

# Conversations with Renowned Professors on the Future of Copyright

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## Prologue

Elizabeth Townsend Gard\*

I want to thank Elizabeth Varner and William Gamble for all of their work on this Special Edition of the Journal. The vision of “The Future of Copyright” issue began a couple of years ago as part of a larger project. Funded by a Tulane Research Enhancement Grant, through the Usable Past Copyright Project, I wanted to explore visions of what the future may bring and how to make cultural works of our past more accessible through the creation of a software tool called the Durationator™. The Durationator™ will calculate the copyright status of any given work, and thereby identify public domain works for artists, scholars, filmmakers, and anyone else using cultural works. We see ourselves as making the public domain more accessible today and tomorrow, but we also wanted to know what others were thinking and doing to prepare for the future.

Professor Glynn Lunney and I invited six prominent scholars to share their ideas on “The Future of Copyright”: Diane Zimmerman, Pamela Samuelson, Mark Rose, Peter Jaszi, Graeme Dinwoodie, and James Boyle. They delighted us with their discussions and interviews, as well as at lunches and dinners throughout their stay. As a community, we were far richer for their time with us.

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The “Future of Copyright” Speaker Series also addressed the teaching of copyright law. I experimented with my Copyright course in the attempt to advance the students’ level of thinking beyond the basics that are taught in the Intellectual Property survey course. In this endeavor, the first day of class was used to review basic concepts through the *Suntrust* case,<sup>1</sup> and then we moved on to intermediate topics, using the casebook by Julie Cohen, Lydia Loren, Ruth Okediji, and Maureen O’Rourke.<sup>2</sup> Simultaneously, students were assigned specific topics related to our speakers that required them to read three to four articles by those authors and write a short paper. By the beginning of March, we had covered Intermediate copyright, read every piece of all the speakers, and were ready to tackle advanced work in preparation for the arrival of our guests. This Article is as much a product of this work as the work of our speakers. The interviews were conducted by *Tulane Journal of Technology and Intellectual Property* (JTIP) members along with students from the Copyright course and Glynn and myself. The “winning” exam (chosen by JTIP from the “A” exams) is a product of this work. The speakers helped to shape our thoughts, and we hope that we reciprocally contributed to our speakers’ thoughts as well.

Special thanks to Patricia Guzman, Andrea Brigalia, Andrew Miragliotta, and Cathy Dunn for all of their assistance in organizing the Speaker Series. Thanks to Kimberly Hart and Andrea Brigalia for transcribing the interviews. Thank you to the Student Bar Association and JTIP for providing funds for the afternoon tea with the speakers. Thanks again to the speakers, Diane, Jamie, Peter, Pam, Mark, and Graeme, for their willingness to participate. And special thanks to Professor Roberta Kwall, who suggested the idea of a Speaker Series in the first place, and has guided us in our development of a new Tulane Center for Intellectual Property Law and Culture from the beginning.

## I. INTRODUCTION<sup>†</sup>

JTIP had the wonderful opportunity to attend the lectures in “The Future of Copyright” Speaker Series and to interview the speakers while they were at Tulane University School of Law. This Article is a product of the hard work of Professor Townsend Gard, Professor Lunney, the

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1. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

2. JULIE COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* (2d ed. 2006).

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speakers, and the JTIP members. It provides a study of the foremost scholars' views on the future of copyright. Collectively, this Article provides a comprehensive view of the future of copyright.

The following presents a brief summary of the speakers' views on the future of copyright that was presented during their lectures and interviews. Professor Peter Jaszi of American University Washington College of Law discussed the future of fair use.<sup>3</sup> Jaszi believes that courts have moved from a modern perspective and have begun to embrace a postmodern perspective where individualism is discredited and value judgments are suspect.<sup>4</sup> Jaszi thinks that copyright can now be a cultural leveler because the courts can refuse to distinguish works of high and low authorship.<sup>5</sup> This shift in copyright is a change from a fixed modernist view to a more flexible postmodern view.<sup>6</sup>

Professor Graeme Dinwoodie, the Chair of Intellectual Property and Information Technology Law at Oxford University, discussed the international aspects of copyright law.<sup>7</sup> Dinwoodie believes that treaties are important to the future of copyright because they affect national laws, which are changed in response to international pressure.<sup>8</sup> International law sets boundaries allowing countries to create laws to balance users' and authors' rights.<sup>9</sup> Dinwoodie, however, believes that the balance is far more complicated than we assume.<sup>10</sup>

Professor Diane Zimmerman of New York University School of Law explained why traditional rules of copyright do not and will not work on the Internet.<sup>11</sup> She believes that copyright is impractical on the Internet because it is inexpensive and easy to copy works on the Internet, but hard to track and find the infringers.<sup>12</sup> There is also a cultural difference between the public's perceptions toward analog and Internet material.<sup>13</sup> People have a different sense of what they can do with a work

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3. Interview with Peter Jaszi, Professor, Am. Univ. Wash. Coll. of Law, in New Orleans, La. (Mar. 2, 2009).

4. *Id.*

5. *Id.*

6. *Id.*

7. Lecture by Graeme B. Dinwoodie, Chair, Intellectual Prop. & Info. Tech. Law, Oxford Univ., held via video conference between Chicago, Ill. and New Orleans, La. (Apr. 8, 2009) (video recording on file with *Tulane Journal of Technology and Intellectual Property*).

8. *Id.*

9. *Id.*

10. *Id.*

11. Interview with Diane Zimmerman, Professor, N.Y. Univ. Sch. of Law, in New Orleans, La. (Mar. 30, 2009).

12. *Id.*

13. *Id.*

they have acquired than what the law permits.<sup>14</sup> The average person does not think there is anything wrong with giving a copyrighted work to their friends.<sup>15</sup> Zimmerman believes copyright on the Internet will look different in the future.<sup>16</sup>

Zimmerman also believes that there is a move toward realism in copyright where the notion that copyright owners could and should control every instance of copying is eroding.<sup>17</sup> Instead, copyright owners are ceding that right in the face of impossibility.<sup>18</sup> Thus she believes that in the future copyright practices will be brought into line with the ways in which users interact with works.<sup>19</sup>

Mark Rose, an Emeritus English Professor at the University of California at Santa Barbara, explained the relevance of the history of copyright law.<sup>20</sup> Looking back at the early history of copyright, Rose believes that the end of perpetual licensing created a positive feedback loop that caused further growth.<sup>21</sup> He thinks, however, that there has been an increase in the proprietary element of copyright, and that the decision in *Eldred v. Ashcroft*, which affirmed the constitutionality of The Copyright Term Extension Act's extended protection for life plus seventy years, has effectively established a perpetual copyright.<sup>22</sup>

Furthermore, Rose believes that the modern conception of authorship does not work with copyright.<sup>23</sup> The concept of authorship is deeply embedded in our culture and it allows us to preserve the illusion that we have definable and durable selves.<sup>24</sup> While he is aware of the many people who have contributed to everything he has ever written or thought, Rose views the notion of the "self" as a necessary fiction.<sup>25</sup>

Professor Pamela Samuelson of the University of California at Berkeley Law School presented a plan for how copyright reform can be

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Interview with Mark Rose, Professor, Univ. of Cal. at Santa Barbara, in New Orleans, La. (Apr. 6, 2009).

21. *Id.*

22. *Id.* (citing *Eldred v. Ashcroft*, 537 U.S. 186 (2003); Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.)).

23. *Id.*

24. *Id.*

25. *Id.*

implemented.<sup>26</sup> Samuelson developed a list of ten possible ways to institute copyright reform.<sup>27</sup>

Samuelson listed a series of ideas that could change copyright, but she felt that they would probably not work. Samuelson noted that Congress could legislate copyright reform.<sup>28</sup> She feels, however, that there are political economy problems and that Congress is not receptive to changes in copyright legislation now as lawmakers are dealing with more pressing financial and military issues.<sup>29</sup> Samuelson also suggested that the intellectual property czar could push reform.<sup>30</sup> However, because the czar's job concerns enforcement, she believes that the czar should not be in charge of reform.<sup>31</sup> Another option she volunteered was to recreate the office of technology assessment, which could write a report at the request of Congress when complicated new technology is introduced.<sup>32</sup> Samuelson, however, believes that these methods were not feasible even though they are often suggested.<sup>33</sup>

Samuelson is far more optimistic about the following ideas to alter copyright law.<sup>34</sup> She believes that courts can reform copyright through judicial interpretation.<sup>35</sup> Reform is often more easily obtained in the courts than in Congress due to the lack of lobbyists.<sup>36</sup> Furthermore, she thinks that the Copyright Office is another option for implementing copyright reform.<sup>37</sup> She believes there should be further discussion to determine what could be done to make the Copyright Office more meaningful and forward-looking.<sup>38</sup> Samuelson also notes that scholarship and treatises can further copyright reform.<sup>39</sup> While she thinks scholars' works typically do not matter outside of amicus briefs, she believes that treatises are so powerful that they can in practice overrule the statute.<sup>40</sup>

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26. Lecture by Pamela Samuelson, Professor, Univ. of Cal. at Berkeley Sch. of Law, in New Orleans, La. (Apr. 13, 2009).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

Moreover, Samuelson believes that private ordering, a response to lack of public ordering about copyright, could be another way to implement copyright reform.<sup>41</sup> She also advocates for social norms and practices to change copyright.<sup>42</sup> She favors a Darwinian approach and believes that those who are best adapted to the environment are the ones who will survive.<sup>43</sup> Lastly, Samuelson believes that international bodies such as the World Intellectual Property Organization (WIPO) can reform copyright.<sup>44</sup>

Professor James Boyle of Duke University Law School provided insight into the future of authorship and the role of the public domain in fostering creativity.

JTIP has also included Blake Mogabgab's winning exam for Professor Townsend Gard's Copyright class. Mogabgab wrote his essay on user-generated content, which incorporates all of the speakers' views on the future of copyright. The interviews with Professors Jaszi, Dinwoodie, Zimmerman, Rose, Boyle, and the winning exam by Blake Mogabgab are included in this Article. JTIP hopes this Article will provide greater insight into the different perspectives on the future of copyright.

## II. INTERVIEW WITH PROFESSOR JASZI

JTIP had the honor of interviewing Professor Jaszi. In his interview he discussed a range of topics, including the relationship between custom and norm-making in copyright, how a shift from modern to postmodern thinking could influence our views of the law, and his (somewhat skeptical) view of the notion that "traditional contours" will affect the future of copyright.<sup>45</sup> He also discussed the direction of international copyright law and some of his recent work on intellectual property protection for the traditional arts.<sup>46</sup> This interview culminated in his discursive vision of the future of copyright.

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* After Professor Samuelson visited us, she went to give a talk at UNC, after which a good deal of her writing time became focused on the proposed Google Book settlement. We have included a piece that memorializes these efforts, and it is included in this volume as a substitute for the transcription of her interview, which in part also focused on this important topic. See Pamela Samuelson, *Pamela Samuelson's Letters to the Court: Concerns on the Proposed Google Book Settlement*, 12 TUL. J. TECH. & INTELL. PROP. 185 (2009).

45. Interview with Peter Jaszi, *supra* note 3.

46. *Id.*

QUESTION: Well, Professor Jaszi, it is really not so much a question as it is a comment. We were talking about your ideas regarding post-modernism slowly creeping into copyright law. For example, using custom to make fair use something that people actively engage in as a way to reset custom, moving it away from gatekeepers who require that you have a license. We were talking about how that whole idea is not just customary but it . . .

ANSWER: . . . represents a virtuous circle.

QUESTION: It is also very postmodern in the sense that it recognizes that the authority that gatekeepers have to tell you to license these products really only comes from us agreeing to do that, not because it is actually something that is mandated by copyright law.

ANSWER: I think that is an interesting perception and I like the connection you make with postmodern thought. Look at Professor James Gibson's piece, *Risk Aversion and Rights Accretion in Intellectual Property*.<sup>47</sup> It is an excellent piece, though there are some things in it I do not entirely agree with. His argument, in effect, is the one that you have just made: by buying into ubiquitous licensing regimes, users can influence the law in ways that actually are negative, at least from their own perspective. If you think of custom as a source of law in that way, in the context of fair use especially, it actually can have deleterious consequences, which Gibson refers to, quite correctly, as a kind of vicious circle. While I certainly agree that there is a risk, what we are hoping can be done in fair use is to create a virtuous circle—one that moves in the other direction, toward greater openness. That process involves using evidence of custom in a way that is liberating rather than restrictive. But I think Professor Gibson is right—and you are right—that the idea of looking to custom is neutral. It can produce a range of different possible outcomes—some of which one might like and some of which one might not like. Thus it is not just looking to custom that is important, but also thinking quite clearly about how you are looking, why you are looking, and what you are looking for.

QUESTION: Along those lines, Professor Jaszi, I studied how the *Documentary Filmmakers' Statement of Best Practice in Fair Use* traced back to some of the customs that the early documentarians were using and that are still utilized today, and looked at how those work against

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47. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007).

some of the law that is in place today.<sup>48</sup> Do you think copyright will ever move in a direction that is a more specific medium? For example, different fair use standards for films, books, visual arts, and Internet creations. If it does, could and should these differing standards be applied to genres within a medium, like a more liberal fair use standard for documentaries versus fiction films?

ANSWER: Let me begin with a general observation and then I will get to the question. The observation is that you are absolutely right that there is something about this project that resembled time travel. As we interviewed filmmakers, we tried to talk to people who were very well established, including some who had been making documentary films for twenty, thirty, forty, and at least in one case (that of George Stoney), more than fifty years. They told us, again and again, that the kind of uses of material that are controversial now—for which they have recently felt pressure to get copyright clearances and that they are now trying to deal with (once again) under fair use—are ones that twenty-five or even twenty years ago nobody would have even thought about. They would have simply used the material.

This is important because one of the interesting critiques I have heard of our fair use/best practices work with filmmakers is that what we describe as a custom is not that at all, but more like a preference: how people would like things to be, not how they actually do things. In fact, though, we discovered that these use practices are not just preferences, but also customs that go back in the history of documentary filmmaking even though they have been occluded in the last twenty years.

Let me also answer your question about whether we will see specific statutory standards for different kinds of fair use. My first impulse when I heard your question was to give a flippant answer: “I hope not.” In fact, I sincerely hope that our legislation does not move toward disciplinary (or other) subcategories in fair use. One reason is that it is hard to imagine a political process that would produce a new codification of fair use that was both wise and relatively specific. But the larger reason is the same one that causes me to hope that we do not amend section 107 at all, at least in the short term: as it stands, the existing section 107 already is an incredibly useful, dynamic, and open-textured piece of legislation.<sup>49</sup> It is flexible enough to adapt to change,

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48. AM. UNIV. CTR. FOR SOC. MEDIA, DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE (2005), [http://www.centerforsocialmedia.org/files/pdf/fair\\_use\\_final.pdf](http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf).

49. Copyright Act, 17 U.S.C. § 107 (1976).



which is something you would lose taking an approach involving detailed legislative guidance for specific anticipated instances.

Under such an approach, how would you even break down the subcategories? I am not convinced that we can tell today what the structure of particular fields is going to look like in ten years. For example, is the fiction/nonfiction distinction that now prevails in filmmaking going to continue to be a valid one? I am not entirely sure of that. We see a lot of blending in filmmaking practice, coming from both directions. So, for example, I do not think that it would be wise to distinguish the fair use rules between fiction films and documentary films. More generally, the structures of genre are necessarily fragile and I would not like our law to be too closely tied to them.

