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Conversations with Renowned Professors and Practitioners on the Future of Copyright

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I. INTRODUCTION¹

For years, it seemed that Copyright was a term that only affected the lives of publishers and professional authors. Since the Internet became a widespread phenomenon, and the definition of an “author” changed, people have become more interested in, and affected by, an increasingly outdated law. Further, with the recent surge of copyright related issues, such as the proposals to change the status of Pre-1972 Sound Recordings, the Second Circuit’s ruling in *Salinger v. Colting*,² and the proposal and subsequent rejection of the Google books settlement, we have been left with more questions than answers. As a result, we asked six of the most prominent names in copyright law to answer those questions, as well as provide some questions and concerns of their own for Tulane University’s 2011 Future of Copyright Speaker Series.³

1. Written by Jessica Edmundson and Elizabeth Townsend Gard.

2. 607 F.3d 68 (2d Cir. 2010).

3. The “Future of Copyright” Speaker Series was funded by the Intellectual Life committee at Tulane University Law School along with a grant from the SBA at Tulane Law School. Thank you to Wendy Hadfield and Cameron Malone of the Tulane Law School IP Society. Thank you especially to Janice Sayas and Cathy Dunn for their administrative support.

Jane Ginsburg, Professor of Literary and Artistic law at Columbia University, wrote three casebooks, including *Copyright Cases and Materials*⁴ and various treatises, and has taught French and U.S. Copyright law at French Universities.

Dr. Kenneth Crews, director of the Columbia Advisory Office, completed a study for the World Intellectual Property Organization, wrote various books on copyright law, including *Copyright Law for Librarians and Educators*,⁵ and received the first L. Ray Patterson Copyright Award from the American Library Association.

Nina Paley, cartoonist and filmmaker, faced serious copyright issues and concerns while finishing her film *Sita Sings the Blues*,⁶ an animated feature film that interprets the events of Ramayana through the musical tracks of Annette Hanshaw.

Siva Vaidhyanathan, Professor of Law at University of Virginia, is also a bestselling author: *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*,⁷ and recent release *The Googlization of Everything and Why We Should Worry*.⁸

David Carson, General Counsel for the U.S. Copyright Office, was a longtime copyright litigator in New York and Los Angeles, who moved to the Copyright Office in 1997.

Jule Sigall, Associate General Counsel for Microsoft, was the Associate Register for Policy and International Affairs at the Copyright Office until his appointment at Microsoft in 2007.

The speakers all discussed their viewpoints on several key issues currently affecting copyright. In large part, the discussions centered on Google's digitalization of books and the ongoing discussion of how to best handle orphan works and future digitalization efforts. Other topics include: the impact the Internet has had on copyrighted works, the affect copyright law has had on public and private libraries, fair use, the uncertainty of future copyright protection, and how each speaker first became interested in copyright law.

Professor Vaidhyanathan's visit was cosponsored by the Innovative Learning Center, the Tulane Center for Intellectual Property Law and Culture and the American Studies Program. Thank you to Matthew Delulio and John McNew for making the transition from an oral experience to paper possible.

4. ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT CASES AND MATERIALS* (2006).

5. KENNETH D. CREWS, *COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS* (2d ed. 2006).

6. *SITA SINGS THE BLUES* (Nina Paley 2008).

7. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001).

8. SIVA VAIDHYANATHAN, *THE GOOGLIZATION OF EVERYTHING: (AND WHY WE SHOULD WORRY)* (2011).

The *Journal of Technology and Intellectual Property* hopes this Article will provide a much-needed insight into the different perspectives on both the current and future uncertainty of copyright law.

II. INTERVIEW WITH JANE GINSBURG⁹

QUESTION: In your 2002 essay entitled “How Copyright Got a Bad Name for Itself,” you argued that greed on the part of copyright owners and users is giving copyright a bad name.¹⁰ You discussed fair use and the twenty-year copyright extension multiple times in that piece. Do you think the twenty-year extension was a good idea?

ANSWER: I think that the twenty-year extension to copyright was a really bad idea. It has been, on the rhetorical side, extremely damaging, even if in fact it may largely be a red herring. There are not many works that are between seventy-five and ninety-five years from publication that are subject to a lot of cupidity. The extra twenty years are a convenient whipping boy for use of works that are five weeks old as opposed to seventy-five years old. I think that the reputational damage to copyright is very substantial.

I also think that there are a lot of misconceptions about why the twenty-year extension, often dubbed the “Mickey Mouse Act,”¹¹ exists. As a practical matter, even without term extension, Mickey Mouse is never going into the public domain, because today’s Mickey Mouse does not look like Steamboat Willy, the original iteration of the character. Similarly, tomorrow’s Mickey Mouse will not look just like today’s. All cartoon characters evolve over time. Not because of copyright maintenance, but to stay with the taste of the times. That means that when the original iteration goes into the public domain so that anybody can use it, that historical version will have very little commercial value. But try to explain that to people who have not taken classes in copyright. People are going to call it the “Mickey Mouse Act” no matter what. If you tell people that one of the biggest lobbyists for term extension was a group called AmSong, Inc. and said that AmSong consisted of the estates of Irving Berlin, George Gershwin, Rogers and Hammerstein, the entire

9. Transcribed by Matthew DeLulio and edited by Matthew DeLulio, John McNew, and Professor Elizabeth Townsend Gard.

10. Jane C. Ginsburg, *Essay—How Copyright Got a Bad Name For Itself*, 26 COLUM. J.L. & ARTS 61 (2002).

11. 17 U.S.C. § 302(a) (2006); see also Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1065-70 (2001) (referring to the time extension as the Mickey Mouse Act).

American Songbook, people might instead call the Act the “George Gershwin Act.”¹² But that just does not have the same polemical punch as calling it the “Mickey Mouse Act.” Ultimately, it does not matter who most benefitted from term extension. The fact remains that the extension was a very bad idea and it has contributed, I think, to substantial discrediting of the copyright system.

There have been other contributions to the discrediting of copyright, most notably, overreaching by record producers, who in this instance did not miss an opportunity to miss an opportunity. You may remember that at the time that the Napster litigation was just getting underway there was a piece of legislation that went through Congress to add a tenth category to the nine categories of commissioned works that can be deemed works made-for-hire. The new category included sound recordings, which were not previously on the list of categories. The absence of sound recordings from the list meant that unless they are considered works made for hire under some other theory, for example as compilations or collective works, their creators’ grants of rights are subject to statutory termination. Thus, even if the performers transferred all their rights to the record producer, they still could get them back after thirty-five years. Not surprisingly, the record producers did not want performers to recapture rights through termination. So they slipped in this little piece of legislation adding the tenth category as a technical amendment. Then, when there was an outcry, the producers agreed to an amendment amending that amendment out of existence. But the reduction of the categories of commissioned works for hire back to nine came with a lot of negotiation on the transitional provisions because the producers did not want any inferences drawn from the initial inclusion or the subsequent exclusion of this tenth category. This episode would have been embarrassing under any circumstances; what made it even more unfortunate was its timing. The record producers tried to make sure the performers would have no recapture rights at the same time as the producers were lamenting about how Napster was not only harming them, but was very bad for recording artists who were being ripped off by file-sharing. This sort of shedding crocodile tears for artists while trying to stab them in the back does not help copyright’s image.

QUESTION: How does the U.S. attitude toward art compare to the French attitude towards art?

12. See Brief for AmSong, Inc. as Amici Curiae in Support of Respondent, *Eldred v. Ashcroft*, No. 01-618 (D.C. Cir. Oct. 2001).

ANSWER: There is much more public funding of the arts in France than in the United States. In fact, my son, who is an actor, is working in Paris, not in New York, in part because there are more opportunities for small theater groups in France. The French copyright laws from the start protected all kinds of works of authorship (“écrits en tous genres”) and granted public performance rights, whereas we did not protect prints and engravings until 1802, and did not grant performance rights until 1870.¹³ We started in 1790 with maps, charts and books and then we progressively enlarged the scope of copyright both as to subject matter and as to rights. But, perhaps in both countries, the selection of copyrightable subject matter reflected national goals. As a new republic with expanding borders, we had an interest in encouraging the production of maps and marine charts, as well as of books that would “promote the progress of science.” But the French may have seen the arts as a means to express and propagate the glories of their culture.¹⁴

It has been pointed out that every town in France will have an avenue Victor Hugo. Every town in the United States does not have its Edgar Allen Poe street (though New York City does, the length of a block where he once resided). Generally, in the United States, for our cultural reasons, streets are named after presidents, or trees, or numbers. This difference may say something about the place of culture (or of cultural figures) in the two systems. What that means for copyright however, I am not entirely sure. It is true that our copyright law protected works of information before it protected artistic works, and that we therefore favored Truth over Beauty. But the French also protected inartistic works of information, too. They just did not admit they were doing it.

QUESTION: In your article entitled, “The Author’s Place in the Future of Copyright,”¹⁵ you discuss your feelings as related to the future of authors and their interaction with copyright law. Could you write an equally valid article about the place of the publisher and the place of content owners in copyright? Do you think that as the road opens in front of us there will be a shift in the power balance such that authors are going to end up with a bigger slice of the pie than the publishers or will it stay as it is and go back to when publishers had more power than

13. See Act of Apr. 29, 1802, ch. 36, s 2, 2 Stat. 171; Copyright Act of 1870, sec. 86, 41st Cong., 2d Sess. ch. 230, 16 Stat. 198; see also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 387 (1996).

14. See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1002-04, 1115-16 (1990).

15. Jane C. Ginsburg, *The Author’s Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381 (2009).

authors? Or are we heading to a harmonious utopian future where everyone gets along?

ANSWER: I think we are certainly in a period of ferment. It is possible that neither authors nor publishers will fare well as long as people expect that “information [by which they mean works of authorship] wants to be free.” We run the risk that people will recognize too late that we have dried up the wherewithal for authors and publishers. This is what many newspapers are now bemoaning. Another possible outcome is that, given that authors can themselves use the means of disseminating their information directly to their audience, the intermediary role is no longer necessary or could evolve in a way that does not oblige authors to give up their copyrights. Authors do not necessarily want to be, nor are they any good at being, business managers. Many, therefore, will still need intermediaries, but the intermediaries will not play the same role in digital media as they will have played in the hard copy world. Intermediaries may remain necessary for publicizing the works, accounting for the works, and providing ratings or other means of guiding reader choice. Having access to everything is having access to nothing: users will want services to help them sort through the morass of available material.

One additional feature could make a significant difference to the literary and artistic landscape. Until now we have been talking about works that, if not “born digital,” are simultaneously released in analog and digital form, like hardcopy books and ebooks. But what about all of the “legacy” works that have yet to be digitized? With mass digitization, à la Google, the transaction costs of licensing in traditional ways are too high. That is why Google just goes ahead and does it and does not pretend to ask for licenses. The response to that may be more collective licensing organizations like ASCAP and BMI. Those organizations have the advantage of pooling works to offer exploiters the rights to commercialize a lot of material without putting them through the substantial expenditure of obtaining individual permissions.

A typical feature up until now of collective licensing has been that it is “all or nothing.” In other words, we have not yet come up with a hybrid model that would offer both transactional licenses and blanket licenses; such a model would recognize that there are some uses that authors might not want to authorize. For example, ASCAP and BMI license so called “small rights”—nondramatic performing rights for musical compositions. Composers may be willing to put up with a certain amount of distortion or unfortunate context imposed on their

music in exchange for the assurance of getting paid. But grand rights have always been, and continue to be, transactionally licensed because there, the composers do care about the production of “South Pacific,” or “Phantom of the Opera.” They do want to be able to have some say in the quality of the show. Up until now grand rights were exercised on a relatively small scale, but if you scale everything up to the Internet, will it be possible to exercise on a mass level the kind of quality control that has come with certain kinds of licensing? I think there is a lot of work to be done—a lot of thought and creativity—to go into developing business models that can recognize both the transaction cost problem and at the same time allow authorial integrity.

QUESTION: What do you think about digital archiving and how it should proceed? Specifically, how good is Google as a model for digitization?

ANSWER: Google’s exploitations, as Justice Holmes said in another context, “are not eleemosynary.”¹⁶ It is unfortunate that Google is the only game in town with the wherewithal to do what it is doing. There is a similar project called Europeana in the European Union but it is on a much smaller scale.¹⁷ The Library of Congress should be digitally archiving, but nobody is appropriating enough money to take on the entire collection. There is a new project you may have read about in an article by Robert Darnton, in which he talked about the Digital Public Library of America (DPLA).¹⁸ The project will have to start with public domain materials. But the idea is in due course to make all of the combined libraries’ works available in remotely accessible digital format so that somebody in a small town in Montana, who does not have a well-stocked public library, can have access to all of this material. There is a lot of groundwork that has nothing to do with copyright that has to be done first, particularly if the plan would decentralize the digitalized archive. Various tasks may be divided up among different libraries. In that event, it will be necessary to devise a standard that makes everything interoperable and that would permit interlinking of all of the participating libraries. There will also be a lot of preservation issues: once a work is

16. *Herbert v. Shanley Co.*, 242 U.S. 591, 594 (1917) (“The defendant’s performances [of Victor Herbert’s musical compositions] are not eleemosynary.”).

17. See EUROPEANA, <http://www.europeana.eu/portal> (last visited Nov. 4, 2011).

18. Robert Darnton, *Can We Create a National Digital Library?*, NY REVIEW OF BOOKS (Oct. 28, 2010), available at <http://www.nybooks.com/articles/archives/2010/oct/28/can-we-create-national-digital-library>.

digitized, that is not the end of it. The digital format may need to be “refreshed” and “migrate” as the means of reading the work evolve.

An advantage of paper is its longevity: you can look at paper from the sixteenth century and, by and large, it is still in pretty good shape (at least if it was properly stored). You can directly apprehend the work fixed in that physical media. But digital media must be constantly updated because formats that are not even that old quickly become obsolete. So, as to any digital public library, there is an enormous amount of thinking and money that has to go into laying out the groundwork for preserving the digital archives. The Digital Public Library of America¹⁹ would start with the public domain, where there are no copyright issues, and achieve a model that, once up and running, could encourage copyright owners to participate voluntarily.

QUESTION: What is the scope when you talk about the public domain? The public domain is very large. What do we include and exclude?

ANSWER: I think you have to start with pre-1923 publications, but you have to make sure that access is limited to the United States because our cutoff might be pre-1923 but it is not the duration of copyright in Europe, where it is life plus seventy years. In many cases, the author of a work published before 1923 could have died less than 70 years ago. Thus, that work would be in the public domain in the United States but not in the European Union.

This disparity shows why it is important to start as simply as possible when creating a framework for copyright analysis. If you do not want to deal with fairly thorny international copyright issues, then limit the initial project to access by Americans or American residents. In the first meeting on the DPLA, when the participants tried to come up with some inspirational statement to describe the library, someone used the word “citizens,” to which I objected. The public library system has been one of the greatest mechanisms for integrating immigrants. It is a slap in the face to say “citizens.” It is unnecessary. The scope of the library should be territorial so that its accessibility is based on the U.S. location, not on the U.S. citizenship, of the user.

QUESTION: One of the things that Google has done with their Books project is that they intentionally do not define “public domain.” If they copy something that is not in the public domain they can claim safe

19. See *Digital Public Library of America*, BERKMAN CTR. FOR INTERNET & SOC’Y AT HARV. UNIV., <http://cyber.law.harvard.edu/research/dpla> (last visited Nov. 4, 2011).

harbor protections. Just because Google says something is in the public domain does not mean I can use it as a public domain document, because it may not actually be in the public domain. That is kind of problematic, right?

ANSWER: The University of Michigan is the only library that is letting Google copy their works regardless of copyright status, but there are other libraries that are letting Google copy their public domain works—among them, the New York Public Library, Stanford, Harvard, and Oxford. What is their definition of the public domain?

I think there is so much to do just to get framework up for archiving that I would be willing to draw an arbitrary and unduly conservative line and say only things through the nineteenth century qualify as being in the public domain—which is probably excessively gun-shy. But the objective is to put together something that works, and once you have the template, and have devised the way to feed books into the system, then we can grapple with the difficult issues. With regard to the Google books project, many have assumed that only Google has the resources to do what it is doing. What they are doing requires massive optical character recognition for book scanning. But if Google is not the only one who can digitally archive—and I am told that there will be soon be consumer priced optical character recognition scanners—you could have hundreds of thousands of people doing a couple of small things each, and we could collectively “crowd source” what Google is doing. Admittedly, there is still the question of interoperability and compatibility among the scanners. And, of course, the crowd would need to limit its sourcing to works in the public domain. It may be that the prospect of a Digital Public Library of America is more doable than one might think.

QUESTION: The presumption of copyright is that that nobody will create something for free, because the author will always want to gain something for creating something. With the rise of the Internet, a lot of people try to create things for free because they like to create. How is the Internet, and its growing compilation of free material, affecting copyright law?

ANSWER: I am rather skeptical about Internet utopianism. I think that a lot of people will create a lot of stuff for free once, and some people who have day jobs will continue to create stuff for free. They are up at 4 a.m. writing stuff for free and they work for Microsoft by day. And what does Microsoft live on? Their copyrights. So whether the copyright is

helping directly or indirectly, the infrastructure of authorship will continue to rely on copyright.

I think that copyright is a good thing in part because I do not think there is a better alternative. Lord Macaulay said that copyright was exceedingly bad but he said it was the best way given the alternatives to ensure that we have a supply of good books.²⁰ Maybe I am wrong, but I think that if you are going to do creative work for a living, it is very hard if there is no prospect of actually making a living. People will stop doing it. People will not create on a consistent basis for the love of it. In fact, most people cannot afford to create for the love of it. To be a professional creator requires not only large literary or artistic gifts, but it also demands a huge amount of discipline and persistence, as well courage; there are a lot of talented people who will not stick it out. There may be a lot of reasons beyond merely economic reasons for not sticking it out, but being what I sometimes call a “real creator,” is very hard. It is not just work; it is a whole life attitude. It is not for everyone. Everybody can self-publish on the Internet but it does not follow that just because you can publish you are an author in that consistent, bullheaded, and often hopeless way. I think that there is insufficient appreciation of that. I did not think that all readers were authors in the 1980s, when a strain of literary criticism to that effect hit its crest, and similarly, I do not think that tenet’s transposition to the Internet is any more persuasive.

QUESTION: In the context of the Anticircumvention Act, you have said that we need to suppress the market for anticircumvention in order to control the way that anticircumvention law will proceed? Do you think that is possible?

