish and run those societies, you know, whether it's corruption or transparency or inefficiency or whatever, and try to -- so that you can learn from those mistakes and look for accountability in the folks that you try to empower and facilitate.

MS. CHAITOVITZ: Thank you. And okay, we ran a little bit over for our question time, but there's time for questions. Eight minutes

instead of ten, but -- Rebecca.

PROF. TUSHNET: Rebecca Tushnet. So, we talked a little bit about what we can learn from the Copyright Hub. What can we learn, if anything, from what's going on in Canada, both in terms of legislative reform and also in terms of universities' responses to access copyright, since they're going through many of the same licensing issues now?

PROF. BUTLER: I'll take the first shot at that. I think we can learn a lot. And one point I hoped to try to make today is that it's interesting to see this process where we're asking how can we, at least for the educational context, how can we change the American system, and can we look at European systems that are more focused on licensing to see if there are good things that we can take?

And I think that's a useful exercise. But Canada, Australia and other countries, as well, who have had comprehensive licensing systems, things like Access Canada, are looking to

our system and asking whether they should be turning to fair use more to facilitate educational uses, and to CCC, frankly, to license things one by one rather than paying the kind of statutory license rates and blanket license rates that are mandated in those countries?

And so, I think I would absolutely commend the Department to look at what's happened in Canada and in Australia -- what's happening now.

MS. CHAITOVITZ: Thank you. Do you have any other questions? We have six minutes for questions.

MR. ADLER: Allan Adler, Association of American Publishers. One comment and one question. The comment would be, I think that all this talk about being concerned about prohibiting waivers of fair use or other rights -- the fact of the matter is that I don't think that we would see the government engage in the kind of paternalistic policies that would impose that.

Because there's no question, I think,

that people would be uncertain about where that would end. And in this country, you have the ability to waive almost any right, including your First Amendment rights to speech. People who work for the government do that regularly. They do it for privacy reasons. They do it for security reasons.

I also think that it would be a problem with respect to prohibiting waivers, because there may be reasons of convenience and efficiency by which people find that paying particular access to something and a particular version is actually better for them and easier for them, and gets them to the results they need faster than relying upon fair use. So, that's just the comment.

The question is, all this talk about the government's involvement with databases sort of is very resonant this year, because the two biggest stories of the year have been about the problems in connection with the implementation of the Affordable Care Act and the NSA's rather interesting activities in a variety of database

contexts.

So, I just wanted to ask the panel if any of you have any concerns about a government role here, particularly since we're talking not only about the question of databases of rights information, now we're talking about online transactions. And the question is whether you have any concerns about the government's involvement in that potentially becoming inappropriate.

MS. CHAITOVITZ: And first, I want to apologize to the panelists, because in the green room, I did promise that we wouldn't talk about the Affordable Care Act (Laughter).

MR. LAPHAM: Well, I can chime in there briefly. I mean, I think the answer is yes, that there would be concerns about that. And I think the concerns are not so much based, you know, from my perspective -- and I've never been confused as an academic, it's more just a pragmatic concern, and that is that there are technology companies that can do it faster and probably more

practically than if you had a large governmental effort.

And that's why in working with the UK government, for instance, we've advocated letting the private sector take some of the goals that the government has in terms of orphan works' availability or whatever the policy goals may be, but then allow for private sector solutions to some of those issues.

PROF. BUTLER: Yeah, and I share your concerns, Allan. I mean, I think we learned -- I mean, in fact, from some of the most recent revelations about the NSA that the private collection of information is a great tool for the government. Right?

(Laughter) So anytime anyone is keeping a whole lot of information about what you're doing with content, especially when you're talking about reading, that's something that's going to make librarians very concerned.

And so that's something -- and I really appreciate you raising that, because I think any effort to create a centralized database of what people are reading should raise concerns other than copyright concerns.

MR. KAUFMAN: Okay, so since you violated your rule from the green room, I'm going to violate one of my promises (Laughter). I can't answer your question, so I'm going to respond to your first comment, Allan.

And that is -- and it gets to this, you know, comment about text and data mining, which is something that we are looking at CCC, where we are developing you know, with a lot of engineering resources a normalized, centralized place for corporations to do text and data mining.

It's really got very little to do with all of those other issues. It's actually about building a service where a user can come to one place. So, it gets to that point which is, you know, there's clearly fair use as a doctrine in the United States that we have copyright

exceptions, we have statutory licenses here. We have all similar things in other countries.

But really, I think the whole point is to actually get users something that they can use in a way that they can use it as fast as they can with rights -- sometimes it's rights awareness and sometimes it's content normalization -- taking something from a PDF and putting it into XML. So you know, that wouldn't demonize us for doing that.

MS. CHAITOVITZ: Okay, I beat you, Garrett. I'm a minute and 15 seconds early.

(Laughter) Thank you all very much, and I want to thank the panelists.

(Applause)

MR. MORRIS: So, Shira and are the last people standing before you get to go home. So, I have just two very, very quick tasks up here or goals that I'd like to do. One is just to pass on a lesson or two from NTIA's consumer privacy multi-stakeholder convenings, which my office

facilitates.

And obviously, consumer privacy and copyright are very, very different issues in many, many ways. But they both have pockets of stakeholders with very, very, very strongly held views and who have a lot of experience -- in fact, years and years -- decades of experience of being on panels and talking past each other on panels.