QUESTION: Building on that question, reading your work, this notion of creating customs and looking back and what you are saying about fair use is not throwing out what we already have. How does the notion of traditional contours fit within your idea of this postmodern turn? Do you see a place for this, and is it a concept that we should be exploring? Also, there now appears to be a turn to the First Amendment. How does that fit? They seem to be looking outside of copyright law to deal with the problems of copyright law. Do you think we need to figure out what the traditional contours of copyright are or do you think that is not a very fruitful exercise?

ANSWER: That puzzles me, too, because I do not know as a scholar how one would make that determination. “Traditional” is a very slippery word.

QUESTION: “Traditional” and “contours” are both incredibly elusive.

ANSWER: “Limits” is a nice hard word, but “contours” is a soft word. But to return, “traditional” can mean so many things. Presumably, it does not mean simply “conventional,” so there is some historical dimension to the idea of traditional contours. That worries me, of course, because over time there clearly has been a significant evolution in the way that copyright has taken freedom of expression (whether it has been called a First Amendment interest or something else) into account. For example, I would not want copyright thinking about fair use to be stuck with the “traditional contours” of 1960 or even 1980.

If you take a historical snapshot of copyright at any given moment, you see that similar interests are being accommodated in different ways. For example, fifty years ago, the fair use concept itself was much less developed than it is today. But what does that really tell us about

traditional contours? Certainly, there was much less fair use jurisprudence, but, on the other hand, perhaps we did not need it as much because other structures of copyright law were not so aggressively defined. The scope of protection was less, as was the reach of exclusive rights. Also, the penalties for copyright infringement were less extreme. In other eras, we find historical iterations of copyright law that are balanced—but in different ways from those in which we believe that ours today are or should be. How would one isolate the true “tradition”? My guess is that it will turn out to be less than meets the eye to the idea of traditional contours. For all of the reasons just suggested, it will turn out that this is an idea that is hard to operationalize judicially as a meaningful limit on the law.

QUESTION: Understanding traditional contours in a postmodern historical context is sensible, but it is just asking for people to take these modernist ideas of what history is and slap them onto copyright. It is very disturbing.

ANSWER: Very well said. What follows is a real digression but perhaps the point will emerge when I finish. Recently, I have been doing some work on law and the traditional arts in Indonesia.<sup>50</sup> One of the things that you see in such a culturally, ethnically, and linguistically diverse place, where there also is a long-standing, politically driven project of nation-building, is that deciding what constitutes “tradition” is both enormously important and enormously controversial. For example, when the dictatorship of Suharto, the so-called New Order, came into power in Indonesia in the late 1960s, one of their early initiatives was to decide what kinds of artistic expressions were *real* Indonesian traditions and what kinds were not. This was a process that generated winners and losers, depending on whether a given group’s music, costumes, or building style were chosen as traditional. So the notion that we can identify a generalized tradition in a way that is neutral rather than inherently political is questionable.

QUESTION: Professor Jaszi, if I could ask you to speak further on this, earlier in the class you spoke on the effect of postmodernism on traditional knowledge in indigenous culture. How do you think this effective postmodernism will affect the future of copyright in relation to traditional knowledge?

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50. LAPORAN PENELITIAN, KEBUDAYAAN TRADISIONAL: SUATU LANGKAH MAJU UNTUK PERLINDUNGAN DI INDONESIA (2009). An English translation of this report will be available soon at <http://www.wcl.american.edu/pijip/go/jaszi-traditionalculture2009>.

ANSWER: Over time, two problems have faced custodians of traditional culture as they try to get legal recognition for their artistic productions. One is that copyright itself is dominated by strong modernist constructs: the identifiable individual author and the fixed work, both of which sometimes are hard to locate in the traditional arts. In other words, one frequently does not know who started a way of singing or weaving, or even who exactly is continuing it. Traditional cultural production is a group process rather than an individual one, and—what is more—it is also very hard to define the product itself with precision. A lot of material is not systematically recorded (as in the case of music) and material that *is* incidentally fixed is nevertheless in constant flux; old weaving motifs, for example, are constantly being adapted to suit the needs and tastes of new generations of weavers. So those twinned modernist structures have been barriers preventing recognition of copyright protection for traditional culture.

One possibility is to acknowledge that copyright is a poor fit for the traditional arts and create a new kind of law—a *sui generis* legal regime—for traditional culture. The problem with that approach, which has been discussed in many places and even tried in some, is that no one has been successful in imagining an alternative that is really and truly liberated from the deeply embedded modernist structures of copyright law. Even though you change the superficial details, the structures do not go away.

For example, you could say that we are not going to have the author figure in *sui generis*, and as an alternative we will assign rights to the “community.” But if the community is going to be the author-substitute in a new law for traditional arts protection, the trouble begins all over as we start to work with this new concept. The community is not any less constructed a concept than the author. In an ethnographic sense it is probably an impossible concept—one that does not really correspond to any stable objective reality because the nature of collective social life is always changing. So when efforts to make new laws for traditional culture aim to escape the force field of modernist copyright, we are often pulled back by that structure’s massive gravity. That is the problem.

So what do I anticipate where protection for traditional culture is concerned? If I am right that copyright itself is beginning to feel the influence of the postmodern turn in the general culture (in much the same way that it assimilated modernist discourse in the late eighteenth and early nineteenth centuries), then we can expect to see the question of copyright protection for the old arts being revisited. Already, some copyright experts and bureaucrats are looking again and asking whether,

if it were possible to loosen the grip of modernist thinking on copyright, we could find more space for traditional culture within its existing scheme.

The best examples are found in Australia. There, people have been thinking about the problem of IP and aboriginal art seriously for more than twenty years. If you look at the older literature, you can read that there is no place for the traditional arts in copyright. Copyright is only about one thing, and the traditional arts are something else, that is, copyright is all about individual authors and the traditional arts are all about collective activity. But, if you look at Australian case law over the last ten years, you see something entirely different happening. Creative judges who have been schooled over the years in understanding aboriginal culture through their involvement in aboriginal land rights cases now are doing interesting things with copyright. They are finding ways to give traditional culture meaningful protection—not perfect protection but meaningful protection—under the existing copyright umbrella.

This is important because it will be much easier in many places in the world to open up some space in copyright than to create a new, autonomous, functionally independent, additional form of *sui generis* protection within the intellectual property system. It is also significant because where copyright as such is concerned we already have operational international treaties. If it is possible to make some space for traditional arts within copyright, the existing transnational legal structure will allow for the enforcement of claims across borders. That is important because often a custodial group's concern is not about something that has happened locally, but about an act of appropriation that has occurred in Europe, Japan, or the United States. Of course, it would theoretically be possible to create a new international treaty to link up new specialized national laws specifically designed to protect traditional culture. This is an approach currently under discussion in the Intergovernmental Committee of the World Intellectual Property Association. But in practice it will be enormously difficult to pull off, especially when there are very powerful countries, including the United States, that strongly oppose it.

QUESTION: Expounding more on your discussion of treaties, how do the concepts of American postmodernism, multilateral agreements, and international organizations like WIPO coexist?

ANSWER: Uncomfortably, I think, though, not because there is anything wrong with treaties as such. The basic framework of any

international copyright treaty is constructed around the principle of national treatment. At base, international treaties simply commit countries to recognize foreign works to more or less the same extent as they would recognize similar works of their own nationals. So it should be possible for one copyright culture to choose its own direction on issues like the ones we have been talking about—like the definition of authorship or the scope of fair use—without coming into conflict with the international copyright system.

The problem comes from a different source—what we might call international copyright diplomacy. In the setting of negotiating new multilateral treaties in WIPO or WTO, or in negotiating bilateral free trade agreements, powerful copyright exporters like the United States and the countries of Europe are trying to persuade others (especially developing countries) to accept more stringent minimum norms of protection. That is because setting floors for protection is the other thing international copyright agreements can do, in addition to providing for national treatment. So, over the years, treaties have included provisions requiring that protection must last for so many years, that certain kinds of works and rights must be protected, that certain remedies are required, and so forth. In general, the representatives who conduct international copyright diplomacy on behalf of the United States and the other copyright exporting countries are working for global adoption of highly protectionist minimum standards that have a strong modernist component.

This is nothing new. In the work that I have done on the Romantic author—that particular emanation of modernism—you will find me arguing that the rhetoric of authorship sometimes proves most powerful when it is deployed not on behalf of individual creators but in support of corporate copyright owners—whether we are talking about the stationers of early eighteenth century England or the international recording or motion picture industries today.<sup>51</sup> Over the centuries, various entities have made lots of headway in promoting their own interests by selectively invoking the author concept, and that is happening now in international copyright diplomacy. There is a real risk that powerful groups supported by national governments, and strategically adept at deploying the logic of authorship for their own ends, will manage to get strong new mandatory norms written into international agreements, which will then take many generations to eliminate—at the very best. It

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51. Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29 (Martha Woodmansee & Peter Jaszi eds., 1994).

is telling to me that when the United States went to Geneva for the diplomatic conference on the WIPO Copyright Treaty and Performances and Phonograms Treaty, or when (to name one example) it concluded a free trade agreement with the countries in the Andes, U.S. negotiators began with a list of demands for minimum legal standards to acknowledge and protect the value of American cultural production.<sup>52</sup> On the other hand, we never demand that other countries ought to adopt fair use in the way that we practice it in the United States. We are completely silent on that. In other words, we engage in one-way, one-sided negotiation which emphasizes the protectionist implications of the modernist structures of copyright. A postmodern turn in copyright thought is in no sense incompatible with the existence of an international system. But some of the ways in which the present international system functions, as well as the kinds of arguments that are characteristically made by the U.S. and its allies in international negotiations, are at odds with a postmodern perspective.

QUESTION: In your article *Copyright, Fair Use and Motion Pictures*, you discuss how you and Pat Aufderheide helped documentary filmmakers develop the statement of best practices and then you mention that we now have other statements of fair use practices for other practice communities.<sup>53</sup> It seemed that before you could actively begin to engage in the process of having people affirmatively do these things to make sure that what they are doing would qualify as fair use, there was an intermediate step where you look at court decisions that seem to indicate that the courts are receptive to that kind of an argument in this kind of medium. Will we have to wait to see that kind of receptiveness? I am thinking that maybe we will get to a point where we can have a statement of best practices for visual artists.

ANSWER: I understand it is underway, with the Art Law Section of the Association of the Bar of the City of New York taking the lead.

QUESTION: So are we just waiting for that kind of a signal from the judiciary for other types of works that traditionally get the so called thick protection like narrative films and novels? Are we just waiting for the signal from the courts that they would let us do it before we can do it?

ANSWER: I do not think anyone is waiting for an external signal. More accurately, we are all waiting for various communities to decide when and how they want to claim their fair use rights. And this is an ongoing

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52. WIPO Copyright Treaty, adopted Dec. 20, 1996, S. TREATY DOC. NO. 105-17.

53. Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 2007 UTAH L. REV. 715 (2007).

process. Educators, for example, are rediscovering the power of fair use. In the last few years, for example, Pat Aufderheide and I have worked with Media Literacy educators and with the OpenCourseWare community to develop their own codes of fair use/best practices. More groups will be taking the same path in years to come. I would not be surprised, for example, to see new interest in the fair use concept on the part of fiction film producers—given the ever-tightening cost crunch in which they find themselves today.

QUESTION: Professor Jaszi, I noticed that Lewis Hyde was on your best practices committee. I am reading *The Gift* right now and my question is twofold.<sup>54</sup> What are your thoughts on his research and ideas? What impact do you think his new work focusing on the created commons will have? In my opinion, it seems that Hyde is reformulating the postmodern theory that everything is borrowed and there is nothing new under the sun into a legal justification for a stronger public domain. Could his argument be construed that way, or am I off in thinking this?

ANSWER: Let me start by saying that Lewis Hyde, whom I have known for many years, is one of my heroes. In almost every class I teach, almost without regard to what the class is about, I find ways to introduce *The Gift*. And I am proud to say that Lewis has now become very interested in working on fair use/best practices for college and university teaching in the humanities. There is no incompatibility between promoting fair use on the one hand and campaigning for an enhanced public domain on the other. In fact, these represent two different but complementary approaches to the same problem: restrictions on access to information. Lewis recognizes that the struggle to maintain a meaningful functional public domain is really our own struggle, and that we cannot depend on courts or legislatures to do this important work for us. The Creative Commons movement is a great thing, and, along with other open access campaigns, it can solve many of the problems that constraint by copyright has imposed on our culture.<sup>55</sup> But there are other problems that will require fair use solutions, because there is a good deal of material, especially in the nature of commercial culture, that is never going to be available on an open license basis—at least in my opinion. So what Creative Commons and the campaign to reclaim fair use have in common is that they are both contributions to an enhanced functional public domain. Moreover, they are both activities that practice

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54. LEWIS HYDE, *THE GIFT: CREATIVITY AND THE ARTIST IN THE MODERN WORLD* (2d ed. 2007).

55. See Creative Commons, <http://creativecommons.org/about/> (last visited Oct. 22, 2009).

communities can do for themselves without waiting for anyone else to act.

QUESTION: In your 1996 article *Goodbye to All That*, you wrote, “[I]n today’s new discursive climate, those who care about the survival of the public domain must begin to find new, and newly compelling, vocabularies with which to articulate their concerns.”<sup>56</sup> It seems that is your current mission: creating new customs and documentary practices. Behind this notion that we must create new language or adopt new language, there is a kind of intellectual activism that you seem to be trying to encourage.

ANSWER: When I wrote that, almost fifteen years ago, I did not have much idea about what form that new language might take. About the time I wrote that piece, I was becoming embroiled in various efforts to influence legislative copyright policy, which took up most of my energy for a number of years. I spent inordinate amounts of time on copyright term extension, on opposing the obnoxious parts of the Digital Millennium Copyright Act,<sup>57</sup> and on advocating for various kinds of constructive legislative fixes (relating, for example, to the “orphan works” issue). I was very taken with the possibility of making a broad-based political movement around these issues. And from my academic work on the rhetorics of copyright, I recognized that having the right words would be a very important part of constructing an effective political movement. But I do not think I ever discovered the right metaphors. This time spent in the legislative wilderness was, overall, a strange experience, and one I am grateful to have had. But I will admit that it was also frustrating and somewhat disillusioning. The disillusionment was not with the legislative process itself, so much as it was with the seeming inability of copyright progressives—myself included—to successfully implement the strategy I was suggesting (though not very precisely, I will admit) in the passage you quoted earlier.

I am not sure I still believe that there is a set of new tropes that, if we could only find them, would be the master key to changing the direction of copyright policy. These days I am much more interested in what might be called “self-help” solutions. In addition, I am not confident that it will ever be possible to get enough people to take these

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56. Peter Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT’L L. 595, 596 (1996).

57. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).



issues seriously in a political sense to make a difference in the legislative process. So now I am more concerned with local rhetorics than with generalized ones. My work on fair use/best practices reflects a new interest in how the ways that particular communities think and talk about these issues can be projected forward—one that has displaced my one-time enthusiasm for finding a new one-size-fits-all vocabulary in which to talk constructively about the big issues. That is what appeals to me about imagining a postmodern take on copyright—one that is by its nature decentered and polymorphous and multifocal. Indeed, the very notion that there could be *one* postmodernist take on copyright in the culture is absurd, because we obviously would expect multiple visions to proliferate according to the communities involved. In this sense, a postmodernist move would be very different from the modernist one, which had a consolidating, centralizing, and generalizing tendency. I am still very concerned about whether the stakes in copyright policy can be persuasively and effectively articulated. But I am no longer sure that we need to have one new vocabulary as distinct from many new vocabularies.