ANSWER: The market you have to suppress is the market for descramblers—which you can never completely suppress. Before we had section 1201 we had the provision of the Telecommunication Act,²¹ which makes it unlawful to buy a black box descrambler to get cable service without paying for it. There are people who still buy the black box, even though it is illegal, but by and large most people do not do that. As long as there are few enough people who have figured their way around the system, the cable or other services can keep offering content.

20. See LORD MACAULAY, *SPEECHES: THE COMPLETE WRITINGS OF LORD MACAULAY* 270-90 (Lady Trevelyan ed., 2004).

21. Pub. L. No. 104-104, 110 Stat. 56 (codified at various places in the United States Code (mostly in Title 47)).

Nobody pretends you can stamp out technology used for circumvention entirely.

The idea behind section 1201 was not only that it was going to make descrambler market illegal, but it was also going to spawn new business models based on price discrimination backed up by technological control, and it has.²² For example, streaming is a DRM technology.²³ DRM allows you to watch a time-loaded digital download, which you retain for a week before it auto-deletes. There are many variations on the controlled delivery theme. The tradeoff for not having an unimpeded retention copy is a lower price, one that corresponds to the level of enjoyment that you actually want. On the one hand, you can pay full price for unrestricted access, for a song you want to listen to over and over again. But if it is a movie you are going to watch once, why would you pay the full price for the DVD or unrestricted digital download? No copyright owner is going to distribute that material on faith that they give you an unrestricted copy of their work and trust your promise that, say, within a week you will throw it away after you are done. So the DRM technology throws it away for you. That is the idea. Whether it has actually worked is another question. Section 1201 was not meant to be merely a suppressive provision; it was also supposed to be business model-empowering provision.

QUESTION: Is there anything that you find exciting about copyright? Conversely, is there anything that really worries you about copyright?

ANSWER: I am not sure if we are on the brink, or over the brink, but we are near a time of tremendous change. Some of the ways we might go with copyright law in the future are author-empowering, some ways are copyright owner-empowering (“copyright owners” being employers-for-hire or other entrepreneurs to whom the creators have ceded their rights), and some are user-empowering—without an accommodated balance between the creative side and the using side. We are at a time when nobody knows how everything will turn out. It is exciting and scary.

QUESTION: What do you want students to take away with regard to the role history has in their practice? Also, why should scholarly arguments matter to them?

22. 17 U.S.C. § 1201 (2006).

23. DRM stands for “digital rights management.”

ANSWER: Students should have a good grip on history in order to give them a richer understanding, but history should not be deployed in the instrumental way of: "I can cite that in my brief." That is terrible and unhelpful distortion.

My current project involves sixteenth-century Papal printing privileges. I am very conscious of how important it is not to commit anachronisms. I am looking for the documents through which I can reconstruct the system of proto-property in literary and artistic works that grew up in the sixteenth century. For what kinds of works were exclusive rights granted? What was the scope of the rights? What were the authors' and printers' arguments to justify monopoly rights? Perhaps I will learn more about the purposes as well as the mechanisms of literary and artistic property. But, I have to be really careful in reading these documents to remember what century they come from, and not to parachute the romantic nineteenth-century author into the sixteenth century. I want to take care not to overread this material.

QUESTION: Thank you so much for speaking with us. Is there anything else you would like to add?

ANSWER: If you have been listening to me speak, you have observed what it is like to be "bitten by the copyright bug," as one of my mentors in law practice termed it. Copyright is fascinating stuff. Some people can get totally obsessed with it. I truly believe from my time in practice that copyright lawyers have more fun. They really enjoy what they do because a lot of interesting questions arise. And even when they fill out time sheets, they are interested in talking about this stuff and throwing around ideas. When I was in practice it was not unusual for someone to come by and say, "what do you think of this?" I am not sure that that characterizes your standard Wall Street practice.

III. INTERVIEW WITH JULE SIGALL²⁴

QUESTION: How did you originally become interested in copyright law?

ANSWER: I have a theory that behind every copyright lawyer is a failed creator. For me, I wrote my first computer program in 1982 and I was so good at it that I had to become a lawyer. Most of my talk will be about

24. Transcribed by Matthew DeJulio and edited by Matthew DeJulio and Professor Elizabeth Townsend Gard.

how you can view copyright law through the eyes of someone who has written code.

I started writing code in 1982. I thought I was going to be a computer programmer. I ended up going into philosophy in undergraduate and then thought that law school might be interesting. At that point, someone told me that copyright covers computer software so I figured maybe I would take up copyright and see what was going on there. As it turned out, I really loved the subject matter beyond just the computer programming. One of the things I like about copyright law is that you can look at it entirely as someone building a piece of code. If you can look at it like that, I think that you will have some insight into what it does and what it should be doing in the future.

QUESTION: What did you end up doing after graduating from law school?

ANSWER: I went to night law school.²⁵ I worked in a law firm while I was in law school. After graduating I went to work for Arnold & Porter in Washington, D.C. as an associate. After my first year, my copyright professor, Shira Perlmutter, became the first Associate Register for Policy and International Affairs at the Copyright Office. She convinced me to come over to the U.S. Copyright Office and work there for one year.

It was a good year to work at the copyright office because the D.M.C.A. passed during that year.²⁶ Database legislation was being considered at the time, and term extension passed during that year.²⁷ So it was a pretty hot time. It was right after the World Intellectual Property Organization (WIPO) treaties were concluded, which happened at the end of 1996.²⁸ It was a good time to work in the copyright office because there was a lot of interesting stuff going on.

So I did that for a year and then went back to Arnold & Porter to do mostly copyright litigation. And again, I got lucky that there were a lot of fun cases to work on at the time, including: *Recording Industry Ass'n of America v. Diamond Multimedia*²⁹ and then *UMG Recordings, Inc. v.*

25. Mr. Sigall is a *summa cum laude* graduate of Catholic University's Columbus School of Law.

26. Digital Millennium Copyright Act (1998).

27. See Copyrights—Term Extension And Music Licensing Exemption, Pub. L. No. 105-298, § 302(a) (1998).

28. See World Intellectual Property Organization Copyright Treaty, *opened for signature* Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997).

29. 180 F.3d 1072 (9th Cir. 1999).

*MP3.com, Inc.*³⁰ We had *Ets-Hokin v. Skyy Spirits, Inc.*, which was the vodka bottle originality case we had for photographers.³¹ We also did the first ever webcasting CARP proceeding, which set terms and rates for webcasters.³² Another fun case we also did was *Leonard v. Pepsico*.³³ I understand that case is now in contracts textbooks. It is about the kid who wanted to get a harrier jet because he collected enough Pepsi points.³⁴ That one was fun too. It started out as a false advertising case and somehow we got it. So I got lucky doing a lot of that litigation. It was really interesting to watch how the law shapes and does not shape the world and how people react to that in practice, not just in the abstract.

QUESTION: Did you continue to work at Arnold & Porter?

ANSWER: Well, it became harder and harder to do fun copyright cases in a big law firm because the size of those cases do not support the business model for big law firms. I decided to call Marybeth Peters at the copyright office and said, “is there anyway I can come back to work with the copyright office?” Somewhat to my surprise she said, “I need a new associate register for international affairs. Can you apply for that?” And I said, “I don’t think I’m ready for that.” I said, “I just want an attorney advisor position somewhere.” She said, “I think you would be great.”

So I applied for that and got it. That was another really lucky break because that was in 2003 and when I started there I was immediately doing lots of interesting things. Most interesting was the stuff relating to orphan works. When I got there I thought we should do something interesting and fun, and it looked like orphan works was an interesting area where we could get a lot of people on board and maybe cut through the politics and rhetoric of copyright. And it almost worked. We got close. We issued a report on orphan works and got legislation that passed in the Senate but did not pass in the House. Regardless, it was a fun project to work on.

QUESTION: Did you do a lot of international material at the Copyright Office? Tell us a little about that.

30. 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

31. 225 F.3d 1068 (9th Cir. 2000).

32. See 37 C.F.R. § 261.3 (2011); see also *Summary of the Determination of the Library of Congress on Rates and Terms for Webcasting and Ephemeral Recordings*, <http://www.copyright.gov/fedreg/2002/67fr45239.html> (last visited Nov. 12, 2011).

33. 88 F. Supp. 2d 116 (S.D.N.Y. 1999).

34. *Id.*

ANSWER: Yes, that job was split 50-50 between domestic and international issues. So fifty percent of my job involved advising Congress—but also any other part of the government that needed advice on domestic copyright legislation. So I was involved in any bills that were pending, and any studies they wanted me to do.

I felt like we were a small boutique law firm for the government. There were about six attorneys that were devoted to advising the government on copyright issues. When a congressional staffer called you up and had a question about what copyright law is and what they might be doing, that is what you advised on. The other half of the time I worked on international issues. Again, we were sort of the expert copyright advisers to U.S.T.R.³⁵ in a trade negotiation or the State Department or any other government agency that needed copyright advice.

QUESTION: Were you at the Copyright Office during the U.R.A.A.³⁶ and § 104(a)?

ANSWER: No, that happened in the early 1990s, so it was before I got there.

QUESTION: What did you do after working at the copyright office?

ANSWER: I have three kids. Three kids can be expensive to raise. So, I thought I might want to do something else. As it happened, I was at a conference with Tom Rubin of Microsoft and we went out to dinner afterwards. He asked me if there was any chance I would move out from D.C. and do something different. I said “probably not, but let’s talk.” Turns out he had an opening on his team to work on copyright and wanted someone to do copyright policy in particular. So I thought it would be a good fit because, again, I have always wanted to be a computer programmer—so going back to Microsoft made a lot of sense.

Microsoft is one of the few companies that not only is big enough to care about copyright on a global policy basis, but also has different business that are looking at the copyright law from different perspectives. A lot of big companies look at copyright only from one side or the other. I realized that Microsoft would be a fun place to go as a copyright policy person because you have to balance that internally within the company. Plus, you can get close to the technology.

35. U.S.T.R. stands for the Office of the United States Trade Representative.

36. Uruguay Round Agreements Act, Pub. L. No. 103-465 (1995).

One of the frustrating things about being a government official, I felt anyway, is that you are very removed from things that are actually happening. Especially in copyright, because copyright is being shaped by a service that Google launched, or a service that Microsoft launched, or the way that Microsoft put something in its code, or what Facebook is doing, or what Twitter is doing, or what any of these companies are doing. It just took forever to get information about what was actually going on through all of the layers of lawyers, lobbyists and others in D.C. So, I wanted to be closer to that actual development as opposed to waiting for people to come to D.C. to tell us what was happening. So I left D.C. around four years ago, and I have been at Microsoft ever since.

QUESTION: Has it been fun working at Microsoft?

ANSWER: Oh yeah. There is no shortage of fun. I tell people we get every type of claim. We even get V.A.R.A.³⁷ questions regarding what to do with artwork hanging on Microsoft's walls. We get all kinds of questions. It is a perfect place for a copyright geek because you get all types of questions. We do fair use and parody for the entertainment teams. We do music. We do film. We do deep open source type stuff. We do deep computer software substantial similarity for the deeply technical server and tools business, ownership questions, and right of publicity issues. All kinds of copyright related issues. All that stuff that goes into copyright—we get it. So it just forces you to understand a lot of that stuff and know what is going on.

QUESTION: In 2007 you compared copyright law to an old house that was growing out of date.³⁸ You said that we are either going to have to continue adding amenities to the house or we are going to have to kick out all the occupants and start over with a new house. I am curious as to which way you think copyright law is heading and which way you think is more practical?

ANSWER: There is a bit of that in my talk today, especially as it relates to, not building a house, but writing code. I was probably a little too categorical there. The problem is you cannot really knock down a house while people are living in it. This is the hardest part about copyright. You have companies and individuals and organizations of that have very

37. Visual Arts Rights Act, 17 U.S.C. § 106A (2006).

38. See FutureMusicCoalition, *Jule Sigall Compares Copyright Law to an Old House*, YOUTUBE (Aug. 6, 2008), <http://www.youtube.com/watch?v=as3o94SjvZ4>.

strong vested interests on all sides of the issue so you have people really rooted in the house. To continue the analogy, these people would actually starve or suffer great harm if you were to move them out of the house and tried to build a new one. So, you are going to have to accommodate that in some way.

The real trick is to figure out a way to develop changes and mechanisms that make other things work without disrupting the existing system as much as some might like. There was a lot of push in the early part of the decade to just start over. I think that comes out of a technologist's and developer's mentality, because developer's rarely want to rewrite another person's code. They just like to start over. But you just cannot do that. Part of the orphan works project is to try and figure out a way that you can start gradually, in small steps, giving mechanisms to affect change that improves the overall system.

So, I think the house analogy still applies, and it applies in this way in many respects. Some people, when they think of a house that has been changed a little bit over time say, "this is a mess—this is an eyesore." But people still live in the house and people still care about it. And to them it is their home.

Another problem is we really have two houses. We have a whole house being built by the technology sector right next door to the house we know as copyright law, and the residents of the two are yelling at each other and not getting along very well. Neither side really understands each other. And that makes it difficult. But I think we will end up getting there—to a point where there is better understanding.

QUESTION: A lot of young law students are interested in becoming copyright lawyers. Is there a frame of reference that would be helpful for those individuals to have?

ANSWER: If you are interested in becoming a copyright lawyer, I would say you need to know that the uncertainty of the copyright industry is real. You had better be ready to do something very different than you had previously thought. The reality is that the systems that will be used to protect creativity in practice in the future may be very different from the copyright laws you know now. So, you may find yourself going into copyright law and forcing yourself to be much more of a contracts lawyer than you thought; or much more of a privacy lawyer than you thought; or more of a patent or technology lawyer. That is because the market will drive the legal issues into those areas.

Take Microsoft for example. Microsoft has one of the longest histories of exploiting copyright law. We like to say we have the most successful copyrighted products in history, with “Windows” and “Office.” However, when you look at our intellectual property group you will find that it is predominantly patent lawyers these days. For the first two or three decades we were focused on copyright law. In the mid-1990s, around the time of *Lotus Development Corporation v. Borland International, Inc.*,³⁹ you saw a shift in our thinking, and the thinking of the software industry. Namely, we thought patent law might be a great way for us to protect our product.

If you think of different areas of intellectual property each as a set of dials you can adjust to protect the interests of the company, when it comes to something like cloud computing, which dials gets turned up and which dials gets turned down? Is trademark law that is more important? Is it more trade secrecy law that is important? What we are trying to figure out is where those dials need to be turned, combined with the fact that a lot of our cloud services face liability risk for hosting other people’s content. So that again pushes us towards the center.

So, you just cannot expect to go in and think you know exactly what you want to do in copyright law because it is fluid and always changing. We did a fun case at Arnold and Porter that was an old Pepsi commercial where a little girl walks in to a shop and talks using Marlon Brando’s voice.⁴⁰ Pepsi actually got the real Marlon Brando to do the voiceover. However, we got a letter from Paramount right when the commercial was about to air for the Oscars that said we were not supposed to do that. I think they had a contract with Mr. Brando to not do that. It was an interesting issue, a type that is in all the casebooks: how much of a character does copyright protect.

You do not see many cases about characters anymore. I think that is because the film industry and other creative industries can no longer afford to litigate the character cases anymore. They have got more pressing matters, like just trying to figure out how to get copyright to help them preserve the traditional business models. So there really have not been that many cases that involve the kind of stuff that we saw in the 1970s and 1980s. So when I taught copyright a few years ago, I struggled with teaching those cases—they are interesting and fun, but I do not think expertise in them will be very relevant to most copyright lawyers in the future.

39. 49 F.3d 807 (1st Cir. 1995).

40. See zlosiej, *Pepsi Godfather Commercial with Marlon Brando*, YOUTUBE (Apr. 13, 2008), http://www.youtube.com/watch?v=j4A1_Wk-sZs.

You cannot judge by the cases what issues will be around and be interesting in the future. You have to move up a level and figure out where the marketplace is going. But, on the other hand, a whole new market can develop. Look at the mobile phone app stores—the Android and iPhone and Windows Phone marketplaces. There are lots of people developing programs and lots of people expect to get paid upfront for those programs. The most successful ones are now half-complaining because there are too many knockoffs of their product. The question is whether there is an ecosystem developing from the ground up. You might actually get a new generation of cases dealing with similarity there. But you would not expect that right now. It did not exist two or three years ago. So, you are advised to be nimble, I think is the way to look at it.

QUESTION: What do you think the role of a company like Microsoft, which is a large player in both content creation and content distribution, is going to be moving forward? Should Microsoft be trying to advocate changing the law or should they be relying on more traditional law, like contract law, to protect their IP?

ANSWER: That is a good question and I think the answer is all the above. When you look at it from our perspective you are trying to figure out what can help us get a return on investment. We want to know what can limit our liability, what is best for our customers, and what is best for our partners. I do not think anybody makes this judgment explicitly, but things sort of fall out where they fit most easily. For example, when it comes to something like an app store, the reality is that the technology and market will move at a much faster pace than the law ever will. The immediate judges of what we do and whether we do it right will be the customers, the developers, the partners, and everyone else involved. That is probably going to be something done at the contract level. And it is important to look at it on the contract level because that is the part we can quickly make changes to and update based on the reaction we get from the public.

There is a fair amount of transparency just from the bloggers telling you what is going well and what is failing. So we are getting pretty good information. I do not think you are going to get any legislative push on that front. However, other issues might prompt legislation. For example, statutes have passed in various states that say that when you are a company and importing goods from outside the country you have to make sure that your suppliers use legitimate software and information

technology. In other words, that you have a reasonable supply chain practice. If you do not use legitimate software, you can suffer an injunction against your imported products. This helps get folks focused on the question of piracy in China from a different perspective than traditional IP laws.

I think the interesting question from a macro-perspective is, looking what everyone in the industry is doing. For example, what is Google doing? What is Facebook doing? Everyone is doing something that sort of pushes and pulls on each other. In their terms and conditions, they put things in that are essentially trying to rebuild copyright law for them from the ground up. They say things like, “competitors cannot sign up to our service” in order to observe how it works to create a competing product. These companies are building that into their terms to try to get new protections. Who knows if they are enforceable; but you can see that, like most business players, they want to figure out where their vulnerabilities are and try to get their lawyers to help them.

QUESTION: What should we be teaching our copyright students? What kind of skills should we be giving them in a copyright class because we are still teaching them very basic principles?