So in that regard, they're I think, probably pretty similar. And so, I mean the lesson I want to report from that process is that trying to get together and really make progress collaboratively is very, very, very hard, but that it actually does work. It can work if folks come into the process, you know, really committed to actually trying to get something done. And I think that's really what the Green Paper is trying to encourage on all the 5 issues. We try to get something done.

Then my last responsibility is really just to introduce your next speaker, Shira Perlmutter. Now, Shira -- I met Shira when I was

right between -- going into my third year of law school, and I was a summer associate and she was my associate mentor at a law firm in New York City. And so, she and I go way back, and so when we both, kind of from quite different areas came into government, came into the Department of Commerce a couple of years ago to agencies that had -- you know, PTO and NTIA, that had, in fact, tussled and competed and argued and not necessarily collaborated as much as, perhaps, it should have, we really made a commitment to work really hard to collaborate.

And I think that in my view, the Green Paper shows that -- I really kind of want to personally thank Shira for the effort that she and Garrett and PTO and then folks at NTIA put into trying to get to common ground on these issues. And so, I mean, my hope is that the Green Paper really does lay a groundwork for you know, trying to tone down some of the rhetoric and, you know, let's try to get together in the room on all of these issues and make some progress. So, Shira

Perlmutter.

(Applause)

MS. PERLMUTTER: Well, I couldn't agree more with John, of course, and it's been fantastic working with NTIA on this. It's been really, a terrific collaboration, and I think we've learned a tremendous amount in the process. So, it's been great, and we hope that that sets the tone. The inside the Department of Commerce collaboration will set the tone for the broader public collaboration.

So, we are reaching the close of our meeting. I do want to say how much we appreciate all the attention of those of you who made across the river to Virginia today. We always like having visitors over here. And also, to all of you who have been watching and listening online.

So, I would say the discussions today have been intensive. They've been interesting, and I also think they've been very productive. They've certainly given me a lot of food for thought and a lot of ideas.

As we'd hoped, I think you've heard set out a very wide range of perspectives and current and up to date perspectives after all of the last few years' discussions on the issues that we identified for further work in the Green Paper, and that set the table for the debate going forward in a constructive way. And just to continue the analogy of the dinner table, hopefully, we've whet your appetite for more.

Now, both Andrew Byrnes and Larry Strickling stressed this morning that we are committed to the goal of finding the sweet spot for copyright and Internet policy. And again, as John said, to do that, we really need continued engagement and cooperation and collaboration from all of the stakeholders, everyone in this room and the wider community that was identified in some of the discussions.

And, as Larry emphasized, there's going to be some hard work ahead. We haven't chosen issues that are easy to resolve, because what would be the point of that? But if the positive

tone of the discussion today and the willingness, certainly I sensed in the room to engage constructively can continue from the good start that we've made, then I'm optimistic we will make meaningful progress.

So, as you've heard repeatedly now, this event is only the beginning of the conversation that we envision taking place. We will soon be announcing further public outreach on each of the topics we've been discussing today so that we can delve into them further, and hopefully, try to reach some conclusions.

So, our plan, and it's still tentative, but you'll hear more about it -- our plan is to conduct roundtables around the country in the coming months in order to engage with the widest possible range of stakeholders, not just in Washington. And we do want to continue to hear from all of you as the process continues.

So, we urge everyone to file comments by the January 10th deadline, and feel free to comment. It would be very helpful for you to

comment on things you heard today as well as the issues that were laid out in our October notice of inquiry. And of course, as Andrew mentioned this morning, please sign up for our Copyright Alert subscription service at Enews.uspto.gov, so you'll be able to stay informed about all of the latest on the upcoming activities.

So in closing, finally, I would just like to say a few words about all of the work that went into this program. So, let me start with a note of gratitude to all of our speakers and moderators for their contributions, and in particular, for engaging in such a lively and substantive way throughout the day. Again, I'd like to thank John and his team at NTIA for the fantastic work we've done together collaborating.

And then, the folks at the USPTO here who made today possible, which includes Hollis Robinson and her colleagues at the Global IP Academy. Tim Luepke and his team, who are responsible for our physical space, Mark Rein and his team who are handling the webcast, Patrick

Ross, Paul Fucito and Paul Rosenthal from our communications office and the entire copyright team in my Office of Policy and International Affairs.

And Garrett Levin, in particular, has served not only as the master of ceremonies and taskmaster today, but also, as executive producer, organizing and directing the whole program. So, we look forward to reading your comments and to broadening and deepening the conversation that we started today. So, thank you all very much.

(Applause)

(Whereupon, at 4:55 p.m., the PROCEEDINGS were adjourned.)

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CERTIFICATE OF NOTARY PUBLIC

Commonwealth OF VIRGINIA

I, Carleton J. Anderson, III, notary public in and for the Commonwealth of Virginia, do hereby certify that the forgoing PROCEEDING was duly recorded and thereafter reduced to print under my direction; that the witnesses were sworn to tell the truth under penalty of perjury; that said transcript is a true record of the testimony given by witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was called; and, furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

(Signature and Seal on File)

Notary Public, in and for the Commonwealth of Virginia

My Commission Expires: November 30, 2016

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