QUESTION: It seems like your vision of the future of copyright is this postmodern vision of multivalent voices and customs and a messy, but vibrant copyright. Would you agree?

ANSWER: I am pretty terrified that if we attempted to rationalize copyright, we might end up with something worse than we have, simply because it would turn out that the people who had the most political power were not friendly to the idea of a more flexible or balanced system. Of course, it may be possible to do some strategic repairs on the current legislative vehicle. And I admire tremendously Professor Samuelson's effort to envision what a good copyright system would look like if we started with a clean slate. Obviously, the heuristic value of such a project does not depend on its realizability. My concerns, however, go back to what I was saying in response to an earlier question about the desirability of "fixing" fair use through new legislation. Would it be a good idea to revise section 107 so that it was much more specific and included special rules for different kinds of enterprises and creative practices?<sup>58</sup> My response was that I did not think so. I thought that in that specific area it was better probably to work constructively with all the messiness of what we have. And that is my general view as well. There are many voices out there that are beginning to be heard, but may

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58. See Copyright Act, 17 U.S.C. § 107 (1976).

never be manifested in the form of a million person march on Washington demanding rational copyright law. But they can be heard locally through open access projects and through the strong assertion of existing use rights—as, for example, by way of fair use. That is a large part of the good future that I imagine for copyright.

### III. INTERVIEW WITH PROFESSOR DINWOODIE

JTIP interviewed Professor Dinwoodie who shared his insights on how the international community affects copyright law in the United States.<sup>59</sup> He also explained his views on the international harmonization of copyright and the development of WIPO.

QUESTION: How do you think international pressure will shape the future of copyright?

ANSWER: The pressure is only likely to increase. However, the form and source of that pressure may be different than, for example, that which shaped international regulation of anticircumvention of technological protection measures in the WIPO Copyright Treaty.<sup>60</sup> I doubt that the near future will see many new global treaties on substantive copyright norms. But international pressure—that is, pressure from the ever-increasing international nature of commerce and culture—will not let up. That will generate private ordering arrangements that create international solutions even in the absence of treaties. Likewise, we will see a lot of international pressure exerted bilaterally through trade agreements, which will shape many countries' norms even though no global agreements are being reached. Despite the vision of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that international IP would be more legalistic post-1994, commercial and political power will continue to be important drivers of internationalization.<sup>61</sup>

QUESTION: Do you think the Treaty Clause<sup>62</sup> takes precedence over the Copyright Clause?<sup>63</sup>

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59. This interview was conducted via e-mail. E-mail from Graeme Dinwoodie, Chair, Intell. Prop. & Info. Tech. Law, Oxford Univ., to William Gamble (Sept. 21, 2009) (on file with JTIP).

60. WIPO Copyright Treaty, *adopted* Dec. 20, 1996, S. TREATY DOC. NO. 105-17.

61. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81.

62. U.S. CONST. art. II, § 2, cl. 2.

63. *Id.* art. I, § 8, cl. 8.

ANSWER: I have written about this at length in *Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*.<sup>64</sup> Without rehashing all of that argument, I think the question contains a false premise. I do not think that one takes precedence over the other. They are two alternative sources of lawmaking authority. In an era of vast international commerce, I think the key to understanding them is to recognize that there is a dynamic relationship between the two.

QUESTION: In Pamela Samuelson's article, *The U.S. Digital Agenda at WIPO*, which you included in your casebook, Samuelson voiced concerns that the U.S. delegation was attempting "an end run around Congress" by trying to include the U.S. digital agenda in the WIPO Copyright Treaty to force Congress to pass legislation under the Treaty Clause, which Congress had previously rejected.<sup>65</sup> In your article, *Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*, you indicated that the Treaty Clause should take precedence over the Copyright Clause, subject to "political realities."<sup>66</sup> What do you think about the possibility, and the process, that would enable one group to alter U.S. copyright law through a treaty at WIPO against congressional and public opposition?

ANSWER: My argument was a bit more nuanced than that. As I explained, "Subservience theory ignores the distinct concerns of the international process; autonomy theory presumes a separateness of domestic and international regulation that is illusory."<sup>67</sup> So, as I said in my answer to the last question, there is no hierarchy. Thus there is nothing inherently improper with the idea that advocates would argue for an international rule that shapes domestic policy. The key is to ensure that there is a proper procedural framework in which that occurs. Thus the nightmare scenario that you paint—"one group altering U.S. copyright law through a treaty at WIPO against congressional and public opposition"—should not, and I believe could not, occur. Of course, it is always important to ensure that international lawmaking is accountable. But, to go back to the 1996 example, the problem was not that the lawmaking which occurred in Geneva reshaped U.S. copyright law over congressional opposition. Instead, the problem was that *Congress* passed

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64. Graeme B. Dinwoodie, *Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*, 30 COLUM. J.L. & ARTS 355 (2007).

65. Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 374 (1997).

66. Dinwoodie, *supra* note 64, at 386.

67. *Id.* at 395.

a law that substantially over-implemented the international obligations assumed in Geneva.

QUESTION: In your casebook, *International Intellectual Property Law and Policy*, you included several articles that advocated for harmonization of international laws.<sup>68</sup> Your casebook was written in 2001, before the introduction of WIPO's Development Agenda.<sup>69</sup> Scholars, like James Boyle, have since noted that the "one-size-fits-all approach" of harmonization harms developing countries. Do you currently think harmonization of international laws should be a goal for WIPO?

ANSWER: Even before the first edition of the casebook was published, I, and many others, had noted that one size does not fit all. (See my *New Copyright Order*,<sup>70</sup> the *Integration of Domestic and International Lawmaking*,<sup>71</sup> John Duffy's article on harmonization in patent law,<sup>72</sup> or Rochelle Dreyfuss' writing on the WTO).<sup>73</sup> Again, however, I might question the premise: efforts at harmonization *need not inevitably* impose a one-size-fits-all solution. Harmonization is about convergence rather than uniformity. I do think that the need for harmonization remains a strong one in a number of areas, but the convergence that harmonization brings should occur with due respect for national, cultural, and economic differences. I should add that while this respect for differences may seem most acute in the context of North-South debates, it is more pervasive than that.

QUESTION: What are your views on WIPO's Development Agenda? Some scholars argue that the Development Agenda has been in play since WIPO's inception and has gone nowhere. Do you think the Development Agenda will result in substantive changes?

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68. GRAEME B. DINWOODIE ET AL., *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* (2001).

69. See World Intellectual Prop. Org., Overview of the Development Agenda, <http://www.wipo.int/ip-development/en/agenda/overview.html> (last visited Oct. 16, 2009).

70. Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2001).

71. Graeme B. Dinwoodie, *The Integration of International and Domestic Intellectual Property Lawmaking*, 23 COLUM.-VLA J.L. & ARTS 307 (2000).

72. John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685 (2002).

73. Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT'L L. 95 (2004); Rochelle Dreyfuss & Andreas Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997).

ANSWER: Certainly there have been instances where international IP institutions had regard for the concerns of developing countries. However, I think the formal Development Agenda that is now center stage is somewhat different in kind. This is not because it is the first occasion on which WIPO has been concerned about developing countries (I think that would be inaccurate), but because it is promoting a root and branch review of the procedures and objectives of international IP lawmaking. I think we are a long way from knowing what *substantive* changes will result from that debate. In the short-term, the principal changes are likely to be changes in focus, process, and tenor (or tone). But over time, I think we will see more international provisions addressing substantive *limits* on the scope of protection. Ironically, of course, we might expect to see the dueling stakeholders all switch their position on whether one size fits all as those provisions unfold. But that is one of the challenges for advocates domestically and internationally: resisting short-term strategic positions on lawmaking “process” that might undermine substantive objectives.

#### IV. INTERVIEW WITH PROFESSOR ZIMMERMAN

JTIP enjoyed an informative interview with Professor Zimmerman. Zimmerman expressed her dismay with the current state of copyright law and gave several suggestions for its improvements.

QUESTION: The term copyright was derived from the nature of the right that was originally granted—the right to control the reproduction of copies.<sup>74</sup> Do you think that controlling the reproduction of copies will be the key focus of copyright law in the future, or will there be some other focus such as the commercial exploitation of works?

ANSWER: My guess is that the focus will be on commercial exploitation. I think that if we focus on every instance of the unauthorized copying or performing of works, we are going to find ourselves in a quagmire from which we will not be able to extract ourselves.

In the future, we will concentrate our attention on trying to segregate out commercial users and controlling their uses, insofar as the copyright owner desires to do so.

QUESTION: We currently see difficulties in trying to assert this distinction in the area of copyright litigation where the commercial

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74. PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 3 (1994).

nature, or similarly, transformative use, is identified as the controlling legal principle.<sup>75</sup> However, these words have taken on a meaning quite divorced from their ordinary usage and have become, not a way to make a decision, but rather the conclusion itself.<sup>76</sup> You have written that whether the use of a work is legitimate may be decided according to a wide range of reasons, but you ultimately frame the question in terms of either commercial or noncommercial use, rather than transformative or nontransformative use.<sup>77</sup> Is there any way to avoid these defining terms?

ANSWER: Whether the problems associated with my defining terms are more or less troublesome than those associated with transformative and nontransformative is hard to say. I do admit that the commercial/noncommercial line that I am proposing has much in common with the notion of public performances for profit under the Copyright Act of 1909, which was used as the dividing line between copyright-protected performances and those that were not. That distinction was certainly problematic.

I do not think there is going to be an absence of difficulties, but it seems that with my commercial/noncommercial test we would at least know what we were looking for. Instead of asking whether a use is legitimate by determining whether it is a fair use, I hope that we can more usefully ask whether the use is generating a profit that should be shared. I think that a commercial/noncommercial line would be a way to narrow the area of dispute.

QUESTION: Is it relatively easy to spot when money changes hands?

ANSWER: Yes. It is my hope that it would be at least a bit easier than the fair use determination.

QUESTION: Would your noncommercial/commercial line be similar to what one federal court has suggested. That is, if you make a private

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75. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (criticizing *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir. 1992), and noting the lower court's opinion that all commercial uses are presumptively unfair); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 725 (9th Cir. 2007) (holding that defendant's use of thumbnail images on search engine was fair used based almost entirely on a finding of transformative use); Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990) ("Factor One is the soul of fair use. A finding of justification under this factor seems indispensable to a fair use defense.").

76. See *Perfect 10*, 487 F.3d at 725; *Acuff-Rose Music, Inc.*, 972 F.2d at 1436 (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 449 (1984)).

77. Cf. Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y U.S.A. 251, 268 (1998) (discussing the diminished usefulness of the transformative use analysis as an indicator of fair use).

personal copy for your own enjoyment, instead of purchasing a copy, would that still be a commercial use?<sup>78</sup>

ANSWER: No, I believe copying for personal use needs to be thought of differently, although I understand that many people believe that individual copying supplants markets. For one thing, individual copying is quite difficult to control, especially because attempts to do so can evoke negative publicity, and people who engage in such behavior do not think there is anything wrong with their actions.

Earlier this week, I spent a morning with a representative from a European government who was fairly distressed about the pressure that his and other countries have received from the United States urging implementation of a “three-strikes-and-you’re-out” rule for the Internet. From his point of view, the rule could be used to target ordinary people who are not criminals. His take was that even if he were to think that what those individuals are doing is not ideal, they are still not criminals and should not be treated as such by taking away their Internet connections. It seems there is a growing sense that we ought to think differently about how to approach this problem, and maybe distinguishing between people who make copies for their own use and a Web site that makes money from distributing copies would be a potential solution.

QUESTION: This has been an area that has tested boundaries. Do you feel the same way about the MIT student, LaMacchia, who may have started us down this road even before Napster? He set up a Web site that allowed anyone to make available software of any kind, but he did not charge for it and made no money on the Web site.<sup>79</sup> When the government tried to prosecute him criminally, they had to resort to wire fraud and other statutes.<sup>80</sup>

ANSWER: Right, and then they changed the law.

QUESTION: By changed, you mean Congress amended the Copyright Act?<sup>81</sup>

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78. See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912-13 (N.D. Cal. 2000).

79. *United States v. LaMacchia*, 871 F. Supp. 535, 536 (D. Mass. 1994).

80. See No Electronic Theft Act (NET Act), Pub. L. No. 105-147, 111 Stat. 2678. The stated purpose of the NET Act was “to reverse the practical consequences of *United States v. LaMacchia* . . . by criminaliz[ing] computer theft of copyrighted works, whether or not the defendant derives a direct financial benefit.” H.R. REP. No. 105-339, at 3 (1997).

81. NET Act, Pub. L. No. 105-147, 111 Stat. 2678 (codified as amended in scattered statutes of 17 and 18 U.S.C.).

ANSWER: Yes, but now I wonder if LaMacchia might have actually been considered an Internet service provider (ISP) and would have had a claim to some safe harbor under the DMCA.<sup>82</sup> This just goes to show how we have changed our attitudes about these issues as time has progressed. I think it is really interesting that LaMacchia was probably doing something he actually thought was socially useful.

QUESTION: Since he was an MIT student, might he have been a bit more radical than others?

ANSWER: He might have been; that goes with the territory. What I find especially interesting is that we no longer think about someone playing a role similar to LaMacchia's as an entity, at least absent inducement, that we would necessarily be going after, because we now view hosting as an activity that deserves significant protection.<sup>83</sup> Now, to find an ISP liable for failing to remove infringing posts, we ordinarily require copyright owners to give the host notice of the infringement and to monitor for such instances themselves.<sup>84</sup>

QUESTION: What about Napster and what followed?<sup>85</sup> If you draw the line between commercial and noncommercial uses, then it seems the people who are doing the sharing would be noninfringers, and without direct infringement, there would never be an issue of secondary infringement. Do you think that is the correct result, or would you draw a different line for people who share works on services like Napster?<sup>86</sup>

ANSWER: I understand the problem, and maybe the special facts of how Napster operated made the result in that case inevitable. I think they, Napster, were inducers; but, I worry that the court in *Grokster* went on to create a set of tests for secondary liability by inducement that will have negative consequences for hardware and software innovators in the future.<sup>87</sup>

What the United States Court of Appeals for the Ninth Circuit did recently—essentially saying that if you can provide a cheap and easy fix

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82. See Digital Millennium Copyright Act of 1998, § 512, Pub. L. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. § 512).

83. See 17 U.S.C. § 512(c) (2006).

84. See *id.*

85. This reference alludes to the peer-to-peer file sharing decisions in *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), and *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

86. Napster was found to have materially contributed to copyright infringement largely based on their provision of software, search engines, and centralized servers for peer-to-peer file-sharing users. *Napster*, 114 F. Supp. 2d at 920.

87. See *Grokster*, 545 U.S. at 936-37.



to prevent piracy then you have to do it—made me sort of cringe as a former torts professor and products liability litigator.<sup>88</sup> That is how design-defect litigation started and it did not end up well. I do not like the implications of that decision because I have seen where this kind of second-guessing about design goes, and it is not an edifying sight. But people now can easily obtain peer-to-peer software since it is all over the Internet. Hardly anyone needs to be told where to get it or how to use it. So intermediaries like Napster and Grokster are not likely to be needed in the future.

QUESTION: You have discussed how, in the future, there might be a need for a dual copyright regime: one for those who make hard copies of works and another for digital copies. How do you envision these working together, and what would the law covering digital copying look like?