ANSWER: That is a good question. I struggled as a professor to try to figure out the right things to keep in the course and to keep out. If it were up to me, I would cut out all the stuff about substantial similarity. It is much less relevant these days. Obviously you can spend a whole semester on fair use. I think that is a reflection on a problem in the system—that fair use is a generalized exception that is carrying a lot of baggage because none of the other exceptions work very well for the things people want to do with copyrighted works. I would spend a lot of time dealing with licensing in contracts cases. When I learned copyright law, that was boring to me and I did not think it was useful, but that has changed. What I try to do is give students a framework for looking at the overarching issues. In every single copyright case the judge can affect copyright policy, so it is important to understand what you think the policy should be. If lawyers and judges approach copyright law with the perspective of protecting artists they will interpret a contract accordingly. If they come from a utilitarian perspective and making more use possible, they will go the other way.

QUESTION: It seems like we also need trade law in there as well.

ANSWER: Yeah, that is really interesting stuff. It is hard to know whether that is freshman year or senior year stuff because you really have to understand the underlying material. I did not spend much time on preemption five years ago but I probably would now because there is probably more activity on the state level.

You need to look at the current disputes. There is a current dispute now between Time Warner Cable and their iPad application.⁴¹ Time Warner created an application for the iPad that allows people to watch their cable television from the time warner cable box around their house. A lot of cable networks like Discovery have come in and said, “you cannot do that.” It is not likely to be resolved by just the copyright law. I think mostly they are relying on their network agreements with Time Warner Cable, and they say, “we gave you a license for this content on these terms, and you have gone beyond that.” They have also gone to the FCC.

I am always telling my clients this about default copyright law. Default copyright law will give you an answer, but that is only the start. There are probably three or four other areas of the law or the FCC regulations that you had better know about too.

QUESTION: Given how fast the technological change is occurring, it seems that companies are having to rely on contract law to seek protection immediately because copyright law is not fast enough to evolve. Going forward, is copyright law ever going to be able to evolve quick enough to keep up with technological advancements, or is technology moving so fast that it is not going to be able to keep up?

ANSWER: I think it will evolve in some way. It will be interesting to see how it does, but you should never say never. It is always interesting to me to watch online communities that are skeptical of copyright discover the need for it in their own experience. Several years ago, before I was at Microsoft, there was a feature in the Internet browser that could change the HTML code of the web site you were visiting to make it more useful. For example, when a street address appeared it would change the HTML to put in a tag that would then be used by other software. When it showed up in your browser it would light up and you could click on it and do a search to find that address. Many web developers were just incensed that Microsoft, or anybody, would mess

41. See Steven Russolillo, *Time Warner Cable, Viacom Take App Dispute to Court*, WALL ST. J., Apr. 7, 2011, available at <http://online.wsj.com/article/SB10001424052748704013604576249173441261958.html>.

with their HTML code. They started going on and on about, “we need a system that prevents people from making changes to your code. This code is something I built, it is my stuff, and it is my property. We need a system that stops people from making any adaptations or transforming it.” They were sort of reinventing copyright law before their very eyes.

QUESTION: I was having a weird conversation with my daughter this morning. She is writing a story and she said to me “you know actually I took the name of one of the character’s from the book, *Monster High*, and I think I probably should not have done that.” If a seven year old is recognizing that she should not take something from a book she has read, is that something that is part of our being—our cultural being—or will that just disappear?

ANSWER: No. I do not think that is going to disappear. I think you have to look at the time horizons for various things. There is a centuries old, if not millennia old, notion that: if you work hard at something and produce something, it is yours in some loose way. That principle is not going to go away. In the coder world, this is manifested essentially in the attribution right. Attribution is still critically important, even among communities that are otherwise relaxed about copyright. I think it reflects what your daughter went through—that someone else created this and I should at least let people to know that.

I gave a talk at Berkeley, where I said that Creative Commons to me are much more about someone staking their claim in their work than about them allowing other people to do stuff with it.⁴² Now, they may want other people to remix it, but it is mostly about the concept that “this is mine.” That is why most people chose a license that requires attribution. I think our country is founded on the notion that if you do expend labor in creating something you get some rights. What exactly you get is another story. There was a blog, just a couple of months ago where someone had written a blog post and some other commercial service took it and reprinted it without any attribution—not even a link. The person complained and what caused the dust up was the editor of the commercial service that used the post basically said “tough luck for you. I did you a service by publicly disseminating your idea. You’re lucky I even did that.” There was a real uproar among the community of authors who are not your traditional authors, not your protective authors, who said, “that’s not right.” And that is a real struggle right now in online

42. See JULE SIGALL, FORMALITIES, DURATION, AND THE PUBLIC DOMAIN, IN BERKLEY CA (Apr. 13, 2010), available at <http://www.law.berkeley.edu/7731.htm>.

journalism and blogging in generally. Is attribution enough? Is there enough revenue? Kids get it. Everyone sort of gets it. That is why they use words such as “theft.” That is the handle they use to describe the situation which most of us agree would be a negative one.

QUESTION: Do libraries have anything to fear from everything going on with copyright? We have been in the trenches for a long time. The whole attack on fair use is our biggest concern.

ANSWER: Libraries have been among the longest defined users of copyright, and a user not only in the practical sense of using works, but also participating in the policy debates about copyright. It is funny because I gave a talk about the orphan works issue to the V.R.A.⁴³ at several art libraries a couple of weeks ago. The big debate seems to be that libraries are very pro-orphan work legislation and photographers and illustrators are very much antilegislation. In some respects, those two groups are in the same boat. Part of their concerns, and this is mostly from the photographers’ side, is that they are just being competed to death by so called amateurs or aggregated services like iStockphoto.⁴⁴ That has made it a lot harder for them to sell their services in a way that makes them money.

Libraries have real copyright issues to deal with, but again, there is also the issue that people can skip the library and just go to Google to get the information they want. The copyright office faces the same problem as libraries, which is that people think the copyright office has this big registry of copyrighted works that should be immediately accessible. They want to be able to go to a search box, type in a few words and get exactly what they need. And I know as a library you feel the same way—that they have that level of expectation of delivering access to information that can exceed your ability to deliver it.

The problem is that libraries are caught between a rock and a hard place. By and large, libraries have been very good copyright citizens and generally follow the rules. Doing that can cut back on what you can deliver to patrons, which in turn makes your services look less attractive than someone like Google.

QUESTION: Do you think the term period for copyrighted works is going to be perpetually extended?

43. V.R.A. stands for Visual Resource Association.

44. See iSTOCKPHOTO, <http://www.istockphoto.com> (last visited Nov. 12, 2011).

ANSWER: Well, I like numbers, so I like to do math. Term extension was passed in 1997—I think November of 1997.⁴⁵ I think lobbying started for that change in 1993 because the Europeans changed their term duration at that time. Most people do not know this but the primary movers behind term extension were music publishers—actually, estates of various famous songwriters who are living off of the royalties. So if you do the calculation, you think, when is the term going to expire and start working backwards. Twenty years after 1993 is 2013, so you would start to see lobbying in the next few years.

But I do not think you will see the lobbying for term extension like we have in the past for a couple of reasons. It is still very much fresh in people's minds—it is still an extremely active hot topic. Nothing gets done in Washington outside the view of anyone anymore, so it would be very hard. Recording artists pushed for it in Europe a couple of years ago and they are still pushing for it. Things may change. I think it would be very interesting if people started pushing for it again. I guess, the thing to watch for is when they push for it; they might do it in a way you do not expect. That will be interesting.

QUESTION: Are you talking about Google Books and what they tried to do by seeking court ruling as opposed to traditional lobbying?

ANSWER: That would be interesting. I had not thought about it that way. I had thought the next version of a Google books-type “settlement” would be with regard to music—that a company could be sued by a class action of music copyright owners and try to settle that case on terms that resolve a lot of the complex issues that have plagued the music industry. I do not think going to happen now, and that is a good thing. I think those kinds of issues need to be resolved in Congress.

I always looked at it like a computer programmer would. Google wanted a copyright system that was “opt out,” making the owner do something to protect its rights. Copyright code does not have opt out in it. Class action law does. So it is like Google just made a call to a different library of code. They just wrote their program to make a call to a different set of rules. It did not work but it was a very clever effort.

QUESTION: What do you think will happen now with Google books?

45. See Copyrights—Term Extension And Music Licensing Exemption, Pub. L. No. 105-298, § 302(a) (1998).

ANSWER: They just postponed the status conference, so we will see. I think it creates an open field for Congress to reconsider orphan work legislation, or some sort of legislation. The interesting question is that there is a lot of history now, so it may not be orphan works as we knew it but either something focused on books and the digitalization of books—like a national digital library. As far as I understand, Google has never stopped scanning and digitalizing their database. They actually ratcheted up their scanning when a settlement was proposed. So, in the economist terms of revealed preferences, they do not seem too worried about the liability questions arising from their actions. So, I think they will continue.

Publishers, I have always thought, wanted to develop an alternative supply channel for their electronic books. Now, they have not only got that in Google, because they are partnering with Google right now; they have got that in Apple.

QUESTION: With regard to Google Books, why do people care so much about books composed between 1923 and 1963 that are still under copyright but where we cannot find the owners—*orphan works*?

ANSWER: Part of the publishers' issue has always been, like a lot of copyright industries, they did not really know what they owned or what the rights status is of the books. The contracts have reverted and nobody knows who owns what. And that is an interesting part of the deal that was often overlooked—that there was kind of a cleaning up of that issue in a way that angered a lot of agents and authors but it would have cleaned up and helped get those books out. Now, whether or not that was a good thing or bad thing depends on where you sat and what you thought your contract rights were. If you talk to someone like Brewster Kahle, at Internet Archive, he thinks we should just be scanning this stuff and getting it out and see what happens—namely, because he is understandably a bit impatient on that front.⁴⁶ There is probably a lot more activity on this in Europe than there is in the United States because a lot of European publishers were involved in the process.

The question of the scope of the *orphans*, and how many there are, and who they are, has always been a daunting one. One of the interesting questions I really want to know is, how many *orphan works* are there? We have a great mass of data. People have been spending, presumably,

46. See Agencies, *Internet Archive Founder Turns to New Information Storage Device—The Book*, GUARDIAN, Aug. 1, 2011, <http://www.guardian.co.uk/books/2011/aug/01/internet-archive-books-brewster-kahle>.

the past eighteen months filing claims about what they own and nobody has mentioned what happens to that data. I asked Dan Clancy, at Google, at Grimmelman's Conference in 2009, "Can we have that data to see how many orphans there are?" He said, "Well, it's not our data, it's the publishers and authors data." And so, who knows where that data is. But, there is a lot of stuff that is potentially useful for people to understand and think about to understand the orphans question a little better.

QUESTION: When we did this speaker series in 2009 everyone was all about personal use and user-generated materials and we had nobody speak about that this time. Do you have any idea what has happened in the last two years that has changed the hot issues so substantially?

ANSWER: I think you are exactly right, and your description of the phenomena is exactly right. It does seem like user-generated content is not a big issue anymore. I think a couple things happened. First of all, the main outlet for user-generated video, YouTube, has become more and more like a cable network every day. The notion that there is a sustainable business model around pure user-generated content is not what people thought it was. There are a lot of people who want to create stuff. It is getting filtered through the same types of systems and that have filtered content forever. And the main point of UGC sites these days is as vehicle for people to post stuff and draw attention to themselves, but not make money on that particular content. But then they know that in order to monetize their work they have to focus on the quality of the stuff, or at least identify the people who create quality stuff, and move them there. I do not think that even in policy debates people are worried about the common uploader anymore. They are worried about the organized businesses offshore that are aggregating this stuff and trying to make a business. Those folks are more serious pirates and threat to the copyright industries.

I think another thing people have realized, and you can see it in a couple of charts that came out on the web in the past month or so, is that the economics have shifted. There was the chart about music industry revenues, which showed what the music industry actually made per capita after inflation. It showed, basically, that despite all of Apple's success, a smaller fraction of revenue is still being generated for traditional record companies than what they are used to. It makes sense. What the basic theory is is that people can now buy the two songs they like on the CD for \$2 instead of paying \$12 for the two songs they like.

That just means the record companies are going to get about one-tenth of the revenue. So, despite the growth of digital things, everything is going down. There is a similar chart for newspapers. Newspapers are suffering the same thing. So, I think what people have realized in the past couple of years is that legitimate sales are at a revenue level that is much lower than we are used to for certain creative industries. And so that is why there is more doom and gloom in the sense that, even if you had perfect enforcement policy, and even if you increase prices and get rid of all the bit torrent sharing, and up the price to \$4 instead of \$2 per song, you are not going to reproduce the fundamental economics of the traditional systems.

QUESTION: How much should we be looking at enforcing the laws already in place, rather than trying to make new laws?

ANSWER: I think the issue is trying to make the laws effective—at least in the minds of the proponents. A lot of people say, “if you’re serious about copyright, you should be serious about trying to enforce it in those ways.” And of course then there are counterbalancing concerns about over breadth, and catching dolphins in the net, and things like that. But I think most people would agree that there should not be web sites that are only aggregates of pirate material. And the question is how do you most effectively curb that behavior and what mechanisms you use to do that.

QUESTION: So, I actually love the little corners and crevices of law, but sometimes I wonder, does copyright law even matter?

ANSWER: As a pragmatist, on a day to day basis you have to ask yourself, “how useful is this?” especially where the “corners and crevices” of the law you mention are so many and so complicated.

This is the problem of the complexity in the statute. It is hard to know how it will actually help inform people to know what they can and cannot do, how much it will change their behavior at the end of the day, or give them freedom to do something. It is a problem with the system, and that the state of technology around the law demands so much more in terms of speed and scale. There are a lot of pieces of code in the Copyright Act that have been written but never really used. For example, the § 108(h)⁴⁷ provisions regarding use of materials in the extended term. The § 115⁴⁸ statutory licenses section is hardly ever used because it is

47. 17 U.S.C. § 108(h) (2006).

48. *Id.* § 115.

mostly done through negotiations, which are shaped by the provisions but not exactly the same as the provisions.

I think the law and statutory provisions still matter, of course, but in a much more complicated way than you would think.

QUESTION: So, what gets you excited right now about copyright law and what makes you wake up in the middle of the night thinking copyright law will fall apart?

ANSWER: I never wake up in fear. What gets me excited is what I mentioned before—app stores and mobile device platforms—because it is actually pretty remarkable that Apple made that happen. People forget now, but before that happened, the conventional wisdom on the Internet was that people would not pay for anything and that revenue generation required advertising. So, where I spend a lot of time looking is just watching the various ecosystems playing out and shaping themselves. Apple is a relatively closed place where you can get paid for your work. Android is more wide open but a place where you do not get paid except through advertising. I want to watch the way that the business works.

There was an interview with the head of Major League Baseball's Internet arm and he basically said, "our studies show that people come to the Apple iPhone marketplace thinking that they'll have to pay something to get something. People go to android thinking they won't have to pay."⁴⁹ That sort of shapes where we are going and the norms that guide behavior. To me, the interesting yet unanswered question is whether those developer communities will ever care enough about intellectual property to bring it back into these ecosystems in a more prominent way. What typically happens in those communities is that there is a very small subset, usually 5% of traditional creators, who care about intellectual property issues. Everyone else is just trying to outcompete everyone else. As Tim O'Reilly says, "their problem is obscurity, not piracy."⁵⁰ But there is a point at which you are no longer obscure and you start to care about the piracy stuff. Developers of some of the more popular games have suggested that Apple should do a little more about the counterfeits and knockoffs, but they have not yet focused on IP law as way to address that. So, it is a question of whether that develops into

49. See Dan Frommer, *Google Should Run the Android App Store More Like Apple's*, *Says MLB.com CEO*, BUS. INSIDER (Mar. 10, 2011), <http://www.businessinsider.com/android-apple-bowman-2011-3>.

50. Ernesto, *The Real Problem For Most Artists Is Obscurity, Not Piracy*, TORRENTFREAK (Apr. 21, 2011), <http://torrentfreak.com/the-real-problem-for-most-artists-is-obscurity-not-piracy-110421/>.

something more; because what usually happens is unclear. And that is the interesting part to me. Where those norms are developing, how those norms are developing, if they are developing, what you do with them, and where do disputes get resolved. Is it just Apple's benign dictatorship that protects those norms, or should it be something more democratic?

QUESTION: Did we see that with Second Life?⁵¹

ANSWER: Yes. Second Life, you could argue, was an interesting case study, because they distinguished themselves from other online communities by saying that users keep their intellectual property rights. That was a big deal for them. But all of their graphics were based on open GL, which is an open system, so anyone could make copying devices really easily. So, Second Life users who spent time creating stuff for sale in that world started complaining and picketing and doing naked sit-ins (or whatever you do on Second Life to complain) after people started copying their stuff and selling it for less. The operators of Second Life basically said the copying was not their problem to solve—the users had to rely on the DMCA and existing copyright law to get relief. Now, the interesting thing to me is whether app stores or other new online marketplaces will do more or simply refer users to legal system.

If you think about Microsoft's operating system, Windows on desktop PCs, we could just go and sell Windows. We had to do deals with companies to sell the product, but when it came to application developers, they could build applications that ran on Windows and we would work with them and make it easy for them to do that. But when it came to selling those applications, they could do that on their own: we did not have to build the Egghead Software retail outlet for them. We did not have to make a copyright law for them. We did not have to help them get into federal court. They could do all that completely independently of Microsoft. So all of that "code" was running outside of what we did. What Apple has had to do for iOS is pull all of that into their system. They have to provide a retail space, they have to do payment processing, and they have to handle disputes between developers. They have to do all that kind of stuff.

The interesting question from a copyright perspective is whether they can and will also provide enforcement of IP. And that is why this is so difficult. The current existing systems of law and enforcement do not really work for developers of mobile apps. In theory, Apple should be

51. See *SECONDLIFE*, <http://secondlife.com> (last visited Nov. 12, 2011).

able to launch a new operating system and people should be able to go out and sell applications for it on their web site and get paid for it without any help from Apple. But that is not what has happened—instead, developers are flocking to Apple’s app store, with the attraction being that it can actually make you real money. And, in fact, some people like it so much, that when they launched the Mac Apple store one company, Pixelmator, went “all in” on the Mac app store. You cannot buy their product anywhere but on the Mac app store. I think that shows how powerful app stores are for people who are developing software, and how much they need someone to provide all of that functionality for them. And that just reflects how poor the current Internet ecosystem is for selling applications. If you just want to develop software and put it on your web site and sell it, nobody will buy it from you, or people will just copy it and put it on pirate sites and make it very easy for your potential customers to get it for free.

PROFESSOR TOWNSEND GARD: Thank you for speaking with us. It has been a great hour. Thank you.

IV. INTERVIEW WITH SIVA VAIDHYANATHAN⁵²

QUESTION: Can you tell us how you got to where you are?