ANSWER: I think a dual system is a real possibility. One place to start would be to clarify the law on copying for personal use of both hard and digital copies. Although this is something that Congress has never really done—except in the context of the digital audio recording amendments made to the Copyright Act—they could make it clear that individuals who make analog or digital copies for personal use will not typically be liable for copyright infringement.<sup>89</sup>

Admittedly, analog copying is much less threatening to copyright owners, but maybe it is time to resolve the question generally. Right now the law is quite unclear in both spheres. The one time the issue reached the Supreme Court, it concluded that it was fair use for individuals to use VCRs to copy television programs, at least for purposes of time-shifting.<sup>90</sup>

I think eliminating liability for many, if not all, personal uses would go a long way to rationalizing the copyright system. I also suspect there are other fixes that would be helpful, specifically in relation to the digital environment. For example, I think a lot of the possible applications that serve the public interest—archiving, remote access, special collections, and so on—very much depend on digital technology and you may want to make exemptions and special rules to permit some of these activities to go forward.

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88. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir. 2007).

89. *See* Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 (2006).

90. *See* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984).

QUESTION: What would you think about fitting the entire fair use analysis into a market usurpation approach? In other words, if you do not usurp a market, it is per se fair use.

ANSWER: Well, the problem with that is that you first must decide what you mean by a market. One of the real difficulties in fair use has been that courts in a number of instances have been willing to say that any use that you could possibly license was ipso facto a potential market.<sup>91</sup> That means that everything is a market and that anytime anyone uses anything without permission it cannot be fair. The circularity in the fair use analysis is very troubling. I do not see how the usurpation approach would get us out of that. In fact, I think that approach would be too forgiving of decisions that say the fair use doctrine is essentially not a very good idea and should be allowed to disappear.

QUESTION: As a former tort law professor, what is your opinion on the private facts tort, where one person discloses another's private information to the public against their will?<sup>92</sup> Is that tort plagued by definitional constraints that prevent its use against those who are not "press" in the media, as intended?

ANSWER: It is true that the private facts tort is historically a law meant to be used against the mass media, but it has also been used against bill collectors. There is a whole subset of cases involving collection agencies, and one of the reasons for this is the extreme tactics such agencies have used, like posting signs on peoples' cars at their workplace.<sup>93</sup> Many of the tactics are viewed as horrendous attempts to

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91. See, e.g., *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 145-46 (2d Cir. 1998) (reserving to the plaintiff a potential market it had shown no interest in developing); *Am. Geophysical Union v. Texaco, Inc.*, 37 F.3d 881, 898-99 (2d Cir. 1994) (reserving to the plaintiff a secondary market even though it had not fully exploited it); *Salinger v. Random House Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) ("[T]he need to assess the effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime.").

92. The private facts tort is a concept that grew out of the "right of privacy" as recognized by Samuel Warren and Louis Brandeis. Diane Leenheer Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 292 (1983). Their concepts led many states to allow recovery for the private facts tort. *Id.*

93. See, e.g., *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962) (discussing a creditor who stripped the plaintiff's car of tires in employer's parking lot, causing the plaintiff to become the subject of coworker jokes and derision); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) (noting where an auto repair shop owner posted billboard-size notice of plaintiff's failure to pay bill in window on main street of town); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959) (describing a bill collector who repeatedly and loudly demanded payment in front of customers in restaurant where plaintiff worked).

shame a person into paying money the agencies claim the person owes, and this has caused some courts to adapt the private facts tort to that group.<sup>94</sup>

There have even been a couple of cases of defendants saying highly embarrassing things in very public settings, like a restaurant, where the defendant has also been held to have published the information.<sup>95</sup> But, by and large, the line between the media and nonmedia has been the one the courts have used.<sup>96</sup> The court in *Florida Star* was quite suspicious of the wisdom of drawing that line and suggested that it was not such a good idea to allow a tort action against *Florida Star* that would not be allowed against a private backyard gossip.<sup>97</sup> Although the Supreme Court has never really been forced to address the gossip/press distinction directly, my sense is that they would find that you cannot have a valid tort action where only a small population has been singled out as potential defendants.

QUESTION: What about where an everyday computer user who is not technically considered the “press,” but is able to widely disseminate private information using the Internet?

ANSWER: I suspect that today such action would be treated as publication of information because the Internet has, almost entirely, broken down the distinction between publishers and individuals in that regard. Nobody knows exactly how to define a journalist or how we should classify bloggers. Insofar as mass dissemination is a critical part of the tort, it seems that if you quote someone on the Internet, and you were otherwise liable under your jurisdiction’s law, it would not matter whether or not you were “press.”

QUESTION: Getting back to copyright, different groups seem to have their own perceptions of what the principles of copyright are and what the intent of providing copyrights is. Do you see any need for educating the general public as to what copyright law actually intends to accomplish, or should we just leave it in the hands of experts?

ANSWER: In the past, I do not think much thought was given to educating the public about copyright law. Now, many copyright owners

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94. See cases cited *supra* note 93.

95. See, e.g., *Biederman’s of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959).

96. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) (criticizing private fact torts on ground that applies to media but not private actors); *Ali v. Douglas Cable Commc’ns*, 929 F. Supp. 1362, 1382-84 (D. Kan. 1996); see also RESTATEMENT (THIRD) OF TORTS § 652D cmt. a (1977).

97. See *Fla. Star*, 491 U.S. at 540.

would very much like to educate the public about exactly what the law says. However, although copyright owners have made some attempts, it turns out that the public really does not care so much about what the law is.

I am not sure what the best way to educate the public would be in terms of the principles and intent of copyright law. I think people clearly do not understand copyright law, nor do they understand when they are apt to become entangled in a copyright dispute. Oftentimes, even if they are the creators of the information, individuals do not understand that they may have some interest in the work that copyright protects.

Education is a good thing, but in my opinion, to a remarkable degree, people are guided by a good sense of fair play because they do not want their favorite artists to starve. Although there will be people who are not going to pay for something that they can get for free, a lot of people are willing to support things that are important to them. Consider the many not-for-profit causes like public radio, public television, and various arts organizations to which people voluntarily lend support. I do not see there being a mass outbreak of total immorality in the public at large, and would hate to see the copyright industry press so hard that they begin to cause people to perceive artists and the industry as the enemy. That would change the whole equation.

QUESTION: It sounds like you are saying that people's common sense and core values already include a fair idea of copyright. Are these just uniform human ideologies that we sometimes interpret differently but will eventually find a working solution between?

ANSWER: That is my sense. I would like the law to come closer to a set of widely shared values so that restrictions on use can be limited, but creators can nevertheless be compensated fairly. That may turn out to be very idealistic, and maybe we are going in the opposite direction from the one I suggest, but I think it is really interesting that even though only forty percent of people who downloaded Radiohead's album, *In Rainbows*, paid anything for it, Radiohead still sold three million copies and made a great profit.<sup>98</sup> There have been other such experiments. I do not know if anyone read my *Authorship Without Ownership* piece where

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98. The band Radiohead recently offered their album *In Rainbows* over the Internet, and customers could download the album for whatever price they were willing to pay. Radiohead sold a total of three million albums and the experiment was largely viewed as a success. See Greg Kot, *Radiohead's 'In Rainbows' Experiment Pays Off with 3 Million Sales*, CHI. TRIB., Oct. 20, 2008, available at [http://leisureblogs.chicagotribune.com/turn\\_it\\_up/2008/10/radioheads-in-r.html](http://leisureblogs.chicagotribune.com/turn_it_up/2008/10/radioheads-in-r.html)).

I discussed whether the Street Performer Protocol was entirely weird and outlandish or whether it had some possibility of working.<sup>99</sup> The Protocol plan is to promise the public to create a new work, but only if they will pay in increments as it is published.<sup>100</sup> That was how the vast majority of fiction writers in nineteenth-century England were paid, and they turned out to be very prolific.<sup>101</sup>

I was an English major in undergraduate and graduate school and believe that the Victorian novel is one of the great monuments of Western society. Very few authors who wrote those books owned their copyrights or enjoyed any long-term economic benefit from the popularity many of their works enjoyed, but they were still considered to be a well-paid sector of the professional working public.<sup>102</sup>

QUESTION: Can you please elaborate on how the subscription model developed, and why was it so successful?

ANSWER: The subscription model evolved in the publishing industry as a result of both technological and educational advances. It became much cheaper, because of new printing presses and technology, to produce longer works.<sup>103</sup> At the same time, because of improvements in the education system in Britain, more people became literate, thereby creating a bigger audience.<sup>104</sup> There was then an expanding market for the product, and authors and publishers had to devise a system to supply that market in an affordable way.<sup>105</sup>

They experimented with several different methods, some of which did not work terribly well, with the serial novel becoming a fairly big success.<sup>106</sup> An author would write a novel and then offer it in installments, with customers paying by the installment.<sup>107</sup> For the most part, even if the book was not completed before the first installment was offered, the authors finished their books, which is also pretty amazing.<sup>108</sup> A lot of professional writers utilized this method, including Dickens, who got burned because of the enormous success of the *Pickwick Papers*, for which he started out receiving a comparatively low sum per install-

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99. See Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1124 (2003).

100. See *id.*

101. See *id.* at 1128.

102. See *id.* at 1143-44.

103. See *id.* at 1133.

104. See *id.* at 1132.

105. See *id.*

106. See *id.* at 1154.

107. See *id.*

108. Cf. *id.* at 1160.

ment.<sup>109</sup> When the book grew greatly in popularity with each successive segment, he felt that he had been deeply injured by the fact that the publisher made much more money than he did.<sup>110</sup> He was one of the unusual authors at the time who insisted thereafter on holding on to his copyrights.<sup>111</sup> However, the average, even highly successful, author—take Trollope for example—did not want to hold onto his copyrights; he wanted to be paid a lump sum up front and avoid squabbles about what the publisher could deduct from his royalties.<sup>112</sup> It is just amazing that this was the usual approach. It was not until the end of the nineteenth century that a standardized system of ongoing royalty payments was introduced.<sup>113</sup> So there was a very long period, from about 1830 to 1880, when authors published both their fiction and nonfiction after transferring their copyrights to the publishers.<sup>114</sup>

Serialized fiction was also published in magazines.<sup>115</sup> They used another popular method at the time, which I call the filterer-bundler model. With this model, editors chose what they thought was really interesting and then bundled together a variety of different pieces so that readers would buy the entire magazine, even if they did not want everything in it.<sup>116</sup> It was a very interesting model and really shows how limited, in a sense, we are in our thinking about what methods create viable markets.

QUESTION: One of Peter Jaszi's conclusions is that there is about a fifteen to twenty-year gap between where copyright law is and where society actually is—that copyright is behind in some way—and he is very pessimistic about society finding a real solution.<sup>117</sup> You have mentioned that one potential solution is having a dual system. We have seen where legislators have tried to do that by creating things like the DMCA, which some consider a failure. Do you see a constant lag in legislatures passing laws that really are not in the public's interest, or do you think that one day law will catch up? And, if there is a solution, what would that be?

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109. *See id.* at 1147.

110. *See id.*

111. *Cf. id.* at 1142 n.84, 1147.

112. *See id.* at 1143.

113. *See id.* at 1143 n.88.

114. *See id.* at 1143.

115. *See id.* at 1154.

116. *See id.* at 1160.

117. Lecture by Peter Jaszi, Professor, Am. Univ. Wash. Coll. of Law, in New Orleans, La. (Mar. 2, 2009).

ANSWER: I think that the Copyright Act today looks a little bit like a junkyard because we started adding all of these technology-specific parts that were later outmoded as the technology changed. In this regard, I think that the safe harbor for ISPs under the DMCA may also have passed its useful time.<sup>118</sup> I think this happened because the DMCA, and other similar laws, were trying to tailor special enforcement rules to new technologies, while trying to keep the traditional copyright model intact.

Maybe we should finally say that there are some aspects of copyright law for analog works that we do not necessarily want to carry over to digital works. Maybe we would not have to worry as much about obsolescent provisions if we ask ourselves what is the potential of *X*, *Y*, and *Z*, and what is the best way to exploit that potential, rather than focusing on how to make the old copyright system applicable to *X*, *Y*, and *Z*. That would be a very different approach.

I also believe that the Copyright Office is a rather unique entity because historically, it has not had much regulatory power.<sup>119</sup> Joe Liu of Boston College has written some interesting articles about why new copyright provisions so quickly become obsolete, and he mentions the lack of regulatory power in the Copyright Office as one of the possible reasons.<sup>120</sup> Many other administrative agencies have rulemaking power to deal with problems created by new technologies as they come along and are able to modify the rules as conditions change.<sup>121</sup> The Copyright Office has had very little of that.<sup>122</sup>

QUESTION: Why do you think that is?

ANSWER: I do not exactly know why that is, and I will admit that the little bit of administrative power they did have in the registration deposit area was not always used so well. They do have some regulatory authority to make exceptions from the DMCA, but were timid at the beginning about doing so because they were not given much room to maneuver under a literal interpretation of the statute.<sup>123</sup> However, they have gotten much bolder recently and are really using their authority in a much more incisive and confident way. I do not know why they have not had much power in the past, but it could be that they evolved before the administrative state did. In any case, they have not been part of the

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118. See 17 U.S.C. § 512 (2006).

119. Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 95-99 (2004).

120. See, e.g., *id.* at 137.

121. *Id.*

122. See Diane Leenheer Zimmerman, *Adrift in the Digital Millennium Copyright Act: The Sequel*, 26 U. DAYTON L. REV. 279, 281-83 (2001).

123. See Liu, *supra* note 119.

regulatory agency tradition. I wonder if giving them more authority is not at least a partial solution to this problem.

QUESTION: Following up on that, the Register of Copyrights, Marybeth Peters, has recently spoken out regarding the Google book settlement.<sup>124</sup> Peters complained that their input was not asked for in reaching the settlement.<sup>125</sup> She said the settlement ignores a number of commissions that they have started, such as the orphan works commission, the library exceptions, and insightful recommendations to change the library exceptions that would allow third parties to create archives.<sup>126</sup> Do you think that Congress will start to listen to these recommendations by the Copyright Office or will the Copyright Office always be in the same position?

ANSWER: It has been very interesting to watch this whole process because I think Peters has been a very different Register of Copyrights from her predecessors. I think she started out as more of a traditionalist, but, particularly because of the Internet, among other reasons, she has evolved into much more of an active voice for the public interest. Recently at a conference, I presented a paper on living without copyright in the digital realm and she was one of the commentators on my paper. I remarked to her when I had finished that I was waiting to see what she was going to throw at me, and she started to laugh and said “I cannot throw anything because I actually agree with a lot of what you said.” But it will be very hard for the Copyright Office to refocus its role to become more of an intermediary between the public and the copyright owners, as opposed to a representative of the copyright industries, and still get a sympathetic hearing in Congress.

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124. Marybeth Peters, U.S. Register of Copyrights, Statement at Columbia Law Symposium: The Google Book Settlement: What Will It Mean for the Long Term? (Mar. 13, 2009), *available at* [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2009/march2009/google-conf](http://www.law.columbia.edu/media_inquiries/news_events/2009/march2009/google-conf).

125. *Id.*

126. The Copyright Office laid out their proposed compromise and strategy for dealing with the orphan works problem in their 2006 *Report on Orphan Works*, which recommends greater access and usability of works where valid copyright owners cannot be found, while still providing a mechanism for compensation to copyright holders who come to the forefront to claim their rights on orphan works. *See* U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS 93-95 (Jan. 2006), *available at* <http://www.copyright.gov/orphan/orphan-report-full.pdf>. The report spurred proposed legislation in the House of Representatives and the Senate in the form of the Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006); the Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); and the Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008). However, the proposed legislation has yet to pass. Marybeth Peters, The Importance of Orphan Works Legislation (Sept. 25, 2008), <http://www.copyright.gov/orphan/>.



Take orphan works for example. I think the Copyright Office came up with a very good compromise for dealing with the problem, and it looked as if it was actually on track to be passed. Then, photographers came out of the woodwork and the whole thing just tanked. The community of copyright owners still has an enormous amount of power, and it is going to be very hard for the Copyright Office to overcome opposition from the industry, despite the fact that I thought their task force's recommendations for revising section 108 on library fair use and the proposed orphan works legislation were, on the whole, very good and really quite forward-looking. Thinking about orphan works, I remember being at a meeting of copyright lawyers where many were adamant that the orphan works relief should not apply to any unpublished work. They really wanted it to be restricted to published works that were very late in their term of copyright, almost equivalent to what is in section 108 now for libraries, and that was not what the Copyright Office proposed in its legislative recommendations.

I think the Copyright Office has been doing a great job, but it is very hard to break the entrenched power of the industry. They do have an amazing amount of power. When you sit with representatives of sovereign states who tell you about the amount of pressure that their countries are under from U.S. trade representatives because the recording industry is so unhappy with file sharing, then you know that the copyright industries, whatever else is going wrong with them, have not lost their voice or the ability to get it heard.

QUESTION: You seem to be advocating a move away from the traditional contours language so that we do not get mired in history. Would you talk about the meaning of copyright law's "traditional contours" language?<sup>127</sup>

ANSWER: It would be nice if we had a general and serious conversation about what should count as traditional contours. I think that one of the traditional contours in the United States is that public access is a fundamental value of copyright; another is that copyright owners are entitled to compensation. I do not want to move away from either of those, but I suspect there are many different ways to maintain those fundamental values even if the final result looks quite different from the current law. It is very hard to know exactly what the Supreme Court had

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127. "Traditional contours" language first introduced in *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). See also *Golan v. Gonzalez*, 501 F.3d 1179, 1187-89 (10th Cir. 2007) (finding that keeping works in the public domain once they have entered is a traditional contour of Copyright and that any alteration of this feature should be subject to First Amendment scrutiny).

in mind when it talked about changing the traditional contours.<sup>128</sup> If you look at the difference between the 1909 Act and the 1976 Act, one would have to say that most of the familiar contours, many of which I might have considered at least “traditional,” are gone now anyway.<sup>129</sup> For example, the idea that a work must be published to get copyright protection was certainly “traditional.”<sup>130</sup> So I do not know what they had in mind. In the long run, I do not know what is going to come of the “traditional contours” language, but I am convinced that public access and public benefit are at least key fundamentals; you can change the law to promote those ideals but not to undercut them.

QUESTION: Some people think that if something is on YouTube, then it is public domain and anything can be done with it. There is a sense among these people that “we are going to use material that we think is in the public domain.” This attitude seems to be the public speaking out in some way against the recording industry, etc. Now we have a general public domain of sorts with MySpace, Facebook, and YouTube. How do these new players factor in?

ANSWER: You are talking about people who have the expectation that if something is online they can use it. They are not the only ones. Think about the Internet Archive, which preserves content posted on the Internet.<sup>131</sup> Their assumption is that, unless someone affirmatively opts out, there is an implied license to copy something just because it was posted online.<sup>132</sup> Once in a while, someone will object to having a posting included in the archive, but I think it is interesting that this does not happen that often.<sup>133</sup> You have to ask yourself, “What is the logical implication of the fact that you voluntarily put something online for other people to see? How much intent to control is it reasonable to attribute to you, if you put it up there?”

There is a British art collector named Charles Saatchi who has created a very elaborate online art gallery where art students, artists, and so on can post their work online and hopefully sell works directly to the

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128. See *Golan*, 501 F.3d at 1188-89.

129. For an overview of the differences in Federal Copyright protection under the 1909 and 1976 Acts, see *Martha Graham School & Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624, 632-36 (2d Cir. 2004).

130. See *id.* at 632-33.

131. See *Internet Archive v. Shell*, 505 F. Supp. 2d 755, 760 (D. Colo. 2007); About the Internet Archive, <http://www.archive.org/about/about.php> (last visited Oct. 11, 2009).

132. See *Internet Archive*, 505 F. Supp. 2d at 760.

133. See, e.g., *id.*

public.<sup>134</sup> There is nothing that I have been able to find that explicitly discusses this, but I would assume that a lot of people are going to copy images from that gallery. They will not have the original artwork, that is for sure, but what is the appropriate assumption if you put up a digital image of your painting hoping to get someone to buy it? Is there a kind of implicit understanding that people might want to use it for their computer wallpaper? In contract law we deal with the problem of missing terms all the time. One area we look at is what one might assume from normal practices in the area. I think we will need some of that reasoning to make sound rules about what can and cannot be copied from the Internet as well.

QUESTION: On the other side of the coin, there has been a whole smorgasbord of examples of how digital rights management systems (DRMS) are abused by companies. For example, many companies employ rootkits, and iTunes has similar programming, which can prevent full use of rightfully purchased music and videos.<sup>135</sup> Because having Congress step in might not be the best approach, what do you think should be done in order to encourage more transparency from these companies? On the other hand, if you do not have Congress doing it, who will?

ANSWER: I think that it would be useful for Congress to give some authority to the Copyright Office to monitor these types of protectionary mechanisms. Congress could also require that companies tell people who purchase products with DRMS that they are in fact present, what they are doing, and what limitations on use they impose.

None of this is going to be a complete solution from the consumer's point of view, because the companies can couch this information in ways that make it impossible to understand, or make it so long and boring that no one will read it. Consumers already have developed the attitude that whenever they want to download a piece of software, they have to say "I agree, I agree," because they figure, "what is the point in arguing about it?" They need to update their software, and they cannot continue to use the older version. So, while this approach might not help, it strikes me that it would at least be worth trying.

QUESTION: What about possible penalties for companies that do not elaborate on what their DRMS do? Could fines be a solution?

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134. See Saatchi Online Home Page, [http://www.saatchi-gallery.co.uk/saatchi\\_online\\_index.htm](http://www.saatchi-gallery.co.uk/saatchi_online_index.htm) (last visited Oct. 11, 2009).

135. See Nicolla Lucci, *Countering the Unfair Play of DRM Technologies*, 16 TEX. INTELL. PROP. L.J. 91, 94-98 (2007).

ANSWER: Well, that is possible. Frankly, one reason I am worried about eliminating class actions is that we may limit the potential for a suit by those who had their computers damaged by some of these programs or their rights unfairly restricted. There seems to be an issue akin to products liability here and a class action is the only practical way to challenge this sort of problem. There has to be some way to dissuade companies from doing things that are intentionally overly restrictive. I think those are the kinds of things we should be thinking more about. Rather than simply passing a law that says we are going to give companies a veritable palisade of protection for their DRMS once they put them in place, I would like Congress to say, "Okay, if you want to do this, go ahead, but you had better tell people what it is you are selling them."

QUESTION: In light of the orphan works legislation and the Google book settlement, do you think that passing legislation is better than creating a private rights registry and clearinghouse?<sup>136</sup>

ANSWER: I like the clearinghouse idea. I am of the opinion that we should not have joined the Berne Convention, which I know is somewhat controversial. It seems to me that Berne is mired in the nineteenth century and we now have technology that would help us get around some of these terrible transactional problems in ways that would be good for the creators and users alike, but we are barred from using them under Berne. The only reason that such a clearinghouse can be set up is because it is by private agreement and works only to the extent that the class is truly comprehensive. You cannot do something like this in Europe because they do not have class actions. When I was in Ireland about a week and a half ago, I was talking about some of these same issues, and so many people were saying, "We look at this and say 'oh my, can we get class actions?'" because there is no way of putting a deal like this together in the private sector if you cannot essentially get all or almost all of the players on board. Google, the Authors Guild, and publishers found a lever to get virtually everyone on board and then said, "If you are a member of the class and you do not come forward and register, we will hold the money for five years. If you do not come forward by that time, it is going to be distributed among the people who

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136. See Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

have registered so that they will get a higher share of the royalties.’<sup>137</sup> It has got real teeth and you have nobody to complain to if you choose not to register. It is a very interesting system. Once you have the ability to create searchable digital records, if an owner wants the benefits of copyright law, I am of the view that it is not unfair to put some responsibilities on the claimant. Keeping his or her registration up to date seems like a pretty reasonable quid pro quo for protection.

There are parts of the Google settlement that I love. I am just worried that it is going to be Google forever, without any competitors, and I do not think that is good. We must also worry about pricing issues because I imagine them being able to price as they see fit.

QUESTION: There seems to be really no control on that. They can go as high as they want.

ANSWER: Yes, it could start looking like the situation with Elsevier, Wiley, and all the other scientific publishing houses.<sup>138</sup>

QUESTION: Should libraries be concerned about the Google settlement? What should we be telling librarians about what might happen as a result of the settlement in the future?

ANSWER: There are a couple of things. One is the pricing problem, and I actually worry about it in two ways. First, I am worried about potential overreaching, and second, I am worried that, because of that potential overreaching, the result may be disapproval of the settlement. That would be a shame because I do not know how long it would take to get anything else that would be comparable.

Another thing that worries me is that Google has not wanted to make its database searchable by other search engines. It is probably not so much a problem for the libraries, but I think, as a policy matter, it is not good. My impression is that libraries have not been historically happy with these kinds of limitations. The people who have really upheld the public interest in the copyright community have quite consistently been those in the libraries. They have performed an

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137. See Settlement Agreement, *The Authors Guild, Inc. v. Google Inc.*, No. 05 CV 8136-JES (S.D.N.Y. Oct. 28, 2008), available at <http://www.googlebooksettlement.com/agreement.html>.

138. There is growing concern over monopoly pricing schemes among textbook publishers, namely science publishers like Elsevier and Wiley. See Alison Buckholtz, *Declaring Independence: Returning Scientific Publishing to Scientists*, J. ELECTRONIC PUBLISHING, Aug. 2001, <http://dx.doi.org/10.3998/3336451.0007.101>; Priptal S. Tamber, *Is Scholarly Publishing Becoming a Monopoly? It Seems To Be, but Scientific Culture Must Take Part of the Blame*, 1 BMC NEWS & VIEWS 1 (2000), <http://www.biomedcentral.com/content/pdf/1471-8219-1-1.pdf>.

incredible function, and I have an enormous amount of admiration for the library community for stepping up to the plate.

I also think there are other kinds of specialized collections that would be very useful to have digitized and that the Google model does not really help very much with these. A couple of months ago a friend of mine was telling me about an effort to create a special collection of documents that do not, at least in the main, take the form of books. The proposed project is to digitize and make searchable all the documentation relating to the South African truth and reconciliation process. That would be a fabulous database to have, particularly to aid similar efforts in other settings and to see where it worked and where it went wrong. My friend noted, however, that the project is bogged down in trying to find out who owns the copyrights on these works and then obtaining permission to use them. No one is sure if it is ever going to happen. This kind of example indicates to me that we should think about ways to make the Google experience repeatable in other spheres and not just treat it as a one-off.

QUESTION: You have written a lot about the First Amendment and how it is a fantastic tool for giving a more principled contour to the entire intellectual property regime.<sup>139</sup> In *Golan v. Gonzales*, there was at least some First Amendment scrutiny for content-based regulation, which seems to run parallel to Congress promoting access.<sup>140</sup> Where do you see the First Amendment issue going in the future, considering *Golan*?

ANSWER: My vision of the role of the First Amendment is to set limits on, to some extent, what it is that we can create property rights in. I see the First Amendment as both a tool to keep copyright within certain boundaries and also to prevent the use of the Commerce Clause and state powers from creating ancillary property regimes to fill in the blanks that copyright law does not. For example, if after *Feist* you cannot protect databases under copyright, then I think the First Amendment comes in to prevent Congress from using the Commerce Power to do so or the states to use their powers to do so.<sup>141</sup>

QUESTION: As a member of the consuming public, I intuitively say, “Yeah, I have a right to say something about that, and I have a right to

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139. See, e.g., Diane Leenheer Zimmerman, *Is There a Right To Have Something To Say: One View of the Public Domain*, 73 *FORDHAM L. REV.* 297, 300 (2004); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 *WM. & MARY L. REV.* 665, 665-68 (1992).

140. See *Golan v. Gonzales*, 501 F.3d 1179, 1192-94 (10th Cir. 2007).

141. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

remix that.” Do you see it as a tool only for corporations or is this a doctrine that helps both consumers and producers?

ANSWER: I think it gives a tool to both of them. There was the problem with copyright restoration that adversely affected corporate and individual producers, and the court in *Golan* said, “Wait a second—that might not be such a good idea in light of the First Amendment.” And you have the Supreme Court saying in any number of cases—I think I counted about twenty-eight of them—that once a work goes in the public domain, everybody should be able to use it.<sup>142</sup> A number of cases go further and say that once something is in the public domain, it is there permanently, which means it can no longer be subject to intellectual property protection.<sup>143</sup> That is a lot of support for the idea that perhaps copyright restoration is a bad idea on free speech grounds. We signed on to all these treaty obligations, and maybe it turns out that some of them just simply cannot be constitutionally enforced.<sup>144</sup>

QUESTION: We have gone over several issues that you might not have agreed with, like the Berne treaty. You have noted how the Copyright Act has become something like a junkyard.<sup>145</sup> If you could choose to shape a new copyright system for the future, would you redo the current laws or start from a blank slate?

ANSWER: First, I would make the term shorter.

QUESTION: Fifty years, like after Berne, or even shorter?

ANSWER: I think shorter than fifty years.

QUESTION: What about distinctions between the actual publication standard and the public dissemination standard?

ANSWER: I like the public dissemination standard as a trigger for copyright. Believe it or not, that was something that the Copyright Office actually promoted during the long period leading up to the passage of the 1976 Copyright Act as a solution to the problem of not being able to figure out whether something was published or not published. I think it was a very good suggestion. It did not succeed because people wanted to get us in line with Berne. Whatever the solution, I think there are real problems with statutory copyright

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142. *Golan*, 501 F.3d at 1192-94.

143. *Id.* at 1187.

144. *See, e.g., id.* at 1181.

145. *See id.* at 1179.

protecting at least those unpublished works where the owner is unwilling to make the contents public as a quid pro quo for the protection.

I would change a lot of things. I never thought I would say this, and it is not something I came to immediately, but I find myself becoming nostalgic for the 1909 Copyright Act. All the things I thought were really terrible about it seem more acceptable than some of the terrible things we have now.

QUESTION: Do you think it is time for a new Copyright Act?

ANSWER: I do not think it is going to happen, at least in any major way. To make significant changes now, the international community would have to agree, and we are sort of locked together into an international box where every country has different interests. That is going to make it very difficult to sit down at the negotiating table.

QUESTION: We are putting so much pressure on other countries to do the things we do not like here—that is section 104-A in a nutshell, is it not?<sup>146</sup>

ANSWER: Right.

QUESTION: In *Eldred*, the Supreme Court seemed to defer to Congress on the reasoning that Congress put the law in line with treaty obligations.<sup>147</sup> Do you think we have started moving toward a point where, instead of the Supreme Court evaluating Congressional decisions, treaties are blanketing everything so that we are not going to have the usual back and forth?