ANSWER: In the early nineties I was a newspaper reporter in Austin, Texas. I worked for a number of daily newspapers in Texas. During that time I was growing dissatisfied with the intellectual parameters of that job, and I had these big questions about how American culture worked. One of the big questions I had was to what extent cultural expression is curbed by, or influenced by, the law. Specifically, I had a series of nagging questions mostly from hip-hop, and I could not find a place that would take me through that story. Being dissatisfied with the work of a journalist, and growing concerned with my inability to find the story of hip-hop, I decided to go to graduate school and write the book I could not find.

QUESTION: Why graduate school and not law school?

ANSWER: I did not see law school as the path to writing the book I wanted. It really had more to do with the fact that I wanted training from

52. Transcribed by Jessica Edmonson. Edited by Matthew DeJulio, John McNew, and Professor Elizabeth Townsend Gard.

the people who knew about American cultural history more than I wanted training from the people who knew about the law, and they are very different. I also knew that because I was going to the University of Texas, I had legal historians who understood how to write history as well as legal history. I knew I had many resources to depend on, and I knew the professors well enough to know they would be generous with their time. I felt comfortable pursuing training through graduate school in American studies, which is explicitly set up to ignore all boundaries, and one of the things we look for as an American studies graduate student is the courage to cross the street to the law or business school.

I felt that being at a big school like the University of Texas gave me those opportunities, but I was not even sure I wanted to go into the digital realm. We are talking about the early 1990s, when the term digital realm was nonexistent. There was a lot of stuff going on, but it was not obvious that there was going to be this major shift. So when I mapped out my project, it ran from Twain to 2 Live Crew. When I finished my dissertation in 1999, 2 Live Crew did not matter anymore, and it turned out Twain was the middle of the story, not the beginning. I had to basically go back to the Statute of Anne⁵³ and go forward to what was about to happen with Napster, which of course no one knew about yet. And of course, the DMCA⁵⁴ and Sonny Bono Act⁵⁵ had just passed, as I was finishing my dissertation. I knew there was this amazing action happening.

QUESTION: Did you appear before Congress regarding the DMCA?

ANSWER: It was not Congress; it was the Library of Congress. I think in 2001, it was a rulemaking process they were supposed to do every few years, and it was the Library Association⁵⁶ that lined me up for that, which was a big step for me.

Really, I just thought someone needed to write this book, and I figured people would be interested in it. Pre-Napster, there was this sense among publishers that copyright books were boring and did not sell very well. I was trying to convince people that this was going to be really huge, but I did not have the word “Napster” to describe why it was going to be so huge. Publishers kept saying, “Well, we care about

53. Statute of Anne, 1710, 8 Ann., c. 19.

54. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C., 28 U.S.C., & 35 U.S.C.).

55. Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998).

56. In reference to the American Library Association.

copyright, but we don't think anyone else does." So I convinced some publishers to pursue me, and I signed with NYU press.

The book came out on September 10, 2001, which was an unfortunate date to release—not that I suffered at all comparatively—but it meant that it created some weird dynamics. For one thing, it made everything I was talking about seem trivial. There I was talking about how important hip-hop is, and it did not really matter anymore.

Larry Lessig's "Future of Ideas"⁵⁷ came out a few months after my book. We both had a delayed publicity bump, so my book caught his wave. It was the early days of Amazon, which was selling them as a package, so I was able to benefit from his Random House packaging machine. There were a lot of joint reviews, so I was able to sort of assert myself early on in my career as someone who was a nonlawyer writing for nonlawyers.

I did two things when I first heard about Napster in 2001. First, I wrote an opinion in the *Nation* about how great this thing was, an opinion I do not necessarily hold in such a celebratory way as I did in the moment. And second, I had to quickly make sense of it at the end of my book—but that left me the opportunity to write another book about peer-to-peer sharing which came out in 2004.⁵⁸

Because I had started working on that book before 9/11 it was hard to write and care about Napster—and of course Napster went away while I was writing the book. However, the file-sharing phenomenon did not go away. So, it became a much bigger book about the concepts of information anarchy and the ways in which those were being pulled in two different directions toward oligarchic and anarchistic systems that we were losing the value of republican systems, like libraries. I concluded that both these competing trends were unhealthy, and if we fail to recognize them for what they are, we will have poor arguments about digital technology and its effects on our lives.

Ultimately, we need to slow down and pay attention to the libraries, and the notion of a republican system is the core to all of my work in its most fundamental sense. My work celebrates the library and the people who work in it. All three of my books make the same case that you should value libraries and librarians and pay them more money and spend more time in them. I think America and the world would be better.

57. LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2001) (available as a free Creative Commons Attribution-NonCommercial).

58. SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM* (2004).

Like a lot of people, I wrote the same book three times with the same argument but different examples. The first said that we need a copyright system that allows for creativity and research and does not overly reward incumbents.⁵⁹ But I did it in a more historical way and a less instrumental way, showing that over time having an open system has worked out for us but that it may not work into the future. Then, the second book said that we are in this very nasty time of unhelpful arguments on both sides, and we should take a breath and look at republican systems without embarrassment.⁶⁰ We should talk about things like virtue and appropriateness, and eighteenth and nineteenth century ideas. In the third book, the Google book, it is the same kind of concern, that we are hooked on expedience and thrilled by convenience.⁶¹ That serves us so well in so many areas of life—we want expediency when we are getting directions to a restaurant—but we do not need it when trying to figure out what is going on with the climate, or what sort of malady we may have. Those sorts of questions should be approached in a more systematic way with experts and resources, so go to the library—that is where I have been.

QUESTION: In regards to the Google book settlement, rejected by Judge Chin last week, Judge Chin was suggesting an opt-in system.⁶² Would that quell the concerns of a lot of anti-Googlers, and how negatively would that opt-in system affect the Google books business model?

ANSWER: I cannot speak for Google's business interest. An opt-in system gets around the problem of finding orphan works and having their rights exploited for unreasonable gain without having a reasonable system to opt-out. But the opt-in system is what Google already has, with their deals with major publishers for current works. I think that makes sense; that is how it is supposed to work. The real question is, how ambitious does Google want to be? It could cut its losses and revise the settlement with an opt-in option, which would make the publishers

59. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001).

60. SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM* (2004).

61. SIVA VAIDHYANATHAN, *THE GOOGLIZATION OF EVERYTHING—AND WHY WE SHOULD WORRY* (2011).

62. Amir Efrati & Jeffery A. Trachtenberg, *Judge Rejects Google Books Settlement*, WALL ST. J. (Mar. 13, 2011), <http://online.wsj.com/article/SB10001424052748704461304576216923562033348.html>.

thrilled. The only thing that would be a downgrade for publishers is that the whole service may not be as rich and well rounded as it might have been, but that seems to be a completely reasonable way to do this as a first step. Who knows what Google wants to do?

With Larry Page, who was the dreamer behind Google Books in the first place, stepping up as CEO, he may want to continue to be a dreamer. That may mean abandoning the Google Books settlement process altogether, which has its own risks and potential rewards. One thing I hope we learned from this experience is that the entire Google Books project for the past six years has been about some heavy-duty legal and cultural issues and questions about how we want to execute information policy in this country. That is all too important to be left to one company negotiating with a handful of publishers and elite authors. Having a private council that is essentially set up to negotiate a settlement that rewrites American information policy is so fundamentally wrong. From the beginning, I was appalled that anyone considered this a viable option. As an American I was offended, and I think Judge Chin shared my alarm.

I think as little faith as people may have in Congress, we still have Congress. Article One⁶³ is there, and you cannot get around it. As long as we have Congress, we should try to use it. I have said from the beginning, when it comes to basic changes to copyright that could have allowed Google, libraries, and other firms to do this, I do not understand why Google did not just throw its money in Washington and exert undue influence on legislators, like every other American corporation does. This is the way things are done. What makes them so special that they are above and beyond the sleaziness of American politics?

They could have done clarification on not just orphan works, but also liability questions for library copying. They could have expanded the ability of libraries and other corporations to digitize information that is not yet digitized, and Congress could have put parameters on it. It would have been a fight where they would be going up against large corporations like Time Warner and Disney, but at least it would have been a fight, and that is how it is supposed to happen.

QUESTION: The books they are fighting over are books from 1923. Why is there such a big uproar regarding those books?

ANSWER: These works are orphan works for a reason—because even the copyright holder does not care about them. That is how little they are

63. U.S. CONST. art. 1.

loved. There is a Daddy Warbucks fantasy that one of these orphans will get through and strike it rich. That is part of it. Google assumes that if they make all these works searchable and available, that there will be a few gems that rise and surprise people. Maybe not from 1928, maybe from 1971, like the next *Confederacy of Dunces*⁶⁴ that people have let go. It becomes the next major event, and you can measure it through Google. All of a sudden it has 200 downloads this month from only two last month. Then the rights holder comes out and something pops. Someone steps up and the author is able to sell the movie rights—that is the whole fantasy.

QUESTION: Like searching for gold in a Wild West kind of way?

ANSWER: Yes. It is like scanning for gold in a huge, huge river, and the chances that you will find it could be an amazing moment. In the meantime, Google had other reasons to do this. Google wants text, syntax; it wants to be able to have a lot of sentences in a lot of languages because if it can train its computers to analyze a lot of sentences in a lot of languages over centuries, it can kind of determine how the sentence works. The sentence is the most brilliant machine that humans have ever made, and no one can figure out how to make computers get it. It is safe to say that we cannot get computers to intuitively understand sentences the way we do, but maybe we can get enough sentences into computers that they can track mathematical associations in parts of speech and in different languages. Somehow making search work as well in Mandarin as in English has to do with understanding how sentences in Mandarin are built differently than sentences in English.

The notion that we can go to Google and talk to it the way you would talk to me and get a response—this is the goal. If you go to Google and type “what is the capital of Idaho,” the first thing that will come up is “Boise,” because Google has trained algorithms to know that over time when people type in that string of text, the answer they are looking for is “Boise.” The old way is to find pages that contained the string of text and then rank them by the number of incoming links, which will not always give you the simple answer, and people really want the simple answer. So for “what,” “is,” and “where” questions, Google has trained its algorithms to present the answer. It realized this over time by seeing that people were clicking on the Wikipedia entry for Boise, or the Boise Chamber of Commerce. So it figured out that it needed an answer

64. JOHN KENNEDY TOOLE, *A CONFEDERACY OF DUNCES* (1980).

section for the algorithm that simulates semantics. Now that is simple, and with what Google knows now, it is able to structure those results. But given enough text, it can do something like “what is the best restaurant in Santa Fe?” It may not happen for twenty years or so, but if it has enough syntax in the system, it can do research that may lead them to the breakthroughs.

QUESTION: What about the IBM computer? You can ask Watson specific questions, right?

ANSWER: Those are factual questions. So what Watson does, at a powerful level, is mathematical calculations about associations and trends and probabilities. Then, it guesses an answer out of a small number of possibilities; it does it so fast that it makes you think it is thinking. Google is trying to get the simulation to work so well that you can ask it the sort of questions we ask each other.

Back to Google. What strikes me about the entire Google Books saga is that even after the settlement—where it was clear that Google was just interested in setting up a used books store—Sergey Brin was still talking about it as though it were a library.⁶⁵ Not understanding this distinction is a huge political failure. In his op-ed piece, “A Library to Last Forever,” he wrote that they were undertaking the Google Book project because Stanford Library would burn to the ground someday. As if Google would not, because companies last longer than Stanford? It was disingenuous because at no point did he say they were selling the books to make money, which is fine, but just say that. This discrepancy between how leaders of Google think and talk about their company and what they actually do in the world is the source of many of their problems. There is a thin line between saying, “don’t be evil” (Google’s tagline), and believing you can do no wrong. What we have seen in the last couple of weeks is that Google finally had to conceive that it has terribly noxious policies towards privacy of personal information, and the FCC has cracked down on Google Buzz, as the most obvious case.

Eight months ago we saw the uproar in Europe when we found out that Google, in its Street View project, was vacuuming up signals from people’s Wi-Fi. To this day, nobody understands why they were doing that. People at Google say it was a mistake, but I do not know how you could make that mistake. Google is now under antitrust scrutiny in the European Union. Now we have seen the Google Books project in the

65. Sergey Brin, *A Library to Last Forever*, N.Y. TIMES (Oct. 8, 2009), <http://www.nytimes.com/2009/10/09/opinion/09brin.html?pagewanted=all>.

courts. In all of these cases we should have seen the company humbled, but there is no indication that the company has taken that lesson on. And we are still seeing this attitude of “We’re Google, why don’t you trust us to operate in the proper way?”

What I want people to take away from these anecdotes and my books is that we should admire Google as a company that does amazing things, and find a way to make money at a time when no one else can. And that should be enough. That is what we expect companies to do. Instead, too often, we fall for this notion that Google plays a magical role in society, and that is how we get in trouble and Google gets in trouble.

QUESTION: You say you do not subscribe to the idea that Google makes us dumber; instead, you say, it makes us smart in different ways—as learners, we have more breadth of knowledge than depth. But in your interview “Inside Higher Ed, Google’s Gadfly,”⁶⁶ you say “Google delivers knowledge to us to exacerbate our worst tendencies to jump to erroneous conclusions not to act on them in ways that cause harm.” How is Google operating on our cultural brains positively and negatively?

ANSWER: Google facilitates certain behaviors. I do not think Google makes us do anything. Google is all about feedback. It works on our broad tendencies to want a lot of things, very quickly. It structures its system to deliver as much as possible, as fast as possible, and that is not necessarily healthy. In the user studies that Google did early on, we know that people almost always click on one of the first three results. They trust the results so much that they do not go to the links on the lower end of the page, and they never go to page two. Part of it is that we have internalized in a very short period of time that what is at the top of the list must be the best answer. But Google has a tendency of predicting what we might think is the best answer because it tracks our usage, collectively and, to a lesser degree, individually.

Google understands that people in New Orleans tend to click on one link when searching for “Hornets,” whereas people in Iowa will tend to click on a different link when searching for “Hornets” because people in Iowa are much more interested in the insect. And Google knows that and feeds our sense of expediency. So Google structures its search results by what it knows about you in that moment. One thing Google always knows is where you are, so if you happen to be in New Orleans with a

66. Steve Kolowich, *Google’s Gadfly, Inside Higher Ed*, INSIDE HIGHER ED (Feb. 16, 2011), http://www.insidehighered.com/news/2011/02/16/new_book_explains_how_google_has_taken_over_knowledge_and_learning.

hornet in your house, you will have a bit of a problem. But most people know how to get around that by typing, “how do you kill hornets?” and hope that the police do not show up. By reinforcing our need for convenience, Google accomplishes a wonderful service for us by allowing us to become better shoppers. It gives us access to the goods and services that we have proved to be more interested in.

QUESTION: Do you think that we are better consumers because of Google?

ANSWER: Over time. Google continues to personalize search and socialize search. Just this week Google launched a service where consumers can confirm search results. When I click on a link, everyone in my e-mail will have their search results influenced by my choice—much like Facebook arranges the newsfeed around the friends who have the most affinity toward your opinions.

QUESTION: How is this harming our brains?

ANSWER: I do not know that it is harming our brains. It has the potential to undermine our ability to think well as a society. The more we see systems designed to reinforce our beliefs and perspectives, and limit the challenges, the weaker we will be as a society of thinkers. I see Google contributing to that process. This is much more of a warning than a diagnosis, and I hope I am wrong. But I see that every trend Google creates to make us better shoppers has the adverse effect of making us worse learners, which is another reason to go to the library.

QUESTION: One of the criticisms of the Google search is the notion that information gets pushed down on the search result list. Is the notion that you “get what you think you should be getting” really harming us?

ANSWER: Google will occasionally remove things from its index if there is a copyright complaint or a complaint about the appropriateness of the video. It removes things from YouTube all the time for appropriateness. But Google does not have to remove something completely to make it effectively invisible; it just has to move it far down in the rankings. Here are a few examples of Google doing just that: Google bombing is a common phenomenon where people will organize a campaign to have a particular search result generate a joke, so for years if you typed in “miserable failure,” you would get George Bush’s link. And now if you type in “Santorum,” you get something completely different.

It is a common thing. Google does not like that it happens, but to completely correct for it would be very difficult. So often what Google will do is create a banner explaining the reason the search results ended that way, and/or in combination push the Wikipedia entry about phenomenon up high. So now when you type “miserable failure,” you get the Wikipedia article explaining the Google bombing campaign, and that accomplishes a lot because it is history now, and people can learn how and why it happened.

Around 2003, a lot of Anti-Semites and Holocaust deniers were pushing Anti-Semitic topics high in searches of Jewish related terms, and one that succeeded was any search for the word “Jew.” Such a search would bring up a Web site called “Jew Watch News,” which was an Anti-Semitic website. This was deeply troubling, and the Anti-Defamation League approached Google and met with Sergey Brin, who was completely sensitive to the issue. He explained that Google was not doing its job. The Anti-Defamation League wrote a press release saying “We accept Google’s explanation and we’re confident that overtime as the web matures it will correct itself,”⁶⁷ which it has not done. It is still the second link. The first is the Wikipedia entry explaining the controversy.

Similarly, in Germany, an anti-Semitic song sung by Borat, the fictional movie character from the movie *Borat*, showed up high in the Google search results. It is interesting because in Germany they are not allowed to put up any anti-Semitic links—but Borat is there. About a month ago, Google seriously altered its algorithms, which has changed a bit of this story. First, Google refused to sell ads next to the search, which makes sense. They did not want to profit off of anti-Semitic links, but the banner would say that the algorithms had determined the ranks by how the Internet works.

Google claims that its employees never use their values to influence how search results are listed—which is just a lie, they have to. If you are building an algorithm, you are imbedding your values into them. It may just be technical, but they are values nonetheless. Last year Google’s top image result for “Michelle Obama” was a racist caricature, again because of racist Google bombing, which was again deeply troubling. Google took it out of the index and made it impossible to find, which raised the question from a lot of people, “why did you do this for Michelle Obama, but not for the Jew Watch news situation.” There is no good answer, no

67. See Press Release, *Anti-Defamation League, ADL Praises Google for Responding to Concerns About Rankings of Hate Sites* (Apr. 22, 2004), http://www.adl.org/PresRele/Internet_75/4482_75.htm.

good policy here. Google wants to say that, for good reason, “We are not editors of the web, we are interpreters of the web.” And there are legal and ethical reasons for doing that, but they took a very active role in the case of Michelle Obama.