ANSWER: Duration seems to be a very hard place for the Supreme Court to step in and second-guess Congress. I think they were presented with a lot of highly convincing empirical evidence in *Eldred* suggesting that a term of life plus seventy years was not very useful as an inducement for people to create new works.<sup>148</sup> However, ages (the age of drinking, the age of driving, the age of voting) go up and down, and it is very hard to say for sure that a legislative body has made an error in choosing some particular cutoff. I think *Eldred* was a very hard case to bring up to the Court, and I was actually surprised at the decision to litigate it. But, having said that, I think it had an unexpected value because what came out of the litigation was a sense that the Supreme Court was generally annoyed with the copyright industry, as seen in the

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146. See 17 U.S.C. § 104A (2006).

147. See *Eldred v. Ashcroft*, 537 U.S. 186, 259-60 (2003).

148. See *id.*



language of *Dastar*.<sup>149</sup> Although that was a trademark case, really a section 43(a) case, I believe the Supreme Court used it to say, “We did not feel we had a choice the last time in *Eldred*, but do not push us to go one step further in extending intellectual property duration.”<sup>150</sup> I thought that was really interesting.

It is not very often you get the feeling that the justices are completely annoyed. There are critics of *Dastar*, but I have to say that the intellectual property expansionists kind of led themselves into that. I think that in the long run, the Sonny Bono Copyright Extension Act may have been the tipping point in public opinion.<sup>151</sup> I think people just got disgusted.

QUESTION: Do you feel the amount of control over derivative works, for instance in the recording industry, has made the grant of monopoly somewhat absurd? They control markets that they have no intent of entering or control works that may be for personal use but obviously are creating new markets. Does this strain the very premise of the monopoly?

ANSWER: This goes back to what I said earlier about Congress putting in language about using potential markets as a major test of fair use. I do not know if anybody realized the scope of the circularity problem, but it is certainly also true that once you say something is a fair use, it will be much harder for an industry to step in and exploit that market, if it eventually chooses to do so. Thus I can see why courts are worried about where to draw the line between what is a potential market and what is a completely unlikely, or an unreasonable, area for copyright owners to try to capture.

QUESTION: Like sampling?

ANSWER: Absolutely, sampling has become a major income generator for the recording industry.

QUESTION: The court seems to be saying that the sampling decision was driven by the potential market rationale, but that did not seem consistent with other fair use opinions.

ANSWER: It does not make any sense, I agree. I think that is a particularly powerful example of the potential market problem, because

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

150. *See id.*

151. Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827-28 (1998).

if you look at sampling in light of the general run of fair use cases, it is hard not to see it as fair. But the questions are difficult. For example, after *Campbell v. Acuff-Rose*, can you always use a work to make a parody?<sup>152</sup> You need to think about all the other situations in which people could claim they are making parodies; since the definition of parody is extremely slippery, the next thing you know, you could have opened up fair use to allow all kinds of derivative works. It is very difficult to know where to put that cut-off.

#### V. INTERVIEW WITH PROFESSOR ROSE

Then, JTIP conducted an interview with Professor Rose, who provided a historical analysis of copyright law and an understanding of the concept of authorship. By looking to the past, he was able to explain the current state of copyright law and tell JTIP his worries for the future of copyright.

QUESTION: How did you get involved with copyright law? When did it begin? Tell us the story of how you got into this world.

ANSWER: I was—and am—an English professor and I had taught Shakespeare and Renaissance literature at several eastern and midwestern universities before moving to Santa Barbara in 1977. I was also interested in science fiction and had published on it. It was the interest in science fiction together with moving into the gravitational field of Hollywood that got me into your world. A copyright case about a TV series called “Future Cop” had arisen—*Ellison v. Paramount*<sup>153</sup>—and the attorneys for the defendants were looking for a literary expert who could advise them about robots in science fiction. The case actually went to trial, a very rare thing in my experience. But I enjoyed working up my testimony and I enjoyed testifying. The defendants lost. Still, my own work must have been okay because in the next few years attorneys on both sides of that case contacted me about other copyright matters. And so I got to testifying with some regularity.

But the academic side of my interest began maybe ten years later when a friend and colleague at UCSB, Richard Helgerson, suggested that I write something about my experiences. “You know, that copyright stuff

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152. See 510 U.S. 569, 572-73 (1994).

153. See Deep Shag Records Biography of Harlan Ellison, <http://www.deepshag.com/artists/ellison.html> (last visited Oct. 22, 2009); StarTrek.com, Biography of Harlan Ellison, <http://www.startrek.com/startrek/view/library/creative/bio/16034.html> (last visited Oct. 22, 2009); Sci-Fi Authors at MIT, <http://lsc.mit.edu/schedule/archives/design1999/terms/fall01/fiction/ellison.html> (last visited Oct. 22, 2009).

is interesting,” Richard said. “It is applied literary criticism. You ought to write about it.” But I thought I needed to know more about copyright itself, so I asked my brother-in-law, Bo Burt, for recommendations—he is a law professor—and he gave me a couple of references on copyright history, including Ray Patterson’s terrific *Copyright in Historical Perspective*.<sup>154</sup> I realized then that the history of copyright really began in the period I knew best—the sixteenth through the eighteenth centuries—and that I could tell a different kind of story from a legal historian. So then I started writing about the history of copyright and got to be a visitor in your world.

QUESTION: How do you identify your role within the legal community as a whole? Is it affected by your own prominence within the realm of copyright?

ANSWER: Well, I still regard myself as an alien visitor—visitor, not invader. The fact that I have no legal training may be an advantage. Several times I have thought about doing the first year of law school, perhaps in one of the visiting programs for nonlawyers. They say it is the first year that teaches you how to think like a lawyer. But I have a feeling that it might not be such a good thing for me to learn to think like a lawyer.

QUESTION: The concept of applied literary criticism is fascinating. Have you written or thought about writing for the legal community to explain what that means and how it may be used in a legal context?

ANSWER: Yes. I am doing a book now that will probably be called something like *Authors in Court: Scenes in the History of Copyright*. It will be a series of case studies of litigation involving authors as plaintiffs from the eighteenth to the twentieth century. One of the cases that interests me most is the classic *Nichols v. Universal*.<sup>155</sup> In this case, Anne Nichols, a fascinating character, sued Universal Pictures, claiming that Universal’s movie *The Cohens and The Kellys* infringed her play *Abie’s Irish Rose*.<sup>156</sup> Both were stories that centered around Irish-Jewish ethnic issues and employed something of a *Romeo and Juliet* plot.<sup>157</sup> This litigation led to Learned Hand’s beautiful opinion on appeal in which he set out his “pattern test” for infringement.<sup>158</sup> This is the opinion in which

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154. See LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968).

155. 45 F.2d 119 (2d Cir. 1930).

156. *Id.* at 119.

157. *Id.* at 119-21.

158. *Id.* at 121.

he notes that on any work of literature, patterns of increasing generality can be imposed and that at some point in this move toward abstraction one passes through the point at which copyright protection ends.<sup>159</sup>

What Learned Hand is doing here is of course literary theory as well as legal theory. And what the 2000 pages of records from the District Court trial reveal is that the whole case turned on issues of literary theory and criticism. The core of Nichols' case was the testimony of her expert, Moses L. Malevinsky, who had written a book called *The Science of Playwriting*, in which he proposed an "algebraic" theory of play construction that could be used to determine with "scientific accuracy" whether one work infringed another.<sup>160</sup> Incredibly, by our standards today, Malevinsky was also one of Nichols' attorneys.<sup>161</sup> His testimony was countered for the defense by a Columbia University English professor who showed just how conventional Nichols' play was and how the similarities between *The Cohens and The Kellys* and *Abie's Irish Rose* were attributable to the way both drew on the same kind of dramatic commonplaces.<sup>162</sup>

QUESTION: So, what is the role of literary criticism here?

ANSWER: Well, the whole case turns on literary criticism. Malevinsky's algebraic theory versus the defense expert's historical approach. And of course Learned Hand's decision was at core based on a literary insight about particularity and abstraction that he turned into the "pattern test."<sup>163</sup>

QUESTION: Continuing on the same line, how does all this affect your own sense of authorship? How far do you see copyright as protecting your own work?

ANSWER: Well, this is an interesting question. It really has two dimensions, an immediate social dimension—call it a rabbit—and a larger, more philosophical dimension that I think of as a kind of elephant. That is to say, the thing in the room that you pretend not to notice precisely because it is so large. First, the rabbit. As a tenured professor, I live in something like a patronage culture. My income comes from my patron, the university, rather than from sales. I produce scholarship that presumably redounds to the honor of my patron and my patron rewards

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159. *Id.* at 122.

160. *Nichols v. Universal Pictures*, 34 F.2d 145, 147 (S.D.N.Y. 1929).

161. *Id.* at 145.

162. *Id.* at 148-50.

163. *Nichols*, 45 F.2d at 121.

me with advancement. My interests, like those of most professors, are not in royalties but in seeing my work circulated and discussed. So my personal concerns about copyright protection are minimal. I am not talking about plagiarism, of course, which is something different.

QUESTION: Would you consider a contract that allows someone to utilize a copyrighted work for personal use?

ANSWER: Like a Creative Commons license?

QUESTION: Like a Creative Commons license, yes.

ANSWER: I would be glad to use a Creative Commons license. An anecdote may be relevant. Last fall I was on a train in the U.K. going from London to York and, because British Rail trains have a wireless service, I was checking my e-mail. I found a note from Jamie Boyle reporting that he had just published a new book<sup>164</sup> and that it was available for download on a Creative Commons license. Still on the train, I downloaded and started reading. After thirty minutes or so I logged on to Amazon.com and ordered the hard copy. So this was clearly a case of author and publisher both getting to eat their cakes. Jamie got his circulation. Yale Press got its sale. If I had not been able to achieve instant gratification on that train by downloading the book, ordering it might well have gotten lost on my to-do list.

QUESTION: So the second part, the elephant?

ANSWER: The elephant is the question of identity. To what degree can I claim to be the author of my own work? I am acutely aware of the many people—editors, friends, students, scholars—who have contributed to everything I have ever written or thought. At the end of my book on the early history of copyright, I say something about the impossibility of simply abandoning copyright. It is much too deeply embedded in our cultural and economic system to be eliminated. And I also say something about the concept of authorship on which copyright depends. It is also deeply embedded in our culture. Authorship allows us to preserve the illusion that we have definable and durable selves. But the notion of the “self” is a kind of necessary fiction. It is related, I imagine, to the structure of language. I have been told that I have a “dark” vision of things because of my doubts on this matter of identity. But actually I find it liberating to realize that my sense of myself as a distinct and bounded entity is an artifact of language, culture, and history. I am

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164. JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008).

sometimes fond of saying that in the Middle Ages people did not have selves, they had souls. Of course, I do not think of myself—“Myself!” See what language does to us?—as a “soul” either.

QUESTION: I want to move now to the First Amendment, and its relationship to copyright in the context of the URAA. First, what is the historical relationship between the First Amendment, the copyright clauses, and the development of that relationship to the present, and how does that relationship play out now? Is it more like it was when they were originally written or has it become something more? How has the relationship been transformed?

ANSWER: My understanding is that, at the time of the Constitutional Convention, the prospect of a federal copyright act was one of the motivating factors underlying the demand from some quarters for a Bill of Rights that would include protection of freedom of speech and the press. The fear was that if the federal government had the power to promote the press through a copyright act, it might also be understood as having the power to suppress the press. And in fact there is a tension between copyright law and freedom of speech because copyright is all about imposing limits.<sup>165</sup>

Now, after the enactment of the Bill of Rights, this tension lay dormant. Then, about forty years ago, Melville Nimmer asked whether copyright could be understood as abridging the First Amendment.<sup>166</sup> Nimmer was writing in the wake of the *Zapruder* case concerning the Kennedy assassination pictures and the copyright issues it raised.<sup>167</sup> Nimmer did think that there were some special problems with graphic works like the *Zapruder* photos.<sup>168</sup> But, more generally, he thought that the idea-expression dichotomy and the doctrine of fair use provided built-in safeguards so that in practice freedom of speech and press were assured.<sup>169</sup> But the landscape has changed significantly since Nimmer’s time. The digital revolution, for example, has turned everyone with a networked computer into a potential publisher and distributor of works. Moreover, as Neil Netanel, has pointed out in an excellent new book,<sup>170</sup> some of the changes made in the 1976 copyright revision, together with the increasing tendency of judges to treat copyrights as absolute property,

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165. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1180-1224 (1970).

166. *Id.*

167. *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 131 (S.D.N.Y. 1968).

168. Nimmer, *supra* note 165, at 1201.

169. *Id.* at 1189.

170. See NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* (2008).

have greatly increased the tension between copyright and freedom of speech.

So now there seems to be a much greater potential for conflict than when Nimmer was writing. And now some of the dangers foreseen at the time of the Constitutional Convention are perhaps being realized in ways that the Founders could not have foreseen. I am thinking of the rise of the giant media conglomerates. I think that the Supreme Court may have recognized some of these dangers when it ruled in *Eldred*<sup>171</sup> that a change in the traditional contours of copyright could trigger a First Amendment review. And in fact, the Tenth Circuit has recently handed down a ruling in *Golan*,<sup>172</sup> a case which involves the recapture of works from the public domain, that the URAA did indeed alter the traditional contours of U.S. copyright. I believe this is the first time that an aspect of copyright law has been found to be in potential conflict with the First Amendment. It strikes me as an important development.

QUESTION: How would you interpret that phrase? How would you suggest people interpret traditional contours? What is the role of history in traditional contours?

ANSWER: The concept of “traditional contours” is all about history. In using that phrase the Supreme Court was invoking history as a guide.

QUESTION: And how is history our guide? Because we have talked to people in this series that say we are pushing to the future. Why should we always be looking back? Is looking back going to help us with the future? What are we supposed to learn? How do traditional contours, in the sense of how and what we are receiving with history, function as our guide?

ANSWER: What you are asking, I think, is a general question about the value of historical knowledge. One way to answer is to say that knowing history makes us smarter. We cannot know the future but we can know the past. At least provisionally. And knowing the past we can understand something about how we have got to the present and how the present differs from the past. And that gives us ways of making choices and thinking about the future, about for example what kind of copyright regime we might want to see in the future.

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171. 537 U.S. 186 (2003).

172. 501 F.3d 1179 (10th Cir. 2007).

QUESTION: I just wanted to ask, since you are a nonlawyer, was there anything that surprised you with your activities in law, either law itself, or in copyright as you became an expert?

ANSWER: Well, at first I did find the formalized way in which the law approaches infringement issues to be curious. I am thinking about the generally accepted categories for infringement analysis—character, plot, setting, and so forth—and the methodical consideration of prior art and what are called *scènes à faire*—that is, elements that flow naturally or logically from a given literary premise. But now, having done this kind of thing for many years, the formality of infringement analysis seems appropriate to me.

QUESTION: So it is no longer strange?

ANSWER: No, it is not. In fact, when I am lecturing on Shakespeare, I often find myself talking about the plays in ways that reflect my copyright work—not addressing issues of infringement of course but analyzing the plays with a methodology that I know has been influenced by my work as an expert.