After being embarrassed about their reaction, Google put the image back on their search results. It was the top image until about a month ago, when they changed their algorithms. They explicitly said they would favor what they called “high quality content” over low quality content in all searches, without defining what that means. But we know that it was a way of downgrading content farms, these chum producers, that try to use phrases like “What is the best restaurant in Santa Fe?” to get you to click on that link. Google is trying to fight those content farms and trying to help journalism, real professional journalism, by raising stories from mainstreams journals in the results. This was at least an admission by Google of the explicit editing technique that it does, that there are real humans involved with the algorithms. But still Jew Watch News has the same explanation.

QUESTION: Does Google’s safe search feature allow Google to have more editing say?

ANSWER: Safe search is on by default, and that is a way of cleaning up and editing. But this is also important. Since the early days, Google has downgraded sites that have violated its design principles—if it has too much flash, if it is too goofy, if it has too many pop-ups, if it has too much code that might be malware that will affect your computer. Google has made it harder to find those pages. That has had a wonderful custodial effect on the web. You might not notice it, but if you searched in 2000 for anything on the web, you would stumble upon porn regularly because words used in the regular world also have meaning in the porn world. But that does not happen anymore, and not just with image searches. The image search feature just takes out excessive flesh. But Google also does this with words as well, which is great because now you can get on the web and search and not run into porn every few seconds. It has cleaned up the web and made it a friendlier place, but Google does not want to talk about that because it wants to maintain its image of being an impartial arbiter of the web, at least until recently.

QUESTION: In your article, you referenced the “Human Knowledge Project”⁶⁸ and you say that it should be a public project. If Google were a public company, as in government sponsored, would the Google Books project be less problematic?

ANSWER: I do not think Google is bad. I do not want to use that word. I think a company is a company, and companies should behave like companies. What bothers me is when companies say they are more than that, and Google is not the only offender of this. When companies take the place of public space, and take the place of sites of deliberation and exploration—when Barnes and Noble tries to be like a library, when Google tries to be like a library, when we stop maintaining our public parks and create more communities of private parks—that is where we go wrong. That is what I call a public failure. It feeds the argument that we never should have invested in the public institution in the first place, because it fails badly.

Look at the failure of public schools after gutting their funding for years and years. California is a great example. They had beautiful public schools for years, then they stopped funding them in the 1970s and now they have horrible public schools. So this is public failure and it becomes an excuse for, in the worst case, putting public money into private sector experiments—essentially corporate welfare. That was the worst aspect about the Google books project—the corporate welfare part of it. Public university libraries were inviting Google to scan this material for a profit-making venture, and that was what I found deeply offensive, among the many other things I found deeply offensive about the project.

The Public Knowledge Project⁶⁹ is about asserting the notion that there should be a public project that can do the big job of connecting most of the people in the world to most of the great information, building upon the infrastructure of the network of libraries that we have in the world. It invests in a technological infrastructure that will make these libraries as relevant and vibrant as they can be. And we have the technology, the vision, and the people who want to do this.

What we lack is the political will to do this on a national level. University board members even say things like, “Why do we need to build this new library when we have Google.” That completely misses

68. Kolowich, *supra* note 66.

69. See PUBLIC KNOWLEDGE PROJECT, <http://pkp.sfu.ca/> (last visited Nov. 18, 2011).

the point. There is this constant conflation of the public and the market, and I would like us to remember that they are very different things.

QUESTION: With the current wave of technological trends that has people saying, “the sky is falling the sky is falling” with respect to copyright law, what changes do you think need to be made to current copyright law moving forward in order to preserve it?

ANSWER: I like the way you phrase it. I think we should have a copyright system that we all believe in and can trust. The problem with the system is that it is absurd and hard to believe in. Unless you are paid to believe in it, it is hard to believe in. The penalties are excessive, the term is too long, and at the very moment when we all became implicated in the system, it became so complex that no one can understand it. It has always been arcane and complex, but that was not a problem because it deals with a specialized area of life. Most people in the United States did not have to think about copyright. For decades, most of us did not make copies or produce copyrightable content.

Technology, coupled with the Copyright Act of 1976,⁷⁰ made it so that we are all copyright owners now. The minute you write an email or a grocery list, if it is poetic enough, it implicates us all in ways that before the 1976 revisions it did not. So whether we think about it or not, with technology, we are all part of the copyright system. We are also now, since the rise of the cassette tape or photocopy machine, copiers. Maybe not to the effect that we are now; computers are now huge copying machines, among other things. This all changed in the 1970s, between 1972 and 1976. With these new copying machines we were confused as to what was going on. We had these technological changes that we now take for granted as transitional and trivial but were in fact revolutionary. That was where we went wrong.

What we need is a copyright system we can believe in that does not result in these anecdotes of people losing their houses for something very trivial. We need people to have the confidence to be able to engage with the copyright system without fear. We need artists to be able to share their works without having a lawyer on speed dial. We need to lower the transaction costs for creativity.

So, specifically what that means is, I wish we could bring back the formalities of the pre-1976 laws. It is not going to happen because the

70. Copyright Act of 1976, 17 U.S.C. § 107.

Berne Convention⁷¹ probably will not allow it. I would like to have a more reasonable term, which is probably not going to happen because Congress has no reason to change it and the Supreme Court has already said they are not going to touch it. Short of that, we need to lower the remedies so people do not fear for their livelihoods for being cultural. That would be a major improvement. I would like to see over time a more clarified user right, such as library rights, personal use rights.

QUESTION: How do you define “public use” with regard to people putting things on YouTube?

ANSWER: That is an extremely difficult question. I made a video of my daughter when she was ten months old and she loved the “Colbert Report.” I had this great video of her sitting in front of the screen banging the table when the show came on. It is great. But of course, it uses copyrighted material. I put it on YouTube and it was knocked down in a day. This is a case where I am making noncommercial use of the video, but Google is making commercial use of it by making it so available. The personal use right should allow me to create and post that video, but right now it does not.

For library use, I would just have a strong and robust copying right without one or three copy restrictions, with in-house access for visitors. By doing this we are reinvesting in the structure of libraries, which has tremendous externalities as a community center, as a kid’s center, as a babysitter sometimes. A lot of communities would see the value of libraries in their communities. Some families have no space or time for educational exploration. More and more, Americans are finding it hard to afford broadband access, if they can even get it. There are certain places in the country that have designed public spaces on a smaller scale. Gainesville, Tennessee has designed a public library, about 3,200 square feet. It is so well designed for its uses, which has been wonderful for that community.

QUESTION: Should people care about anything besides just learning the law? Should they care about the cultural aspects of the law?

ANSWER: When you study constitutional law, there are rights and obligations of citizenship that were voted on. Constitutional law is about how the federal government interacts with the state. You do not need a

71. Berne Convention for the Protection of Literary and Artistic Works, usually known as the Berne Convention, is an international agreement governing copyright.

back-story for constitutional law. Similarly, you do not have to have a back-story for criminal law. We all know what a crime is.

The problem with law that affects culture and cultural policy is that we take culture for granted. Whether I am teaching technology or culture, I do not want students to think that this is how it is and how it has always been. So I need to make it weird. Making it weird is a bit of a challenge. I have a class full of twenty-year-olds, and they have been dealing with these technologies since they were really young. The way I deal with it is to share my stories about my interactions with technology. And that does some of the work. The reason to understand the cultural background and cultural implications of what you do is that at some point, you will be involved in the policy questions beyond the execution questions. Having a foundation in the culture will give you an advantage and make sure you are not marking papers for the rest of your lives.

QUESTION: What is your greatest fear about copyright? What are you excited about?

ANSWER: I am more optimistic than I have been in a decade. We have had ten to twelve years of conversation and coverage of these issues. The public has a greater understanding of these issues. That is one of the reasons the RIAA⁷² has realized that it cannot sue students anymore. It cannot sue thousands of students and expect that it will stop millions of students downloading. The fact that the music industry has basically given up suing individuals is a huge change and relief. I do not think that means the law is any better; the world is just a little less crazy in that way. Also, there is a real global free culture movement pushing back and creating real arguments. You would not believe the sophistication in places like Sweden. In 1998, that did not happen.

I am thrilled about the fact that privacy has risen to the point where people are paying real attention to it. There is such a close connection to the technological enforcement of copyright and the tracking of peoples' behavior. Making that clear over time is one of our next big jobs. We need to get the word out there that the tracking infrastructure is out there. I am relieved that so many people are doing such great work in this area. I am relieved that the level of conversation on these issues is so much less stupid than it was even five years ago. You just do not have ridiculous things coming out of the RIAA and MPAA⁷³ anymore.

72. Recording Industry Association of America.

73. Motion Picture Association of America.

I do not obsess about copyright anymore, because so many people are ready to do that work, in a scholarly and activist sense. I do not know that I will ever write another book or article about copyright again because I feel that I have said what I need to say and other people are saying much better things now. I am much more interested in privacy now.

V. INTERVIEW WITH KENNETH D. CREWS⁷⁴

QUESTION: In 2000 you wrote a great deal about new technologies such as Facebook and YouTube. How do you feel that those new technologies have changed copyright?

ANSWER: You have asked a question about two broad issues of copyright that new media challenge: fair use and ownership. What is currently going on today is a transition in an important way. We are as masses—the millions of people on Facebook, Wikipedia, and Twitter—under traditional regimes all copyright owners, as in “you wrote it, you own it.” What many of us are doing in this context is creating an environment where we are liberally borrowing as well as liberally creating. The notion of wanting to borrow heavily, like with wiki communications, is accomplished because many of the people who are joining that environment are doing so with an attitude of “I’m not trying to claim my stuff either.”

We frequently overlook the interplay between systems of ownership and fair use. I remember ten years ago, I was sitting with some colleagues talking about fair use, which was a hot button topic at the time. Someone would grumble about how we cannot copy someone else’s articles to talk about in class. Then, later in the afternoon we would talk about ownership, and how one of the really important things to do is re-conceive ownership as a form of sharing. The same person who was expressing concern that he could not use other people’s articles would say “What? You can’t use my stuff!” But, today is a different time. This is a wiki/social media environment, with a bunch of people saying “Tell me the law and then I’m going to selectively disregard it in a way that is acceptable under the law.” With that comes Creative Commons⁷⁵,

74. Kenneth D. Crews is directors of the Copyright Advisory Office at Columbia University. He is also a member of the faculty of Columbia Law School and teaches in the LL.M. program of the Munich Intellectual Property Law Center. Transcribed by Jessica Edmundson, and edited by Jessica Edmundson, Matthew Delulio, and Professor Elizabeth Townsend Gard.

75. For more information, see <http://creativecommons.org/> (last visited Nov. 15, 2011).

licensing, and choosing not to assert rights you might have. There are many other developments that free up content for subsequent use. Users do not have to belabor fair use in many of those contexts because it is understood, either explicitly, as with Creative Commons, or tacitly understood under the given circumstances. If you want to play the game, just borrow and clip from other stuff. This is a healthy environment, and it is an environment I see many people choosing to participate in.

QUESTION: Does the law need to catch up to customs or can the law handle it without change?

ANSWER: I think the law can handle it without any change at all. Changes in statutes do not tend to be helpful with these kinds of changes in custom. If we had the 1909 Copyright Act still in effect, it would still compensate for these issues.⁷⁶ The concept that, “this content is mine, but I hereby choose to license it or I choose to not assert my rights,” has always been accommodated for by the law. We know the list of rights a copyright owner has.⁷⁷ I like to say that among all of those rights is the right to not assert your rights, and that is a valuable privilege.

QUESTION: You have previously said that you can circumvent the legal protections of a work for a legal end. Is that just saying that you are using illegal means to reach a legal end?

ANSWER: Yes, but only because the law says so. It is a little like what you learn in criminal law in your first year. You learn the difference between *malum in se* and *malum prohibitum*. *Malum prohibitum* is wrong because the law says it is wrong. The law says that just because you can use something does not mean that you can break into my house to get it. People will make that analogy. However, we have a thousand years of legal doctrine telling us it is not okay to break into people’s houses.⁷⁸ That is socially a very different breach of responsibility when compared to content protection. I am sympathetic with the principle of anticircumvention. If I am marketing something to sell, I am choosing not to put my work in the public arena for people to take. I am not choosing to be a player in the wiki environment. I turn to copyright owners like that and say, “It’s your choice.” I am sympathetic with the

76. 1909 Copyright Act (repealed with 1976 Copyright Act, January 1, 1978), available at <http://www.copyright.gov/history/1909act.pdf>.

77. See 17 U.S.C. § 106 (2006).

78. See generally Sheldon W. Halpern, *Copyright Law in the Digital Age: Malum in Se and Malum Prohibitum*, 4 MARQ. INTEL. PROP. L. REV. 1 (2000).

idea and principle in a broad sense. Something is not illegal until Congress says it is illegal—and in this case, Congress did. My criticism is that Congress could have drafted a law that allowed for circumvention⁷⁹ in certain circumstances, such as for fair use and education. Some countries have done that, and some court decisions in the United States have started to integrate that view into anticircumvention by asking where the real damage was after an act of circumvention. Anticircumvention has been on the books for thirteen years and we are still learning. We do not have a lot of precedent on this issue. We are still learning the exceptions as well. If you go to the statutes, you will read a couple of pages worth of exceptions to the prohibition on circumvention. There is no polite way to say that they are worthless. Those exceptions are too complicated, and few people can really use them. Those who try to read them often miss the target. They are in the law for one reason. When a member of Congress votes on the bill and someone complains, that member can point to those exceptions and argue that he or she voted on a bill that has something for everyone, and can quickly end the conversation.

QUESTION: What about the bill that was voted on for classroom use and additional exceptions? How does that fit in?

ANSWER: All are just pieces that fit into the fact that there is a prohibition, exceptions that do not work, and a statute that does not open up for allowing the tools for make circumvention available.

QUESTION: Do you think that is true of a lot of legislation that came out of the 1990s with copyright restoration,⁸⁰ and distance learning?⁸¹ Is there a pattern with this legislation?

ANSWER: We can go back even further. A statute that does not work on its face—section 115, for example—has some value. You can think of it as a default, as is a lot of copyright law. If I write a song, I am now the content owner. Then you record a version of the song and you own copyright in the derivative work. However, once I, as the copyright owner, authorize you to do a recording and allow you to sell it publicly, you trigger application of a compulsory license. If someone else wants

79. See Pamela Samuelson, *Towards More Sensible Anti-Circumvention Regulations*, in FINANCIAL CRYPTOGRAPHY: LECTURE NOTES IN COMPUTER SCIENCE 33-41 (2001), available at <http://people.ischool.berkeley.edu/~pam/papers/fincrypt2.pdf>.

80. See 17 U.S.C. § 104A.

81. See *id.* § 110(2).

to do a recording, I am compelled to allow the next person to record a version as well. But that person is compelled to pay me a fee. It is a trade-off. The public gets more recordings of the song and I get paid more money. The problem is the money is set by a schedule that comes in at about eight cents per pop song. In the industry, that is a high price. They will sell that song for, at most, ninety-nine cents, and they need to give eight cents to me. So, the recording artist comes back and negotiates to six cents, for example. For other artists, they may negotiate say 1 cent, and the composer says, “yes” because he wants that recording studio to play his song. The statute is a default—what you get if you do not go for something else. That brings me back to your question.

The TEACH Act⁸² is a complicated statute that allows the use of copyrighted work in transmission or distance education. The problem is it is very complicated and therefore most colleges are not using it. When they ponder fair use, or whatever the alternative may be, they theoretically have a leverage point to go to rights holder and say “if you do not allow me to use this few minutes of your feature film I can use the Teach Act and, by the way, I can also circumvent your technology under the right circumstances, I could go in and clip those three minutes out of the DVD, but I do not want to do that and you do not want me to.” Are educators savvy enough to use it that way? Not many are, but they could be. That is the theory of the law.

QUESTION: In your 2008 WIPO study, you said that it is important for libraries to have an exception to copyright law.⁸³ There are twenty-one countries that do not have library exceptions and three that do not have copyright law at all.⁸⁴ Does that allow for completely free dissemination of information or is the government attempting to limit dissemination of information by not having library exceptions or copyright laws altogether? Or is it a form of censorship?

ANSWER: That is a difficult question to answer because those twenty-four countries are a widely diverse group. It is hard to tell, or impute some actual motive on them. I will say, however, that it is very clear in looking at patterns of statutes from around the world that they tend to cluster geographically with regard to their laws. Countries do what other

82. Technology, Education and Copyright Harmonization Act. See 17 U.S.C. § 110(2).

83. See Kenneth Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, WIPO (Aug. 26, 2008), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192.

84. Those three countries are Afghanistan, Maldives, and Laos.

countries have done when faced with some new problem. They will say, “How did the other country deal with it?” It is the same thing that universities do; they need a policy on an issue, and one of the first things the task force committee will do is ask what other universities have done. It is the same with countries and their governments. So you see a clustering of statutes in countries, like in Asia, and sometimes you get regional treaties that tend to lock each other in.

Regarding censorship, I do not think most countries are thinking that far down the road. What I think they are doing for the most part is meant to be sincere. They tried sincerely to come up with a law that they think might work. For example, lawmakers want to protect owners’ rights, but they also recognize the importance of libraries. Lawmakers somehow they came up with formula that melds those goals. Alternatively, it is just total passivity. Somebody said they needed a library statute, the country next to them had a culture like theirs, and so they borrowed their neighbor’s statue. Such a path gets the job done with little investigation as to whether it actually works. That is a serious problem all over the world, and as you see some of these countries that have these statutes really do not have the means to employ legal or other professional staff members who can take the time to learn and implement the law. The lawmakers may have been sincere, and not insidious in any way in their lawmaking, but the people are not well positioned to take advantage of these statutes. You need to be careful what you ask for. A good example of that is Chile, which did not have a library exception when I conducted my research, but it now has a library exception in place. Unfortunately, a lot of people in Chile are not happy with it, because it is not realistic. Common criticisms are that it does not meet the needs of the people, it will not work, it is too limited, it cannot be implemented, and there are too many conditions. So you have to be careful what you ask for.

One of my least favorite statutes in U.S. copyright law is section 108(h). This provision, enacted in 1998, allows libraries to make copies of works that are in the last twenty years of term of their protection. This is the trade-off Congress added when it decided to grant twenty extra years of protection for copyright. How is anyone supposed to use that subsection of 108? In order to use it, you have to know when something expires, which is extremely difficult. I understand that few libraries may be using it. There are haunting allusions to the three step test of TRIPS in the language, as in you can use it only if it does not interfere with the exploitation of rights of the rights holder.

QUESTION: In the Durationator®, we have been dealing with the legacy of colonization.⁸⁵ Countries do not get rid of their colonizers' laws very easily.

ANSWER: Even centuries later we can look back and see the influence of French law. Louisiana [where this interview took place] has its historical roots in France, notably since it is a civil law state. But the rest of the United States has British roots, and you can see the spread of British ideology through British colonies, which were much more spread around the world than were French colonies. You can see influence of British statutes on what we do in the United States, though few members of Congress necessarily want to admit it. Around the world, one can trace the copyright laws of different countries to their colonial history, especially to the influence of either British or French law on their former colonies. The influence continues long after the powers have departed.

QUESTION: How do you see the issue of restrictive licensing for museum art collections reconciling, particularly with the resistance to adopt the court precedence with *Bridgeman*?⁸⁶

ANSWER: The *Bridgeman* case raises two enormous and conceptual issues. One problematic issue is that many people feel very strongly that the *Bridgeman* decision is wrong.⁸⁷ Legalistically, we can look at it and say it is only one ruling in one district court in all the ninety-plus district courts. Many courts in other countries think about this decision very differently. So you have to be really careful about the lessons you draw from the case and how you act upon the decision. I happen to think it is a very well-reasoned case, founded very nicely on core principles of copyrights. Copyright protects only original works. The straight copies of art images are intended to be faithful reproductions and systematically not include any variation or originality. I appreciate that quality photographic reproductions are difficult and expensive to make, but without creativity and originality, they are outside the bounds of copyright protection. The second conceptual point is that *Bridgeman* is a

85. The Durationator® is a thoroughly researched software tool Dr. Townsend Gard is developing at Tulane Law School that determines the copyright status of a work anywhere in the world. See The Durationator, www.durationator.com (last visited Nov. 15, 2011).

86. *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

87. See generally Colin T. Cameron, *In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works*, 15 TEX. INTELL. PROP. L.J. 31 (2006) (examining the common practice of some museums to ignore the *Bridgeman* ruling and to assert rights in images).

social decision. It suggests that we may be better off if the law bars anyone from controlling those images. However, it is hard for those people whose livelihood has depended upon the use of those images to pause and reevaluate their thinking in response to it.

If we set aside the *Bridgeman* case itself there is a second layer of questions. What about museums and their control of images and claims of rights? We can easily find examples of that kind of assertion of control. I will tell you that many research libraries have had policies that say if you are a researcher coming to their collections, and you find something that you are going to use in your new work, you need permission from the library. That raises two issues for me. First, is the work in the public domain so no one should say you need permission? Second, even if it is protected, the legal rights almost never belong to the library. Libraries are just the proud keepers of that material, and they provide public access to those materials. In assuring access to it, why are they imposing those rules?

As I, and others, have raised this issue over the country, more and more institutions, libraries, etc., are rolling that policy back. At Columbia, we have rolled it back.⁸⁸ If we do not own the rights, we will neither grant nor deny permission to use the work. Sure enough, after a new policy is put in place, along comes an inquiry from a researcher who has found the policy and understands it, but his publisher insists he have a letter ensuring he does not need the library's permission. The practical problem with that request is that the librarians do not have the time to look at all of what researchers are doing and decide whether they need the library's permission or not. Most of the time, the librarian will not know if the researcher needs permission until the researcher tells him, and then takes the time to look at what the researcher has. It might be something the library owns, so a librarian cannot send a letter that it does not have rights. So, I wrote back, "You can tell your publisher that our policy is in fact our policy" and I never heard back from the person. The more serious problem is that the publisher plays the role of gatekeeper and defender of illusory copyrights. The publisher needs to be protective against needless permissions. When publishers are overly cautious, they

88. On October 26, 2009, Columbia University Libraries revised its policy regarding reproduction of materials from the collections, providing in part, "In order to reduce barriers to the dissemination of research conducted in its collections, CUL will ordinarily not set conditions on publication of materials from the CUL collections in connection with scholarship. CUL does not hold the copyright to most materials in the collections, and CUL will neither grant nor deny copyright permission regarding such materials." The current policy is available at http://library.columbia.edu/services/preservation/publications_policy.html (last visited Nov. 15, 2011).

run the risks of driving up costs and driving out intellectual content from their books and other publications.

Museums feel a different pressure. A typical museum official is reporting to a board of trustees, and the board members often have many different things on their minds. They are looking at the revenue coming in from t-shirts and mugs and things in the museum shop, which is sometimes a handsome source of revenues. They want to be careful about letting go of certain purported rights, because they need that money. The other rationale from museums is that they are the keepers, the trustees if you will, of the art. It is their job to protect the integrity of that work, so they do not want it to be used in a way that could be deemed questionable. The problem is that so much of the work in their museums would not even exist if someone did not go out and exploit and rearrange other existing works. So this is an area where museum officials and boards need to do a lot of fresh thinking, and reexamine the way they have done business.

QUESTION: It seems like museums are acquiring larger and broader collections under this internationalist approach and using public access arguments. But on the flip side, with the images, they are taking the opposite approach and it seems like they are having an awful amount of power to control what we can see and have access to without regulation.

ANSWER: I think we are seeing more and more change. Many museums, for example, are now allowing people to take photographs. I think they have come to the conclusion that we all have pocket and cell phone cameras—you realistically cannot stop photography as long as it does not become a nuisance, or hazardous to the art by using a flash. People are going to show up with cameras and snap photos. It is the way people want to enjoy their art, in part because they can. You used to only be able only to stand and look at art, and that is a powerful experience all by itself. Then someone brought his or her sketchpad and that was a meaningful experience as well. But more and more people are relating to their art with their cameras.

Recently I saw a museum visitor just snapping pictures without breaking stride, and I am not sure if he was relating to anything. But aside from that, people relate to their art through their cameras. I know I do that sometimes. I want to see the art differently, through a different angle, and then share it out. I want to put it on Facebook. That is the way people experience museums now, and I think museum officials are realizing that. It is not law, but that is policy and culture.

QUESTION: Do you think museums need to regulate and let people know which photos you can take a picture of? Where does that culture fit into copyright law?

ANSWER: I was watching a presentation recently, where the presenter had snapped a photograph of the sign about the photography policy at the Seattle Art Museum.⁸⁹ It was wonderful, in that the sign elaborately sought to put things in different categories in a way that told the visitor what you could take a picture of and what you could not. I think there are two things going on. Taking of the picture in the first place itself. The taking of a picture is something we can talk about as a reproduction, but while it is only parked in my camera, it seems like an easy fair use. Then there is the widespread reproduction and dissemination, the printing of the picture, or uploading to Facebook or Flickr. I think that sometimes there are legitimate reasons for a museum to impose some barriers. Sometimes, however, it is just brute politics. It may be just the deal the museum had to cut with the artist to get that work on display. I am a realist. I understand all that. I think that the real concern of the rights holder comes in what that person does with the image. If it goes on Facebook with the caption “look at the great painting I just saw today”, it is pretty easy fair use in my estimation.

QUESTION: What if you take the same picture and put your families’ faces in the art?

ANSWER: That is even easier fair use. We are being hypothetical, we have not gone through the four factors, but my gut instinct is telling me you just tipped it more strongly in favor of fair use.

Let’s talk about the infamous Obama poster. Shepard Fairey used an AP photograph of Obama to make the well-known “Hope” poster.⁹⁰ Let us set aside that he is a lousy client. He lied, and admitted he lied, and he did it in a very bad way. He handed over the wrong picture to his lawyer, said it was the picture he took, and it was a different one. He was

89. The presenter was Liam Wyatt of Wikimedia, and his photograph of the museum sign is available at http://commons.wikimedia.org/wiki/File:Photography_sign_in_Seattle_Art_Museum.jpg.

90. See Randy Kennedy, *Artist Sues the A.P. over Obama Image*, N.Y. TIMES, Feb. 9, 2009, at C1, available at <http://www.nytimes.com/2009/02/10/arts/design/10fair.html>.

out there allegedly altering his records, which was one of the dumbest things he could have done.⁹¹

But on the merits of the case, in my mind, in a political environment, with the election and the use of a prominent political figure, who was running for office at the time, all of these facts strengthen the fair use claims. I had the privilege of seeing the original photograph on display at the National Portrait Gallery in Washington, and once I saw the original, I felt even more confident that Shepard Fairey's version was fair use. The original is large, and size can be a factor, as we know, for determining fair use. An AP photo is generally useful and marketable only at much smaller size. The original is actually a composite, not a simple color on board. So, when you look at it, you see pieces of newspaper that are part of the background. It has texture and pattern and clippings, so it is truly not just another representation of a head, it is truly an artistic rendering and transformation of the photograph.

QUESTION: Should librarians be concerned about what is going on with the Google Book Settlement?⁹²

ANSWER: First, that decision can come down at any minute.⁹³ However, let us do a quick recap of where we are. In October 2008, the society representing authors, the society representing publishers, and Google issue a proposal for a settlement for the book-scanning project.⁹⁴ Rounds of critiques from different players, including state, federal, and foreign agencies come forward. In November 2009 came a revised settlement that narrowed the original settlement in certain ways, but the basic structure remained.⁹⁵ On February 18, 2010 the court held a fairness hearing. It lasted all day, and the court took the issues under

91. See Hitell Italie & J. Mandak, *Shepard Fairey Admits Faking Evidence in AP Case*, HUFFINGTON POST (Oct. 17, 2009), http://www.huffingtonpost.com/2009/10/16/ap-claims-shepard-fairey_n_324482.html.

92. For information about the settlement, see <http://www.googlebooksettlement.com> (last visited Nov. 15, 2011).

93. This interview took place in January 2011. The court ruled on the Google Books settlement on March 22, 2011. See *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

94. See Megan Lamb, *Authors, Publishers, and Google Reach Landmark Settlement*, GOOGLE NEWS ANNOUNCEMENT (Oct. 28, 2008), available at http://www.google.com/intl/en/press/pressrel/20081027_booksearchagreement.html.

95. See Peter Brantley, *Google Settlement Revision Post-Mortem*, OPEN BOOK ALLIANCE (Nov. 18, 2009), available at <http://www.openbookalliance.org/2009/11/google-settlement-revision-post-mortem/>.

advisement, and will decide how to issue a decision.⁹⁶ We are now past the eleven-month mark and we do not have a decision yet. I think nearly everyone is surprised that the court has taken this long, but there are many reasons.

Judge Chin has been promoted to Second Circuit Court of Appeals, so this is his last case and he needs to issue a decision in it. He is already on duty on the Second Circuit. He knows that no matter what way he rules, it is likely to be appealed, and it will be appealed to the Second Circuit. He clearly does not want to be overturned if it comes to his peers. So he is looking at it carefully and taking his time. The proposed settlement is a business model, and you can look at it from many perspectives. I had a few pointed things to say about the original settlement, but the second is a serious improvement. As for your question, there is good news and bad news in it for libraries. The good news is that it will give access to a rich variety of materials, and the project already has provided searchability of a tremendous amount of material. In many ways, the Google books project has been hugely valuable for many people, as a business model that allows content to be made available. It may be less beneficial to libraries themselves, but libraries are in a position to reflect the concerns of consumers.

Librarians should be concerned if the settlement becomes the model, the only way to get this content, because we are seeing the same fundamental structure coming from other resources. That is, with many licenses you do not really acquire something that you walk away with, you acquire instead the right to log on and view it off of someone else's server. There may be major concerns of sustainability with that model, but there definitely are concerns with privacy. Google insists that the company is taking steps to safeguard privacy, which is something that we just need watch. I am a lot calmer about looking at the settlement today than I was a year and a half ago. When I first saw the settlement and read it through, it was inordinately complicated. I said I would give it five years before even the most strident proponents give up and say this is too messy and unworkable. Now, two years have gone by, and I have to wonder if the parties are gearing up for their opportunity to come back to court, thinking about what they might like to change. I think that libraries will succeed by adding Google to their many sources. I think Google will succeed, because it has every reason to be motivated to work with libraries and figure out what it can do to support better library

96. The court has since this interview ruled in the case. *See Authors Guild*, 770 F. Supp. 2d 666.

services. I think they will find a way. I am certainly a lot less concerned than I was a year ago.

QUESTION: Does anything about copyright really scare you?

ANSWER: I do not fear very much at all. We will all survive. But I do worry about going to some sort of total pay-per-use kind of model. It is very important for us to exercise fair use in many ways. We have all heard the old motto: "If you don't use it, you lose it." I think there is a lot of that going on here with fair use. However, the reason I am reluctant to put it in fear column is that I think we will use it more and more. Even back to fifteen years ago, when others were saying that as we move to an electronic environment, fair use would become less important, I was even then saying that fair use would become more important. I still think that is true. As technology opens up more possibilities, in an environment where no one predict or control what you can and cannot do, we need to go back to fair use to know how to use and enjoy copyrighted works in a creative manner.

QUESTION: What are you excited about with copyright?

ANSWER: I am excited about the fact that more people are aware that copyright exists. I think more people are becoming aware that copyright exists, and that they are copyright owners and users. The stuff they want to use and enjoy is likely protected by copyright, and only by knowing can people have the wherewithal to exploit copyrights in a positive way and fight back against an antiquated system. Copyright has a lot of problems, and it is important for people to see what is going on and fight for change.

QUESTION: What is the message to librarians, the general public, and scholars?

ANSWER: Three bullet points: First, be a good steward of your own copyrights. Second, be careful about what you sign. Third, whatever you sign, make sure you keep a copy of it.

VI. INTERVIEW WITH NINA PALEY⁹⁷

QUESTION: Can you tell us about your life and how it intersects with copyright law?

ANSWER: I am forty-two years old and I have been drawing since I was very young. I think I remember vaguely in the 1970s when copyright law changed so that you did not have to register copyrights.⁹⁸ I think that was a good thing. I always had anxiety about copyright and questions about how to own something. I was told I have to put the “little c”⁹⁹ on my work, and that I had to register it. Then the law changed, and I was excited. All my copyrights were registered forever!¹⁰⁰

When I was a little older was the first time I heard the term intellectual property, and I loved it. I was a cartoonist then, so all I heard from my lawyer was “blah blah your intellectual property.” It made me excited. Everything I made and drew was property, and it was *intellectual* property at that. It was great, and so I was pretty pro-copyright. My pro-copyright stance changed progressively over the years, and I realized that copyright terms were too long. As an artist I always benefitted from the Dover books, which were copyright free illustration books.¹⁰¹ They were like a gift for artists, books of beautiful old etchings that you could do whatever you wanted with because they were out of copyright. I loved them. Also, I was into rubber stamps when I was young, and some of the books had them. They were just these lovely old copyright free books.

QUESTION: Did you have a sense of what you could and could not use when you were younger, or did you just use whatever you wanted?

ANSWER: No, I was very respectful of copyright because I believed in it. The Dover books said they were copyright free, and they were pretty consistently old illustrations. So, I did get this idea that if it looks like it

97. Transcribed by Jessica Edmonson. Edited by Matthew DeJulio, John McNew, and Professor Elizabeth Townsend Gard. For a short biography on Nina Paley, go to <http://www.ninapaley.com/bio.html>. Nina Paley appeared by Skype in the Tulane copyright course in Spring 2011.

98. 1976 Copyright Act, 17 U.S.C. § 102(a) (2006). The law required notice until 1989, when the U.S. dropped the notice requirement.

99. “Little C” refers to the copyright symbol ©.

100. Copyright under the 1976 Copyright Act lasts for the life of the author plus seventy years (as of 1998), as long as it is not a joint authorship or a work for hire. Works are required to be registered in order to bring a lawsuit for infringement in U.S. courts.

101. Dover Publications publishes books primarily in the public domain that are no longer published by their original publishers.

is very old, it is probably copyright-free. I noticed collage art used a lot of these old etchings. So, without having it explained formally, I could tell that if things were very old, they were not likely under copyright. I did not know the exact date of those images. The sad thing about these images being in the public domain is that Dover would reprint these works, and they would make wonderful gifts, but the books would not say who the artists were because they were not required by law to do so.¹⁰² So, I was looking at all this art without the information of who made it, which kind of hindered me as an artist with this culture because I could not look into that artist to find more of his or her works.

I was not outraged, but I noticed that it was a weird practice. They could have printed the names of the people who made these images even though they were not required to. It would have been nice to know. As time went on, I learned about illegal art and more about arts being censored because of copyright and trademark. There was a magazine called State Free magazine in the 1990s that had an illegal art exhibit. They rounded up works like the *Karen Carpenter Story* (the movie) enacted with Barbie dolls in Mattel suits, so it was illegal.¹⁰³ There have been lots of these things, and I got interested in this. I thought that this art should not be totally suppressed; it is not right that it is illegal. I learned more about fair use. Just from being an artist I knew there was something called fair use.¹⁰⁴ It did not make sense that these things were not protected by fair use.

QUESTION: In the 1990s, when fair use was not as developed as it is now, what was it like, were you using fair use?

ANSWER: It was just a word I heard. Most people's understanding of the law is different from the actual law. I was just talking to someone today about podcasts that use other people's music, and that as long as it is not a commercial podcast, they will not get sued. People really think that if you copy something but not commercially, it is alright and legal. But as far as I know it is not legal. If you want to obey the letter of the law, it is not ok to copy it and use it, even noncommercially. I have looked into it much more than most artists and it is still pretty vague to me. Among artists there is this emotional idea around copyright which is

102. See *Daystar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

103. *SUPERSTAR: THE KAREN CARPENTER STORY* (Todd Haynes 1987). The trademark issues were never actually litigated. A&M Records along with Richard Carpenter had the film pulled from public display because of the film's unauthorized use of Karen Carpenter's songs.

104. 17 U.S.C. § 107 (2006).

“I own this; this protects me. It’s my intellectual property.” But, as for the actual mechanism, people do not know how copyright works, and further, do not know that they do not know.

Somehow, I was increasingly aware that copyright terms were too broad and too long. I liked the public domain material and I learned that nothing new was entering the public domain.¹⁰⁵ I did not have the language for that, but I was aware that nothing new was coming in. I heard that copyright terms were extended and I do not recall thinking that was a good thing.

So even before *Sita Sings the Blues*¹⁰⁶ I was doing animation and putting sound on the animation. I was fraught with anxiety. I started doing animation in 1998, and music was a source of anxiety for all animators. We would tell each other these myths about copyright, such as “it is ok if you only use a part of it,” or “as long as you do not sell it, it is ok to use.”

I did a film in 2000, called *Pandorama*.¹⁰⁷ I had friends who collected weird obscure music, and they had a piece that was perfect. It was called “Yeah Yeah” by the Rezillos.¹⁰⁸ I actually tracked them down and asked if I could use it in 1999, and they said they would love for me to use it. The problem was their label was bought by a label who was bought by another label who was also bought by another label, who I think was Virgin. They said I may have to ask them, but as far as they were concerned, I could use it. So, then I had to contact Virgin and they did not even know that they had it or what it was.