QUESTION: What advice would you give to people who either find themselves in a humanities program and are interested in law, or in law school and find history compelling? Where do we train our legal historians, our applied literary critics? Are there places for them to be trained? Where should they live and study? Should they live in the law school or in a history program? Where do they teach? What do they do? It is vital for the field of law but we do not appear to nurture it in the legal community. What do you think?

ANSWER: Yes, there are still institutional barriers of various sorts, but my sense is that they have been breaking down. Take this interview as an example; you have invited me here and I am an English professor, not a lawyer.

QUESTION: You do not predict the future, you have already said that, but we would like you to predict the future. Do you have any ideas or worries about the future?

ANSWER: I do have worries.

QUESTION: Tell us some of your worries.

ANSWER: I worry that the kinds of developments that Neil Netanel has identified—the increasing tendency of courts to treat copyrights as



absolute property rights,<sup>173</sup> for example, are making it more and more difficult to do vital new work, both new creative work and new scholarly work. How is an art historian to produce a scholarly study, for example, if a scholar has to pay exorbitant permission rights for every image used—or even if a scholar has to spend an exorbitant amount of time just tracking down who owns the rights for every image used? As I said earlier, most scholars work in the context of a patronage culture rather than a commercial culture. But when it comes to employing materials from relatively recent times—or even photographs of very old materials—the scholar is often forced to deal with a system that, in practice, often treats scholarship as a form of commercial exploitation.

I worry, too, that copyright, with its built-in idea-expression dichotomy and its built-in fair use doctrine, is being replaced by licensing schemes in which everything is regulated by contract. There is a relevant science fiction novel by Connie Willis called *Remake*.<sup>174</sup> She imagines a future in which movie making has been completely digitalized. The only new movies are remakes of classics in which digital technology is used to insert new actors in the old roles—say, Paul Newman and Elizabeth Taylor in a remake of *Gone With the Wind*. Movie production becomes mostly a matter of assembling the relevant rights and permissions.<sup>175</sup> Who owns *Gone With the Wind*? Who owns the rights to Newman, to Taylor? You get the idea. New movies are made—sort of—but meaningful cultural production turns into an endless cycle of licensing and contracting for rights.

I worry, too, about the power that Google may be acquiring over the world's library archives. The Google project is great in some respects, but it also has tremendous negative potential.

QUESTION: I think it is strange that it privatizes copyright law in a way that we have never seen before.

ANSWER: That is right. In a recent piece in the *New York Review* about the Google settlement, Robert Darnton points out that we missed the boat, because there could have been a project in which the Library of Congress and the universities and other agencies joined together to produce such a digital archive in a noncommercial context.<sup>176</sup>

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173. NETANEL, *supra* note 170, at 55.

174. See CONNIE WILLIS, *REMAKE* (1995).

175. *Id.*

176. See Robert Darnton, *Google and the Future of Books*, N.Y. REV. OF BOOKS, Feb. 12, 2009, available at <http://www.nybooks.com/articles/22281>.

QUESTION: The Library of Congress refused to explore the digital archive as an option when Google initially approached them about a partnership because they were unaware of the legal issues involved or how to accomplish the project.

ANSWER: Well, I do not know whether this is feasible, but could there still be an arrangement that makes the Google project subject to a public interest board of governors that would oversee the project?

QUESTION: It has to have some oversight.

ANSWER: Yes. Establishing such a board would create a public-private collaboration with the general policy-making power vested in the public interest board.

QUESTION: And there is potential within the settlement agreement that something like that could be created if the judge in the project saw that idea because he has thought to approve it and they have this books registry.

ANSWER: Right.

QUESTION: What you are talking about could easily be morphed into something with a lot more power and a lot more representation.

ANSWER: Yes, but how do you get such an idea onto the table?

## VI. INTERVIEW WITH PROFESSOR BOYLE

JTIP conducted an interview with Professor Boyle, who provided insight into the future of authorship and the role of the public domain in fostering creativity.

QUESTION: In your article *Manifesto on WIPO and the Future of IP*,<sup>177</sup> you advocated an alternative approach to the current intellectual property system to alleviate human suffering. Precisely what was this alternative approach and how do you see this actually occurring?

ANSWER: That is a great question. My point in that particular recommendation was that if you look particularly at our policies for producing drugs and pharmaceuticals, we obviously rely to a large extent on the patent system. Of course, it is not just the patent system; we also have basic science funded by the federal government. But the step between the basic science and the bedside is largely filled by private

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177. James Boyle, *Manifesto on WIPO and the Future of IP*, 2004 DUKE L. & TECH. REV. 0009, <http://www.law.duke.edu/journals/dltr/articles/pdf/2004DLTR0009.pdf>.

capital incentivized by patents. That requires, of course, the anticipation of a market at the end for which you can charge monopoly prices aided by the patent. In places where that is true, the system actually works. Now, there are critics of the way that it works, and there are some things that one could say about the way it works; but it does, in fact, produce drugs and that is not to be scoffed at. Systems that actually work are not necessarily the norm in human affairs.

So, what it is never going to do—and this is not a flaw of the system, it is a design of the system, this is built into it—is it is clearly never going to produce drugs that address diseases of the global poor. Particularly diseases that disproportionately affect people in tropical countries, for example, parasitic diseases, schistosomiasis, malaria, and so forth. Not because there are not people there who love their kids every bit as much as we do, but because those people simply do not have the disposable income to pay for the drugs at the end of the day. The same is true, by the way, for orphan diseases even in the developed world, diseases that affect comparatively few people.

So, we, as a society right now, have made the decision not to help those people suffering and that strikes me as an unacceptable moral choice. That is not an attack on the patent system, it just means we need something different from the patent system or as well as the patent system. The kinds of things that I am thinking about are alternatives to generating innovation and we actually have some experience of this, we have been doing it for hundreds of years.

Prizes are the best-known system. Back in the eighteenth century, for example, the Royal Society for the Encouragement of the Arts, Manufacturing, and Commerce in the United Kingdom was giving prizes for developing mechanical chimney sweep devices. Because rather than say, “You should not send little kids up chimneys,” they said, “Let’s make a cheap way of cleaning chimneys mechanically that is cheaper than sending little kids up chimneys. That will destroy the market for human chimney sweeps.” As soon as it was developed, they gave it away, released it to the public domain and had it delivered at marginal cost. They did not use those terms, of course. Those are our terms, but that was what it meant.

One could imagine a similar system giving prizes for developing certain kinds of drugs and indeed, there are plans afoot to do this with malaria and do it with a number of other diseases. There are other methods; prizes are not the only one, there are targeted contracts, cost plus procedures. You have to deal with the question of how it is going to be distributed. The point is that we actually have the beginnings of an

institutional tool kit to deal with these problems. This is something that intellectual property lawyers and students can really help with: trying to gear the institutional solution to the particular problems. What is the biggest problem? Is it the basic scientific research? Is it having a vaccine that can live without refrigeration for a period of time? Is it simply the delivery? And if so, what does that mean about the type of drug? Each of those questions might militate in favor of a different kind of solution. What WIPO could be doing is basically bringing together all of our expertise on this and saying if this is the kind of problem you have, here is the tool kit that we have of institutional solutions and this is how much we think it would cost. That does not make the money appear but it gets rid of this illusion that we can do nothing—that this is simply a problem that cannot be solved. It is a problem that *can* be solved. The question is whether or not we choose to solve it. Once you have that nicely developed—this is something that lawyers are really good at—then we can say, “Okay, now we can tell you: you could do this and if you choose not to, that is fine, but that is a choice we are making as a society.”

QUESTION: What are your thoughts on the recent developments with the URAA and *Golan*?<sup>178</sup> What are your thoughts on this and do you think this might signal a shift that ultimately might be opening up in terms of First Amendment review of copyright law?

ANSWER: Well, optimistically I would hope that is so. In the case that you refer to, obviously, the Tenth Circuit Court of Appeals and the district court to which it remanded, have said that there can be First Amendment problems with copyright regulation.<sup>179</sup> They draw on a particular line in *Eldred*.<sup>180</sup> The Court said that decisions that alter the traditional contours of copyright may be subject to First Amendment scrutiny.<sup>181</sup> But normally the escape hatches provided by copyright—idea/expression, fair use, and so forth—are sufficient to protect First Amendment interests.<sup>182</sup>

*Golan* seems precisely to address that distinction. Taking stuff out of the public domain is not a usual phenomenon in our IP system. The Court, in *Eldred*, said extending the term of copyright was something

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178. *Golan v. Gonzales*, 501 F.3d 1179, 1179-97 (10th Cir. 2007).

179. *Id.* at 1196.

180. *Id.* at 1184.

181. *See Eldred v. Ashcroft*, 537 U.S. 186, 210 (2003).

182. *Id.* at 219-20.

that we had traditionally done.<sup>183</sup> There is a historical debate about that. But even if we accept that point, the legislation challenged in *Golan* is not something that is normal or traditional and it is also something that profoundly implicates speech interests. The petitioners in these cases, for example, include composers who have been arranging works which they believed to be and indeed were in the public domain.<sup>184</sup> Now they are told, “You cannot do this, you cannot perform this, you cannot deal with this form of expression.” I think one of the big difficulties in *Eldred* is that the Court found it hard to understand what the First Amendment claim was and they thought of it as an assertion on a right.

QUESTION: The Tenth Circuit court or the district court?

ANSWER: Sorry, in *Eldred*, the Supreme Court had a hard time imagining what the First Amendment interest could be. They thought of it—and I think this is actually a basic legal error in classification—they thought it had to be an assertion that I, as an individual, have a *right* that something will pass into the public domain in the future.<sup>185</sup> And the Court thought the plaintiffs were saying that right is protected by the First Amendment.<sup>186</sup> That claim is clearly going to fail; the Court is not going to say there is a First Amendment *right* to have something fall into the public domain in the future.

If the claim is stated the other way, however, it is much more powerful. The alternative way of stating it is this: that the state has no right to extend copyright retrospectively because it curtails speech but does not produce the normal speech-enhancing effects that copyright has in encouraging further creation. You have all deadweight and no benefit, right? And so then it is easier for a court to say, “No, you, the state, had no legal power to do this. In fact, you exceeded your constitutional power when you did.” Not that I the citizen had a right to have a particular work fall into the public domain in the first place. Your question about *Golan* is that if the courts go on thinking in terms of this claim of a right to the public domain, then is a retrospective bringing back into copyright of something that had previously been in the public domain the moment that would more likely trigger such a claim? The court will start thinking in terms of expectation and reliance—the citizen thought this work was in the public domain and now it is not. So I take the question to be, “Might *Golan* encourage the courts to develop a

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183. *Id.* at 194-96.

184. *Id.* at 194-96, 210.

185. *Id.* at 210.

186. *See id.*; *Golan v. Gonzales*, 501 F.3d 1179, 1179-97 (10th Cir. 2007).

notion of a right to have something fall into the public domain?" Perhaps.

Having said that, I am actually not sure that is a great line for the cases to go down because basically that only deals with this very narrow situation, the situation of withdrawing something from the public domain. In my view, retrospective copyright term extension under Sonny Bono was the single most speech restrictive act that Congress has ever passed—taking a twenty-year swab of culture that had already been produced and putting it off limits.<sup>187</sup> The act not only had no demonstrable beneficial effects on speech, but also had demonstrable negative effects on speech. I think that was the basic speech claim and it is one unfortunately that never really got strongly articulated during the oral argument and actually perhaps not even in the briefs. So, as a result, I am happy for the *Golan* case; but I fear that it may be understood as an extremely narrow exception rather than an indicator of a larger trend.

QUESTION: Right, on that note, the district court really talked about reliance parties and it almost split. Is there any historical precedent for the notion that if you started using it before 1996, you can continue to use it? I mean, it seems again to be altering the traditional contours and that they did not seem to go very deep.

ANSWER: They did not go very deep, but it is this reliance focus that I am most concerned about because the legislative answer is to have a carve-out for reliance parties, which completely fails to deal with the issue. What I would like to see the Court doing is what it did in *Graham v. John Deere*, when it said you cannot take something back out of the public domain.<sup>188</sup> Then the Court went on to say that you could do this or restrict access to it, which seems like an even more extensive claim, and unfortunately, the Supreme Court in *Eldred* clearly signaled a forking of copyright and patent jurisprudence in terms of how we understand Article 1, Section 8, Clause 8.<sup>189</sup> Also, perhaps how we understand that, in relation to the First Amendment, with patents this belief that the progress of science comes together in a sort of pyramid. Therefore, I need your prior innovation to make my next innovation under this belief. Thus, withdrawing material that had been in the public domain is catastrophic for that belief, both as a speech matter and as a matter of primitive progress. In our copyright realm, we understand everyone to be

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

188. See *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 6 (1966).

189. *Eldred*, 537 U.S. at 217-18.

an original spirit expressing themselves through their art. That is divergent creativity. I do not need Professor Townsend Gard's novel to write my novel. I should just write my own novel. That is clearly not right for certain kinds of things, protected by copyright—software, for example, historical biography, collage, jazz, right? Rap music.

QUESTION: Is there anything that can fit that model? That is a Romantic authorship model, written about and on so many levels. Is it a fiction? Would you say, or could we say, the pyramid is still in copyright, but it just has not been recognized yet?

ANSWER: I think that it is true that in some copyright areas there is much less of a pyramid. I mean, partly because of the way we choose to understand what gets covered by copyright. So I actually think that in most cases—a person writing a novel for example—it is not that they do not need to draw on prior genres. Obviously, if I am writing a murder mystery, or I am writing a spy novel, I am drawing on all sorts of things. But we understand those things so unproblematically as being in the public domain because of idea/expression and merger and *scènes à faire*, we almost conceal the facts that you are building on prior work. And when it is a matter of sonnets or haikus or whatever, well, of course, the form is in the public domain. It is in areas like music or software where there are problems. I mean jazz is the great unexamined genre. Okay, so I cannot solo your prior song? That just makes jazz impossible. I mean you could have another kind of music but it would not be jazz. So, going back to the constitutional question, what happened in *Eldred* is the beginnings of a signal that we really have this deep set of assumptions, right or wrong, that one converges and one diverges. And, the point about the divergence is that it makes the speech claim much, much weaker. Justice Rehnquist said something in oral argument in *Eldred* and going back to the transcript it does not read the way I remember it. What I remember him saying is something like you are claiming a First Amendment right to pirate other people's work. Of course, words to that effect and less loaded than that. Maybe the transcript got edited, but his point was, "Wait, you have a First Amendment right to take my stuff?" And if that is the vision of the First Amendment, then cases like *Graham v. John Deere* are not going to engage, and that is the fundamental question here. I think we have got probably two justices or three justices who see it otherwise, but the majority, not so much.

QUESTION: In your book, *The Public Domain*, you wrote a little bit about the Google Books Project.<sup>190</sup> The book was written before the settlement agreement and there are obviously good things and bad things about the agreement. What is your opinion on how you think the settlement agreement is going to affect public domain, fair use and orphaned works?

ANSWER: Well, you are obviously right that there are problems with the settlement. First of all, a lot of us, I am certainly one, were slightly disappointed by the settlement agreement because we actually thought this was a place where really good case law could have been made, and I think the courts deserve amazing credit for what they have done in fair use cases. It is true that people can rightly criticize fair use doctrine for perhaps not offering the citizen publishers of cyberspace the determinacy that they need. But in terms of its flexibility in dealing with new technologies and dealing with new situations, I think fair use has been pressed into service as kind of the duct tape of the copyright system. It is the thing that we use to fix everything because otherwise the internal tensions of an expanding copyright law will tear the system apart. There have been hints, for example, in the *Perfect 10* case,<sup>191</sup> that the courts have continued to make those doctrines evolve. The way that they take the word transformative and transform it in *Perfect 10* is a fascinating example of courts adjusting on the fly to new technologies.<sup>192</sup> It was a fascinating and, I think, laudable reinterpretation.