They sent back weird requests asking where I was going to use the film and what I would do with it. They asked these kinds of questions that I could not possibly know the answers to because it was just this little festival film and it could have gone anywhere. They did not even know if they had it, and they could not confirm if they did own it. I ended up using it. It became too complicated for them; it was not worth the trouble for them to spend the time to look into their own vaults. So, I saved the e-mails. Someone told me that since I did my due diligence, since I tried, if Virgin gave me trouble later, I could pull out the e-mails and show that I tried and that they did not give me an answer.

105. This is a common belief because of the Copyright Term Extension Act (CTEA), which extended the term twenty years. However, a new crop of unpublished works come into the public domain every year. See 17 U.S.C. § 303(a).

106. SITA SINGS THE BLUES (Nina Paley 2008). *Sita Sings the Blues* is a feature length film by Nina Paley that is available online, <http://www.sitasingingstheblues.com>.

107. PANDORAMA (Nina Paley 2000).

108. THE REZILLOS, *Yeah Yeah*, on REV-UP! (Vinyl Japan 1994).

So, I had that experience, but that did not make me anticopyright. However, I was beginning to question it; not necessarily the fundamentals of copyright, but I thought that it was terribly managed and people should keep better track of their works. I also thought the term should not be extended and that you should have to renew copyright.¹⁰⁹ I made independent short films for the next ten years and the whole time I was working on *Sita Sings the Blues*.

From the very beginning, I wanted to use old songs from 1927-1928 by Annette Hanshaw. The songs reminded me of the “Ramayana”¹¹⁰—an ancient Indian epic. I had never heard her before, and most people I knew had never heard her. There were no Annette Handshaw records issued in the United States, which I learned was because of the *Naxos* Case.¹¹¹ It turns out that even though recordings were public domain everywhere else in the world, they might not have been in public domain in New York,¹¹² and that meant that no American publisher wanted to deal with that. We have since released a soundtrack of the movie with the Annette Hanshaw songs I used with the understanding that if we need to ban it in New York, we will.

QUESTION: We have had some issues regarding sound recordings with the Durationator®.¹¹³ Are you only concerned about New York? Is New York the only state people seem to be worried about?

ANSWER: I do not know that I am worried. I think most people think that if it is illegal in New York you cannot release it in the United States. I had these student attorneys from American University who did great work and did all this research for the project. I got them from Electronic Frontier Foundation (EFF). There were all these myths flying around from artists, and I really had to use those songs, so I contacted the EFF

109. Under the 1909 Act, renewal was required after the first twenty-eight years. The 1976 Copyright Act is an automatic single term, consisting of life of the author plus seventy years. 17 U.S.C. § 302 (2006). For older works, the term is ninety-five years from the date of publication. *Id.* § 304. Most of the works that Ms. Paley wants to use fall under the second category—works published first under the 1909 Act but that were still under copyright as of January 1, 1978, when the 1976 Copyright came into force.

110. VALMIKI, RAMAYANA (n.p., n.d).

111. *Capitol Records, Inc. v. Naxos of Am., Inc.*, 274 F. Supp. 2d 472 (S.D.N.Y. 2003); 17 U.S.C. § 303(b). The *Naxos* case concerned sound recordings in New York State. The court determined that even though the works at issue were in the public domain in the United Kingdom, they were still under copyright in New York State until Feb. 15, 2007.

112. *Naxos*, 274 F. Supp. 2d 472; 17 U.S.C. § 303(b).

113. The Durationator® Experiment is a Web-based copyright tool invented and researched at Tulane University Law School. The project is directed by Dr. Elizabeth Townsend-Gard.

first to at least know what risks I was taking. They said the songs were in the public domain outside of New York. As I said, I am prepared to ban the film in New York. But, I am so glad I went through all this because I would have just said, “So-and-so owns this, so I cannot use it.”

Going back a little, I was working on this film, and I decided just to go ahead and take the risks, not worrying about asking for permission until I was done. I was mostly producing *Sita Sings the Blues* between 2005-2008. During those years there were lots of stories about small films that distributors paid lots of money for, then cleared the rights themselves. By 2008, when we premiered *Sita*, all those distributors were going bankrupt, and those million dollar deals were changing to \$10,000 deals. Further, there was no way they were going to clear the rights themselves. They would only accept films with the rights already cleared.

Before I was able to accept their very tempting \$10,000 offers, which were not that tempting, I had to clear the rights. So, I set about trying to clear the rights, with the students doing the research. The problem is the musical compositions that underlie the recordings. This is how I learned that there are multiple rights associated with every song.

Most artists, including most musicians, have no idea about multiple rights. They do not know the difference between mechanical rights and synch rights.¹¹⁴ Even when I tell people about synch rights they say, “If you get rid of the lip synch you can use the music.” But, any moving picture with music is related to synch licenses. So, the synch licenses were the big issue, which I was not prepared for. I knew that people could record covers of the songs so I could not understand why we could not put them in the movie. It was because we had pictures with it. I also learned about mechanical licenses and how the prices were regulated.

One time, I had this idea that I could release just the audio from *Sita* on a compact disk and sell it, and it could come with a free DVD that had no audio. The viewer could put them together if they wanted to. I wanted to do that, and I was looking for programmers who could make something that I called an “Insyncherator,” so that the audience could

114. A mechanical license is a license that grants certain limited permissions to work with, study, improve upon, reinterpret, and rerecord something that is neither a free/open source item nor in the public domain. Within the music industry a mechanical license gives the holder permission to create copies of a recorded song which they did not write and/or do not have copyright over. A synchronization or “synch” right involves the use of a recording of musical work in audiovisual form: for example as part of a motion picture, television program, commercial announcement, music video, or other videotape. Often, the music is “synchronized” or recorded in timed relation with the visual images. Synchronization rights are licensed by the music publisher to the producer of the movie or program.

synch them back up. But that did not happen. I do hope somebody does that because it would be a great way to evade those synch licenses. In the end, it fell on my team and me, which largely consisted of my mom, who is a retired MBA, to contact these organizations. We tried. We called and called and they gave us the run around.

QUESTION: What did the owners of the songs say to you when you contacted them asking to use their songs? What was that process like?

ANSWER: There is the initial e-mail, then a vague response because none of them know whether or not it is in their catalog. "I don't even know where they are in my archive." They would always say, "So-and-so deals with this and she is out of the office until next month, contact us then." So we would contact them then and they would respond with something like "Please submit something that you cannot possibly know how to get, then get back to us later." There were months of this.

So, I had this film that I was trying to get out and broadcast. There was a runaround and it became clear to me that they only spoke to lawyers or agents or other intermediaries with whom they had relationships. So, it really fell on me to pay a lawyer to contact them. That was a great expense to me because it was at least \$10,000 just to approach them.

QUESTION: How did you find your lawyer? Did the students help?

ANSWER: The students were great, but they were not fast enough. They were students who had other things to do; they just could not devote all of their time to a project like this. Time was running out with film festivals coming up, which is also how I learned that it takes years to get permission for this stuff. So, at the time I had a sales representative for the film who was an agent who had experience making deals with distribution, which indicates that I was not a copyright rebel when I started.

I was trying to go the conventional route, so I had a sales rep. He was aware of these problems, and yet he ended up botching it pretty bad. I am still resentful that I had to pay all this money, and he dropped the ball on it. But, that is part of it as well. There were documents he was supposed to send and did not. All these delays were because people were not on the ball.

QUESTION: What were they trying to do? Were they just trying to make sure you had the licenses for your film?

ANSWER: Yes, to get permission to use the songs in the film. So the lawyer approached them and said, “This is an ultra-low budget film because the whole budget is under \$2,000, with 11 songs in it. We would like to use them all. We would like to negotiate the rights for it.” So, all of these licensors came back with “We will not even talk to you unless you give us \$500 immediately and sign this thing that says you promise not to make any money off the film, and you promise to only run this in film festivals for one year. After that year, the license expires and you cannot use it anymore at festivals either.” That was what they required. I had to sign licenses just to continue with the negotiations. It was called a festival license, so I signed it. That ended up costing \$5,500. That was just to talk to them and there was no wiggle room. I had no choice. The lawyer said I had to pay them and that copyright protects me too so I should be grateful.

Then I had to find the money, and, in addition, I had to sign something that said I could not make any money off the film. I was worried about how I would get \$5,500 if I could not make any money off the film. But I agreed to sign it. I was hemorrhaging money.

On my Web site is a chart that has the names of all the different licensors and the percent they own because each song has multiple licensors and it changes in each country.¹¹⁵ That chart should give you an idea of what I had to go through. They all came back saying, “This song is between \$20,000 and \$25,000 for the song across the board, no matter who you are,” saying that was their bargain basement license for small films.

QUESTION: Are you still using the one-year license? Does it only cover use in festivals?

ANSWER: No, that was just for the festival license—that was just to talk to them, but if you want a better deal than that, it will be \$25,000 per song. It came out to be about \$225,000, more than the budget of the film itself. And obviously they did not particularize it. They had a list. It does not matter if it is high or low budget, that is just what they say and of course every time I had to go back to them, I had to pay the lawyer. So, this was very prohibitive. I am sure this model is not set up as a way

115. Nina Paley, *Frequently Asked Questions*, NINAPALEY.COM (Nov. 15, 2010), <http://blog.ninapaley.com/2010/11/15/frequently-asked-questions/>.

to license songs. I think it is set up as a way to keep small filmmakers from competing with the big corporations because it turned out that the corporations that own the songs also own the movie corporation and distributing channels.

I do not think it is a conscious thing, but it is probably more just a business system that has its own way of maintaining itself. Sony makes money making big movies and selling them—they do not make money from selling songs to small filmmakers. If I had just gone away, it would have been just fine with them. But, there was no way I could do that.

This was when my attitude towards copyright really started to change. As I was in the thick of the system I was really starting to change my view, and people would say, “You may not like it, but copyright protects you as well, so you should do this stuff anyway and not complain.” That was when I started to say, “How important is this system, and how much am I really benefitting from a system that does not really help me or other filmmakers like me?” At the time, I was on the festival circuit, and I do not think I met a filmmaker who did not have a self-censorship story surrounding copyright. Filmmakers do this all the time where they have to either kill the film altogether or create new scenes which are really contrived. Then they have to redo something two years later with new people, and it really compromises the whole integrity of the film. Or they fight it and they do not change the film, and then there is no way for them to get it out there because it is illegal.

At that point fans were supporting me directly. I was appalled when someone said to me, “Get your fans to pay for it.” To me that is not at all what fan supported art is—fan supported art is about paying me because I need to eat and they love me. I am not going to ask my fans to support me by paying these horrible extortionists and this horrible system. That was the most offensive suggestion. I, of course, was exploring all the fair use projects I could. Stanford was looking at it, but they said there was an eighty percent chance of not being able to justify it in a court because it is not a documentary, and there is just no precedent for fictional films in this kind of fair use.

QUESTION: So the problem is, it is not a parody. It is a very hard argument to say that this is commenting on the song. An argument could be made that the narrative is commenting on the song, but it is a much harder argument because courts will have to go out on a greater limb

than even the *Salinger* case¹¹⁶ and Tony Falzone (Stanford). They probably just did not think that it would necessarily work.

ANSWER: Right, he was willing to do it on principle, but it would have taken years, and I wanted the film to be released. The fair use argument is that there is a thesis—there is an ancient story that is expressed throughout time and place, and it uses these historical songs to express that. That is very different than had I just made up cute songs about it because then that would just be a modern interpretation of the Ramayana. But what it is really saying is that this story transcends time and place because it keeps coming up over the course of history—through human culture—and it may not have any connection to the Ramayana. They certainly were not writing those songs about the Ramayana.

I could have made the same points in a documentary with a narrator saying words and courts would say “Oh yes, that’s a documentary, so it is protected”—maybe. But the fact that it is fiction and animated, they will not accept it.

So at that point, I spent every night scouring the Internet for anyone else in my situation also fighting against these practices. I found questioncopyright.org,¹¹⁷ and I contacted them. They got back to me very quickly, and we became collaborators. They were just the right fit, and they helped. They are a nonprofit, and they have their network of mostly free software people. There is serious overlap between free software and free culture.

Karl Fogel founded questioncopyright.org. When I initially saw the Web site, I thought it was way too radical for me, because Karl was a copyright abolitionist. Even though I thought the copyright terms were too long, the way they were managed was wrong, and that there should be a registry to let people know who owns everything, I still thought that copyright was going to benefit me and was valuable to me. However, after several months of having this all sink in, I began to ask myself if I really needed to have my works copyrighted. I thought I might be better off without my works being copyrighted—that was October 2008. I told questioncopyright.org that if I could not release my work under

116. *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).

117. QuestionCopyright.org is a U.S.-based nonprofit organization dedicated to expanding the range of acceptable public debate about copyright, and to reframing the way people—especially artists and those who work with them—think about copyright.

copyright, that I wanted to clear the music so that I could release the film copyleft.¹¹⁸ They said they would help me.

I hired a copyright clearing house, which was less expensive than the lawyers, and they negotiated a step deal, which took a very long time. Rather than clearing everything outright, I pay a large amount once, and make additional payments for every 5000 sold or every million dollars it makes at the box office, like that would happen. We negotiated it, and it took so many months even after they had all agreed to it, but once all that happened, basically it was about \$50,000 to decriminalize the film. The total legal transaction cost was about \$20,000, which was very low, because a lot of people were working for free or at bargain rates. So it was \$70,000 all together to make the film legal to share for free, and all I had to do was keep track of how many copies were sold.

As soon as it was cleared, I put it under a ShareAlike¹¹⁹ license and encouraged as much copying as possible. That was one of the best things I have ever done. I have done so much better with copyleft than copyright, so I am converted. My experience with copyright is that it has really gotten in my way and in the way of my fans. The audience really dug this. People copy things online and they do it with guilt and fear. I was saying “Copy this and do whatever you want: sell it, distribute it, make whatever money you want off it.” It freaked people out.

QUESTION: With your contract, you could not make money off of it, but a third party could, right?

ANSWER: No, a third party has to make those payments—that is why I have the chart. I make it explicit, you can sell it but you still have to pay the licensor, and the chart tells them how much they have to pay for each copy to each licensor. I make it as explicit as I possibly can. I have to disclose this information about royalty payment to the distributor of the films because these payments have to be legally paid. These licensors did not want me to disclose the information publicly. They had boilerplate contracts and we did not have room to negotiate them, which was weird because I have to tell my distributors how to make the payments. Since my distributors are the public, it was a decision I had to

118. Copyleft is a play on the word copyright to describe the practice of using copyright law to offer the right to distribute copies and modified versions of a work and requiring that the same rights be preserved in modified versions of the work.

119. A ShareAlike license is a licenses created by Creative Commons that allow the distribution of copyrighted works.

make. So we will see how that turns out, see if the licensors consider that breach of contract.

QUESTION: How has this changed how you use cultural works in your art now? How has this changed how you work?

ANSWER: I think it is a good thing that people wait to look into it until the end. If you looked into it ahead of time, people would not do anything because art should not be secondary to law. It blows my mind and angers me that law is involved with art at all; the same way that it angers me that the law is involved in people's sex lives. Art is a very primal and personal thing, and the law telling people what art you can and cannot make is appalling. So the less people take that into account at the beginning, the better.

It does mean you will have hassles at the end, but what artist does not have hassles? You have got to be brave. Philosophically, my attitude is that if I am really moved to do something, I will do it, and if that is in violation of the law, I am still going to do it. Obviously not a gratuitous violation, but if my muse ever tells me again to do something that is not legal and will drag me through a copyright clearance thicket, I will do it.

I feel such revulsion toward copyright and people that copyright everything. I am into textile arts right now, and I am very passionate about this right now. I am making quilts using only solids. There is a whole world of printed fabrics, but people copyright them. Certainly I could make a quilt with some prints and sell it—technically I own it. But I am just disgusted by the idea of taking in something that somebody claims they own, even though I can legally do it. I am just repulsed by it. A copyright symbol may as well be the radioactive sign. It is hostile to other artists, to the culture of art overall, and I prefer not to touch it. Not because I am scared, but because I prefer not to encourage them. I do not want to put my love into this thing where someone is going to claim that they own something that cannot be owned. Copying is an act of love, building on existing things is an act of love, and aggressive copyright protectionism is repulsive to me. I do not want to give them my love.

QUESTION: Do you have other artists who come to you with their problems now that you are so public with your problems?

ANSWER: Yes, I have certainly heard a lot of woes at film festivals, but people are very private about it. I have not done festivals in a while now, but I am always at them. Filmmakers would take me aside and say very

quietly about how they were hoping people would pirate their movie because no one was seeing it. But you cannot say that out loud. I know someone whose film was nominated for an Academy Award and it was a really big deal with his big fancy distributor—but they got nothing.

I have also gotten tons of “I had to censor my film” stories, but the reason that most filmmakers do not talk about this openly is that they want to make another film, and they do not want to anger or alienate the big film companies, which are Warner and Sony. If they are having a problem licensing they do not want to publicly complain because, ideally, they would get a deal with Warner or Sony. So, I have heard stories, but I cannot substantiate them for obvious reasons.

QUESTION: What should law students interested in copyright be thinking about and doing?

ANSWER: One piece of advice is to read the blog “Techdirt.”¹²⁰ There are all these case studies about what is really working for artists. Conventional business models that businessmen cling to are really harming artists and getting between artists and their fans. They are acting as gatekeepers; what we need are facilitators.

I would actually really love to be working on merchandise with *Sita*, but that industry is called licensing, and that is not what I am doing. I am endorsing, so I really need middle men and facilitators who understand the business to do that stuff. The thing is, I still really like money. I get more money copyleft than I would copyright. There are so few lawyers that understand this. So many cling to the copyright model. I shy away a lot when people say I know a lawyer who can advise you because they will cling to the idea of intellectual property.

I still live in a world where I need contracts, but I benefit from more savvy and radically copyleft, free software people. Rather than telling me to cling to copyright, they respect that I want to use copyleft. They understand that I have discovered there is a lot of money out there with copyleft.

QUESTION: Can you talk about how copyleft makes money?

120. See generally TECHDIRT.COM, <http://www.techdirt.com> (last visited Nov. 17, 2011).

ANSWER: I actually publish the numbers.¹²¹ Basically, the more people that share the film, the more they buy DVDs, the more they buy merchandise, and the more they send me donations—I put the numbers on my blog, *Nina Paley FAQs*.¹²² As of today I have made about \$145,000. All the publishers had originally told me that the best I could ever do in my wildest dreams over ten years with copyright lockup would be \$50,000. In one year I made \$145,000.

I make it as easy as possible for my fans to support me. I sell the DVDs myself and I accept donations. Anybody can distribute the film, but most people buying it want to make sure some money is going to the filmmaker. So, rather than selling off the rights with a licensing contract, I sell the endorsement that this is a creator endorsed distribution of the film. Merchandising with t-shirts and tchotchkes, screening fees. There are a lot of people who screen films with a budget, and I tell them screen the film and send me the budget. We do not do a contract; they just send me the money. There have been fan screenings where they collect money to screen the film and send me a portion. I have guidelines for how to do that on my Web site. The main thing is that the more copies people make the more valuable the work becomes. I am not just talking about my value as an illustrator—I have my pick of the paid work to do, if I want. And, of course, I get speaking engagements.

I am just really happy that law schools are teaching this now. There is a whole older generation of lawyers who are oblivious to this, and it is nice that there is a new group of lawyers coming up who are talking about this and who are aware of the issues that surround this problem.

VII. INTERVIEW WITH DAVID CARSON¹²³

QUESTION: How did you become interested in copyright law?

ANSWER: I was a reluctant law student. I was a history major and spent some time in graduate school studying Balkan history. I eventually figured out that focusing on that area in graduate school would really only lead me to a career as a professor in Balkan history and I began to

121. Mike Masnick, *Nina Paley Releases Some Data on 'Sita Sings the Blues': The More She Shared, the More She Made*, TECHDIRT.COM (Aug. 26, 2009, 9:50 AM), <http://www.techdirt.com/articles/20090824/1723375986.shtml>.

122. Paley, *supra* note 115.

123. Transcribed by Jessica Edmonson. Edited by Matthew DeLulio, John McNew, and Professor Elizabeth Townsend-Gard. The remarks herein are those of the author and do not necessarily—and at least in some cases, definitely do not—represent the views of the United States Copyright Office.

have second thoughts. So as a history major, with no marketable skills, what was I going to do? Go to law school, of course.

I went to law school and was not quite sure what I wanted to do with it. I thought at first that I would do something in the public interest, so I worked for the ACLU¹²⁴ and the Conservation Law Foundation in Massachusetts. But in my second year of law school, my girlfriend took a copyright course, and I thought it sounded interesting. So the summer between my second and third years, I got a job with a little copyright boutique in New York and learned copyright. I fell in love with it. I spent most of my time on a case where the firm was representing IBM. In the case, someone had made a cartoon character called SuperKernel. Supposedly, IBM had made a cartoon character that was similar, so I spent my summer dealing with SuperKernel.

Then I got back to my final year, and took copyright law. Fortunately, I had learned everything I needed to know about copyright law that summer, and the course was more of a review course. From then on it was copyright law and the First Amendment. Today, some people think that copyright law is on one side and the First Amendment is on the other side, and that they are fighting each other. But it was not always that way. The kind of people using copyright law—media companies, publishers, motion picture companies, and so on—care about the First Amendment as much as anyone.

There are still plenty of practitioners in the area of media law who are very adamant copyright supporters and very strong First Amendment supporters. Floyd Abrams, just last week, was testifying in front of the House Judiciary Committee on legislation that would allow the Justice Department to obtain orders to shut down rogue Web sites that are dedicated to infringing activities.¹²⁵ A lot of people are making interesting First Amendment arguments that this could be unconstitutional. But Floyd Abrams is in there saying, “if it is all infringing material, there is no First Amendment interest here.”

QUESTION: How did you get to the Copyright Office?

ANSWER: I spent most of the 1980s in southern California, where I grew up. I had a practice that was a mixture of copyright law and First

124. American Civil Liberties Union.

125. Testimony Before the Subcomm. on Intellectual Property, Competition, and the Internet, Before the H. Comm. on the Judiciary, 112th Cong., 1 (2011) [hereinafter Testimony] (statement of Floyd Abrams, Senior Partner, Cahill Gordon & Reindel L.L.P.), <http://judiciary.house.gov/hearings/pdf/Abrams04062011.pdf>.

Amendment Law. Then I got married to someone who, against all odds, hated California. She is from England. We went back to England for a few months—I was on sabbatical from my firm—but it was clear that that was not going to work out for the long-term. So we came back to Los Angeles for a few months, but my wife was not happy.

We compromised and went to New York, where I went back to the copyright boutique where I clerked. It was an interesting practice. One of the partners did technological copyright work. The other partner did authors' and media copyright work, which was of much more interest to me. Both of them were very tapped in to the Copyright Office. They knew a lot of the people, so I got to know them.

In 1997, they were looking for General Counsel in the Copyright office, and I was getting fed up with private practice. I had two small kids, and the commute home was an hour and a half, so the thought of going in-house at the Copyright Office sounded attractive. I thought it would be a very boring work life, dealing with copyright registrations and issues like that. But it seemed like the right choice. I was hired, and it turned out to be nothing like I expected.

I have dealt with registration issues, with the recent cases like *Muench v. Houghton Mifflin Harcourt*,¹²⁶ *Bean v. Houghton Mifflin Harcourt*,¹²⁷ *Alaska Stock v. Houghton Mifflin Harcourt*,¹²⁸ that have put our registration system into serious doubt and possible jeopardy. Those are some real battles we are dealing with now. Basically, someone at Houghton Mifflin Harcourt has come up with a theory that has put some of our copyright registration practices in jeopardy.

One of the great things I have been able to do, and it is one of the reasons why my job has been the best job a copyright lawyer could ask for, has been to get really involved in copyright legislation. When copyright legislation is being considered in Congress the Copyright Office is right in the middle of it. Usually at hearings the Register of Copyright will testify, so we provide the testimony. Even when there is not testimony, we work very closely with the House and Senate Judiciary Committees, which have oversight for all copyright legislation. They ask our views and they may or may not accept them.

126. *Muench Photography, Inc. v. Houghton Mifflin Harcourt Publ'g Co.*, 712 F. Supp. 2d 84 (S.D.N.Y. 2010).

127. *Bean v. Houghton Mifflin Harcourt Publ'g Co.*, No. CV10-8034, 2010 WL 3168624 (D. Ariz. Aug. 10, 2010).

128. *Alaska Stock, L.L.C. v. Houghton Mifflin Harcourt Publ'g Co.*, No. 3:09-CV-0061-H12H, 2010 WL 3785720 (D. Alaska Sept. 21, 2010).

The Office has always had a reputation, which I do not think is totally deserved, as being skewed in its outlook toward copyright owners. It is probably true that we have historically had a lot more contact with the copyright owners than we have had with the people on the user side but certainly not only with them. As a general rule, we have not gone and sought out people. We have taken a rather passive role, and I think probably the copyright owner has come to us more often.

One thing that has happened recently that has caused me to take a fresh view of how we do things in the Copyright Office is largely due to the Acting Register of Copyright, Maria Pallante. In connection with the rogue Web site legislation¹²⁹ I was talking about, she has reached out to stakeholders on all sides of the issue. It is very labor intensive. We could not do this on every issue, but this is very important, and Congress wants us to deal with it. I think that created a model for figuring out who has a stake in the issues and inviting them in, rather than just sitting and waiting for people to come to us.

I am also involved in just about every piece of copyright litigation in which the government gets involved. Certainly, in almost every case that makes it to the Supreme Court that relates to copyright, the government is going to write a brief. That is true in plenty of cases in the appellate courts as well. I have learned a few lessons. We do not go into court ourselves; the Department of Justice goes in for us. They are not copyright experts, so we have to prep them for the cases. They listen to our advice, but may not always take the suggestions. I have been involved in a number of the cases that have gone to the Supreme Court. In *Eldred*, I was in the case all the way.¹³⁰ In *Luck's Music Library*, I was in all the way.¹³¹ In *Golan*, I am still in it.¹³² I may not have control over it, but I get to help shape the arguments that the government is making.

QUESTION: What do you think about the notion, “traditional contours of copyright”¹³³ as a phrase?

ANSWER: Here is my reading on “traditional contours of copyright” law. There are two traditional copyright First Amendment safeguards: the idea-expression dichotomy and fair use. Then there is that famous sentence in *Eldred*, saying that First Amendment review is warranted

129. Testimony, *supra* note 125.

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

131. *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005).

132. *See Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).

133. *Id.*

when an act of Congress has “altered the traditional contours of copyright protection.”¹³⁴ When you read the context and logic of the argument, there is no doubt in my mind that the court meant the idea-expression dichotomy and fair use. It did not mean anything else. When the Tenth Circuit invented a “traditional contour of copyright”—and it is in my view an invention—“once in the public domain, always in the public domain,”¹³⁵ it was wrong on at least two fronts. First of all, that is not what the Supreme Court meant when it was talking about traditional contours of copyright. It really was, in my view, talking about two built in First Amendment issues that it had just spent some time talking about.¹³⁶ Second, if you look at the cases that the Tenth Circuit talks about, in support of the proposition that “once in the public domain, always in the public domain,” none of them are about taking things out of the public domain.¹³⁷ They are about the more general concept that an idea is in the public domain, and you cannot copyright an idea. There is no bedrock principle of copyright law that works cannot be taken out of the public domain. You cannot find a case where a court has ever addressed that issue.

QUESTION: When you look at the Tenth Circuit’s decision in *Golan*, they may not have gotten the decision right, but can you see what they were trying to do?

ANSWER: I have found all of these constitutional cases very interesting to deal with. When I went to the Copyright Office I stopped being a lawyer in many senses. One of the things that drove me to the Copyright Office was that in private practice you represent the interest of your client, whether you agree with him or not. It gets demoralizing after a while when you are representing a client that you do not believe in. At the Copyright Office I have never really had to be in that position. The Register of Copyright’s views have been very compatible with my own. It was rare for me to have to defend a position that I did not believe in. On the other hand, having been involved in each of these constitutional challenges to copyright law, on the merits, my personal views have often been on the other side.

Here is my paraphrase of *Eldred*: Congress has the power to enact really bad laws. Are there limits for how long the copyright term can be?

134. See *Eldred*, 537 U.S. at 220.

135. See *Golan*, 501 F.3d 1179.

136. *Eldred*, 537 U.S. 186 (2003).

137. See *Golan*, 501 F.3d 1179.

That is a difficult question. If Congress had said the term of copyright law was infinity minus one day, the Court would have said “no.” But if Congress had said life plus 170 years, or life plus 500 years, as a policy maker, I would be horrified. If I were a Supreme Court Justice, at some point down the line, I would struggle and find a way to say that is too much time. I think in principle I agree with the Court that “limited times” just means there is a limit, but it does not mean that there is any particular limit. Life plus seventy years is much too long, and I thought life plus fifty years was too long. It is not beyond the power of Congress to make change.

QUESTION: What do you see as the biggest issue facing pre-1972 sound recordings, especially in the context of federalizing them?

ANSWER: There are a bunch of issues. I think that duration is probably the toughest one. There are choices you have to make when determining how to deal with duration. When you look at how we constructed the Copyright Act of 1976,¹³⁸ which would be my starting point, we said “we’ll give them the same term we give to post 1978 works,” life plus fifty years, which later became life plus seventy years. If you did that you would be shortening the terms of a lot of these sound recordings, which politically would be very difficult. That might be where I would start.

We are doing a study on that, and reporting by the end of the year. I do not have an answer yet. Looking at the positions taken by various stakeholders, the recording industry does not want the term to be a day less than it already is. Of course, the users and digitizers want them to be shortened so they can preserve them.

QUESTION: How do you feel about the Mardi Gras Indian issue?¹³⁹ I am curious about pushing the boundaries of what qualifies as a sculpture.

ANSWER: We get applications to register their suits. The issue has not yet reached my level. If they have in fact been registered it is done with the visual arts division, which takes those applications. It is a general proposition that clothing is a useful article and is thus not copyrightable. That is a proposition in which I very strongly believe. I am not a fan of

138. Copyright Act of 1976, 17 U.S.C. § 107 (2006).

139. See MARDI GRAS INDIANS SEEK TO COPYRIGHT COSTUMES (National Public Radio Feb. 8, 2011), available at <http://www.npr.org/2011/02/08/133600362/Mardi-Gras-Indians-Seek-To-Copyright-Costumes>.

expanding copyright legislation to include new things, unless you can really make a strong case for those things being protected. My issue with the fashion design legislation is that no one has made a strong case as to why we need it. However, I am not so sure the Mardi Gras costumes are really articles of clothing. There is a case that they are really works of art. In any event, I certainly understand the argument that they are not just articles of clothing, that there is something unique about them.

QUESTION: Have you noticed any of the Copyright Office's policies changing when political administrations change?

ANSWER: We are the Library of Congress. Administratively, we are part of the legislative branch. The administration does not tell us what to do. When the administration changes, nothing changes at the Copyright Office. To the extent that we have to deal with political pressure—and as a general rule, we do not—it would come from Congress. The leaders of the House and Senate committees are the leaders of our oversight committees. They hold hearings periodically on the operations of the Copyright Office. There have been a lot of issues about the backlog of copyright registrations. The Judiciary Committee has been very concerned with that. We have had a lot of discussions back and forth about that. They are the folks who really have the impact on our operations.

I have worked with the DOJ¹⁴⁰ since the Clinton administration on copyright matters, and there have been one or two occasions in which politics might have had an impact on decisions on copyright matters. There were certain times that you could tell people were pushing a position for political reasons. I do not recall it ever working. But I think it is fair to say that the Clinton, Bush, and Obama administrations have all been pro-intellectual property administrations.

QUESTION: Your office is changing now that Mary Beth Peters, Register of Copyrights, has retired. Can you tell us what that will mean?

ANSWER: The Register of Copyrights is the head of the Copyright Office. She spends half her time explaining what that is. She is the person who sets the tone and makes the decision on what position we will take on matters of law and policy. Mary Beth was an incredibly effective leader. She will go down as one of the great leaders of the Copyright Office, along with Barbara Ringer. Not that there were no

140. The Department of Justice.

other great leaders; Mary Beth was just the complete package. Like most, but not all of the earlier Registers, she essentially grew up in the Copyright Office. It was not her first job, she was a schoolteacher, but I think she was still in her twenties when she came to the Copyright Office. She served for forty-five years, working her way up from the very bottom. She knew everything there was to know about the Office.

The Register of Copyrights job is in many ways a thankless job. To the public, you are the person who is advising Congress on policy matters. She would regularly testify in front of Congress, and the members of Congress loved her. She was our biggest weapon, and you could not ask for a better leader. So, the Register does set the tone. There was a great deal of respect for Mary Beth, not because she was the Register of Copyrights, but because of what she knew and what her values were. The next Register of Copyrights will have to earn that respect, and hopefully he or she will. For the overall state of the world, it may not matter much. But for the future of copyright policy, it can make a huge difference.

QUESTION: Do you have any impending fears or things you are very excited about?

ANSWER: I have a harder time now than at any point in my career seeing the future. If you believe in copyright, it can be scary. I can foresee a decade from now, copyright law may not resemble what it is now and not in a good way. I am not predicting this, but I can foresee this happening. We seem to be fighting a losing battle in terms of protecting works of authorship. You look at what is going on with the Internet now. You look at the fact that the recording industry has declined significantly. It is going to have a major impact on the music world. And it is not clear that without the traditional record companies, recording artists or musicians could find it as easy to make a living. Maybe they would, maybe they would not. While some people have found a way to succeed without the recording industry, I do not think most are doing as well.

As for the motion picture industry, while you might see statistics that they are doing well, if you listen to them, they are not so sure.

The problem is that as everything gets digitized, and becomes easily available on the Internet, these industries take the hit. P2P¹⁴¹ file sharing was bad enough. Now you have these websites that actually look

141. Peer-to-Peer.

legitimate. They take Visa and MasterCard, and to the consumer it looks like you are buying from a legitimate source but it is not. Copyright infringement has become too easy, and the effective methods to stop it are not apparent. I do not know if we are ever going to find a way to actually stop it. The best we can hope for is a way to control it. There has always been piracy, and the notion has always been to get it down to a level where we can deal with it. It is not so clear that that is the way it is going to be in the future. I got into copyright because writings are works of authorship. It was interesting. There was no Internet infringement at the time. I was dealing with issues of substantial similarity. I became a third-rate literary critic, and it was fun. It did not feel like I was practicing law. Copyright law to me is more about culture and not so much about technology. But it has turned into a very technology-driven form of law.

What is true now, that was not before, is that everyone can be an infringer, and that is scary.

QUESTION: The Google settlement was recently rejected, what are your thoughts about that?

ANSWER: The Google Book case was a hard one. We were very pleased with Judge Chin's decision because he followed our advice. What we said was the Google Books settlement would turn copyright on its head. There are many respects where I would like to turn copyright on its head. For example, I believe in formalities. I think that if you want to claim copyright in a work, it is not too much to tell people you want to claim copyright in that work. But, I do not believe in the Google Books model: unless you tell us we cannot use your work, we are going to use your work. Of course, you cannot look at the Google Books project and say it is not cool. It would be a shame if we could not find some way to make it happen. I would like to think we could make it happen.

The problem with the settlement, besides that it turned copyright on its head, was that it worked to the benefit of one single company. Another problem was that, had the court accepted the settlement, it would be creating legislation policy, but for only one company. The notion that two parties can essentially rewrite the copyright law for themselves, but affect so many stakeholders and the public at large, was disturbing. Congress is ultimately going to have to figure out how to address the situation.

We were very instrumental in conceiving and pushing the orphan works legislation. One reason it has not yet passed is that the Google

Books litigation intervened. If that settlement had been upheld, copyright law would look very different ten years from now. I think we have to wait and see what happens in the wake of the settlement.

The proposed orphan works legislation was based on a model where you make a reasonable search for the copyright owner to get the benefits of the orphan work scheme, but if it turns out the work was not an orphan, the most you would have to pay the owner is reasonable compensation, which in most cases is manageable for most people. That does not necessarily work in the context of a mass digitization project for out of print books. That probably can never happen if, for each of those books, you have to do a copyright search to determine who the owner is and where he or she is. What Google did was take the books off the shelves and scan them all. If it were post-1923, they would not give you the full display. The problem is, how do you deal with that? One way we have made it happen in the past, where licenses have not worked, is to make a compulsory license. Anyone who meets the requirements and is willing to pay a certain amount is permitted to engage in the conduct.

One could imagine a statutory license for the mass digitization of books where you pay a certain royalty for each book you scan. That goes into a fund that is ultimately given to the copyright owner if he or she can be found. Another option is some form of collective licensing. This would not be so different from the Google books settlement, but the main difference would be that Congress made the decision. Further, it would be a regime that would be available to everyone, not just one company.