I think we could have had another very similar one in the Google case. Of course, Google has no responsibility to me, nor to the citizens of the United States, to make great fair use law. But I thought that was a missed opportunity. I would have estimated the chances of a good fair use reading and ruling at around 70%, maybe it is 65/35. But I thought it was decent. The question is, "Will we get such a case again?" I think now the answer is no. We will not get a ruling because even though, of course, while offers to settle in theory have no effect on fair use, and the Supreme Court has made that clear, in practice the fact that there was a settlement I think will preclude the courts from revisiting this. So there will be no market for it. Basically, this is going to be like copyright clearance center all over again. Once the copyright clearance center comes into being, the idea of a robust fair use exception for multiple copies for classroom use disappears. That is just the way it is because

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190. BOYLE, *supra* note 164.

191. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

192. *See id.* at 847-49.



practice leaches onto what the market is, defines the market in the minds of the judges. The judges say that you are harming a market and the market is the one you would have if you did not have the fair use privilege. So that is the fair use part.

QUESTION: What do we do with that situation? You see that with sampling. How do we—or is there any way to—push back on that?

ANSWER: Great question. I think there is a way to push back, which is to attack it on a level of the practice because the courts will say, “Okay, we realize this is circular either way. You say you have no right to copy educationally because if you did not have the right then I would have the right to set up a copyright clearance center. And then I could charge you, which means I am losing money I would have gotten.” That is completely circular, right? And it is circular the other way around, too. The Court said, “Well, maybe that is not circular if we look outside the protective sphere of law into the realm of social practice.” Because there, we are maybe getting to something else: perceptions of fairness, perceptions that it is workable, right? So it is not just the legal rights fallacy.

Thus, I think the change has to come from within the realm of practice. I would say as an example, look at the work a number of people have done for the Center for Social Media at American University. Peter Jaszi creating a best practices code for documentary filmmakers is exactly the kind of thing that one needs to do so that one can turn to the courts and say, “You want to know what they think their practice is? This is what they think their practice is and it is different from what the errors and omissions insurers are requiring them to do.”

QUESTION: And what about the publishers?

ANSWER: The publishers lead us to the second part of your question, which goes to what about the monopoly effect on orphan works and so forth. With the Google Books settlement, we would be in a better position than we are in now. There would be access to more books. More authors would be getting paid. I am an author, I like to be paid. But Professor Samuelson was right, Google is going to have an effective monopoly on digital delivery of out of print works that are still under copyright, particularly orphan works. Google can argue, “Hey, we did the work, anyone else can do the work,” but barriers to entry are extremely high. I think that is a problem.

I have two hopes. The hope is that when people start realizing what it is like to be able to search all the books in the world just as they can

now search the Web, they will go, “Oh, this is great, why could we not do this before?” This is bizarre. I mean, do you realize we have come, in fifteen years, to think of books as the *inaccessible* realm of knowledge. We talk about something being “accessible” (meaning online) or “inaccessible” meaning it is trapped in a book and cannot be retrieved as easily as the material on the Web. In the entire written history of the species up to now, that was true for the illiterate but it was not true for anyone else. Books were the accessible realm of knowledge and oral stuff, you could not get. The realm of informal culture was the inaccessible realm. And now we have reversed it.

That is just a dramatic shift in the way we think and maybe existence proofs are the best kinds of proofs. As I say in the book, once one sees a black swan, one knows that all swans are not white.<sup>193</sup> Maybe people would see the changes the settlement brought and say, “Oh, I want this and I do not want it to be controlled by Google.” I can imagine the French, for example, saying, “Right, fine, we will digitize everything.” And if, in fact, they did sort of start doing this—people creating a public domain potlatch—we will put more stuff in public domain. So that is one hope: that the existence will actually change people’s views.

The other one is that there will be a moment where people sort of chafe at the monopoly and say, “Well, I would like to do this and I can only do it through Google and I object to that.” Then we will see a push for better orphan works legislation, so that it can be done by anyone.

We have created a market failure through law, and Google has come through to fix it. Now Google is a *de facto* monopoly. But the market failure was created by law. It is not Google’s fault that they have a monopoly, it is our fault. That point may be a little too subtle but I kind of hope that will come out of it.

Those are cognitive changes. I guess that is not precisely where your question is going, but that is where I think this whole thing may happen. So I am slightly more sanguine than Professor Samuelson is. I agree with her about the *de facto* monopoly. I just think perhaps there is something positive that can come out of that, particularly with people having that experience of, “Wow, I can actually do this?” I describe in my book. My son said, “Where do I click to get the book?” That is his generation’s assumption. It would be great to make that a reality. And we could.

QUESTION: I just want to follow through on the role of informal culture in social practice. How do we get students to understand that

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193. BOYLE, *supra* note 164.

role? What should law students be learning in terms of that? Because this is one of the things that our class tried to understand: that there has been this movement, with user generated content right now. It is a moment that is really interesting and sort of exploding. Do you think that we need to have our law students duplicate that?

ANSWER: Well, it is something at our center. It is something that we wrestle with all the time. In fact, we started the Arts Project, which my colleague Jennifer Jenkins runs, precisely because we thought that the story of what user practice was generally being provided by representatives of the content industry. It was not anything that the artist actually involved would recognize.

So we have actually been interviewing people, not as sort of a formal anthropological study but trying to ask, “How do you do what you do? What do you think is appropriate?” So, for example, I had the chapter on the Legendary KO in the book—the story of the mash-up.<sup>194</sup> We actually interviewed them for about an hour asking, “When do you think it is appropriate for your stuff to be taken? When do you think it is appropriate to take other people’s stuff? When would you expect payment? If you got to choose between this rule and this rule, what would you do?” This was actually after I had written the chapter and it was fascinating. They had this very subtle set of distinctions about what you could do. Just taking somebody’s stuff and not embellishing or changing it is kind of lazy, you are cribbing, it is lame. They even mentioned generational differences in attitudes.

So I think that first of all, we need mapping of artistic practices, and I think the students who come into our classes have useful experience. They are artists, they are poets, they are musicians, they are programmers. We try, in our classes, to get them to give us the benefit of that knowledge. Do not assume because you learned it outside of law school it all goes away.

As copyright lawyers, we need to actually talk a little bit more about the way that the generation and transmission of culture actually works. When I started in the field, most of the sort of canonical texts had been written at a time when it was quite hard for a private individual to violate the exclusive rights provided by section 106. I could not distribute, I could not replicate, I could not copy. These were not things that *people* did. They were things that *competitors* did and this is probably the single biggest shift that we have seen—that people can implicate 106 rights. Obviously with photocopying and videotaping, this shift was happening

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194. *Id.*

already but the web just exploded it. We need to get people to focus on that saying, “Okay, so now you are a 106 actor.” What do you do in your practice when you copy or when you customize? How do you understand it?

We tried, with our comic book *Bound By Law?*, to educate documentary filmmakers about what the law was, and they were astounded.<sup>195</sup> They had assumed that the rules were basically the ones they had met in practice—which required clearance of every fragment. But those were not the rules. So, in brief we need more engagement, clarification, getting into the communities, and education that runs both ways.

QUESTION: Scholars have a role of making sure that the public knows what is going on. So tell us more about the comic book. I am using your comic book for a freshman culture and copyright class in the city of New Orleans.

ANSWER: What a great class! I would love to take it.

QUESTION: Please tell us how that came about and sort of what your hopes are and what has been happening. What has happened since you have written it?

ANSWER: Well, Jennifer Jenkins, Keith Aoki, and I were free-associating about what to do. In fact, it started off with Jennifer and I thinking about the limitations of the tools we have for communicating with the public. We put papers up and they are downloaded by a lot of scholars. I can write a story in the *Financial Times*, but none of these publications are reaching the documentary filmmaker I want or even the kid who is a sophomore or junior in high school who loves to make movies and wants to figure this stuff out. So we wondered what could reach them. We realized Keith Aoki used to be a cartoonist!

It was fascinating because it was a completely new art form to me. The proportion of the semantic meaning that is comprised in the picture is of course much larger than what is comprised in the words. I mean, you have barely a sentence in each speech bubble. It is so hard to do. I mean, particularly as an academic who loves his careful qualifiers and footnotes. And, of course, the comic itself was an exercise in fair use because we were constantly appropriating things and commenting on them and so we really liked that element and we found that one of our biggest users were high schools. We had written it for documentary

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195. KEITH AOKI, JAMES BOYLE & JENNIFER JENKINS, CTR. FOR THE STUDY OF THE PUB. DOMAIN, *TALES FROM THE PUBLIC DOMAIN: BOUND BY LAW?* (2006).

filmmakers and it turned out it was high schools and social studies classes that were buying it.

QUESTION: That is wonderful.

ANSWER: We have had about a quarter of a million people download it. We have sold 15,000-20,000 copies. Our next comic is on the history of music and musical borrowing. It is called *Thief! A History of Music*. It is a more challenging assignment because we chose to cover 2000 years of musical history, the history of borrowing.

QUESTION: And so what is the message, then? What do you do about that? How does the story end in that way?

ANSWER: Well, we are only at page sixty.

QUESTION: Right, big cliffhanger.

ANSWER: Big cliffhanger. For me, it is, I want to open some eyes. I would like to open the eyes of some judges. I mean it seems to me quite clear now that if you took hornbook music copyright law seriously, the practices of jazz are illegal. There is no federal judge who is going to find that. But they will find it for rap music and they will make this very artificial distinction between the recording right and the composition right with no real grounding. If you can make them realize what they are doing and they will say, "Wait, this makes jazz illegal, it makes soul illegal." Then I think it actually forces a reconsideration. That is one audience that we want to reach.

QUESTION: I just wanted to get back to media companies and book publishers. When Mark Rose was here, we asked him what his definition of authorship is. He said that he could basically care less about how people use the things that he writes, because he does not do it for money. If he could, he would really love to publish his things with a Creative Commons license, for example. You published *The Public Domain* with the Creative Commons license, and he mentioned that that is really just not an option for him right now because of his publisher. He said there is just no way that his publisher would do that. How do you think that authors can go up to their publishers and say, "Look, I want this to be published with a Creative Commons license, I want this to be available for mash-up, I like the re-mix culture"? How do you convince them that it is not going to bankrupt their business?

ANSWER: Well I think about it often. I wonder if he has ever asked the publisher. Because most of the authors I know say, "Oh, I could never even ask." It is sort of like, "Dad will never give me the keys to the car."

QUESTION: Why do you think that is? It seems very strange that they are afraid of their contracts in some way or of asking. How do we change that culture, and why do you think that they are so worried and nervous about asking?

ANSWER: Well, first of all, they really just want the book. They want Harvard or Yale or Oxford to take the book. They are kind of frightened and they feel like they are the suitors. So they do not want to ask and so they try and make themselves minimally as difficult as possible. After all, it is just a question. This is true also for journal publishers. I wrote a piece for *Daedalus*, the American Academy of Arts and Sciences Journal. The piece was all about public domain and the publisher. The editor kept saying, "We want to celebrate the public domain, it is fabulous." But when I got the contract, it said that every contribution to the journal was a work for hire, which is the most restrictive you can possibly have. This is out of order, even for scholars. I said, "Are you kidding?" When I called, the editor said, "What does that mean?" Then I explained it to him and he said, "That is dreadful. What do you want?" I said, "I want a Creative Commons license," and he said, "Okay."

So I think there is really that experience. The other thing is you really need to be able to come in with the facts and figures and anecdotes and so now we are beginning to have those. My sales have been nice; the book has been selling well. I have had a lot of downloads but I have also had sales. The same is true of our comic book; the same is true with Yochai Benkler's book, *The Wealth of Networks*,<sup>196</sup> Jonathan Zittrain's *The Future of the Internet*.<sup>197</sup> I asked for the Creative Commons license on my book. I was ready to fight and had my anecdotes and whatever else ready. But they said sure.

I would suggest that we need presses to start experimenting. Take a bunch of authors, some out of print, some new, that they think are roughly comparable. Like right now *X* and *Y* books are selling the same number, they are on back catalog, right? Put *X* on a Creative Commons license and not *Y*. What happens, right? Just do the experiment.

So, I think this is an area where there are a lot of low hanging fruit. You can actually just go in to say, "People, look, that is a completely safe

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

197. JONATHAN L. ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* (2008).

thing to do, right?” It is not going to bankrupt Oxford University Press if you put three titles under Creative Commons license. What is the worst thing that can happen? They do not sell. You are already budgeting for that for a huge portion of your catalogue. And so I think, I actually would expect to see scholarly publishers experimenting with this much, much more. The big threat to all this is the Kindle because partly the reason why the current system works is that the digital book is not a substitute for the paper book. I mean, how many of us really want to read books on screen. Once the Kindle becomes the preferred method of reading for a substantial portion of the audience—if it does or a similar type closed device—then things become more complicated.

QUESTION: Complicated, why? Because then the market will be created and they will charge for it?

ANSWER: Then the publishers will go from the point of never having thought about a Creative Commons license to the point of thinking that they cannot do Creative Commons because that is undercutting this valuable stream of electronic rights without ever actually experimenting with Creative Commons in the middle.

QUESTION: There is a push in Congress to force a bill in that would require any medical research funded by the federal government all to be published, copyrighted, as opposed to available under Creative Commons licenses or in the public domain, and this is obviously being pushed by the publishers of these scientific journals because they are afraid that the Internet is going to bankrupt them once again. It seems almost every time that Congress is asked to make a decision between what would be theoretically good for the public and what is good for the media publishing industry, they always side with the media publishing industry.

ANSWER: I hope that is not the case with the Fair Copyright in Research Works Act because that bill, proposed by Representative Conyers is worse than what you suggested.<sup>198</sup> It makes it illegal for the federal government to require that federally funded research be freely distributed if there is input or labor from anyone else, which effectively means that if a journal copy edits my article, no matter how much money you gave me as a researcher, you are forbidden from requiring me to make that available. The bill was sponsored partly by Representative Conyers out of pique. He felt he was slighted because of his work on one of the key IP subcommittees. I think it is going to be defeated, thank

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198. Fair Copyright in Research Works Act of 2008, H.R. No. 110-6845 (2008).

goodness. There is unanimous bipartisan opposition from everybody that has been the head of NIH. There are thirty-four Nobel Prize winners who signed a letter against it. And you have, thank goodness, an extremely well organized group of patient organizations.

QUESTION: Could you tell us about the public domain conference? It was a really important moment, in that it sort of brought together so much. It is on the Web, you can listen to it, you can watch it and it does just seem like a moment. How did the Center grow and what are your thoughts are about the legacy of all of that?

ANSWER: It did feel like a moment. The conference had this sense that everybody had a problem, but nobody was talking about it. So when we all come together it is like, "Ahh, I have that problem, too, and I have that interest that I want to write about." So it seemed it was a moment of genuine excitement. In most conferences, the energy sinks. You leave the conference with less energy than when you went in. In this conference, people came out just fizzing.

QUESTION: There seems to be a deep dissatisfaction with the current state of the Copyright Act in general. Diane Zimmerman referred to it as a used car graveyard. Pamela Samuelson came last week and she has discussed the method of possible ways to circumvent legislative process because some people do not feel like it was possible to actually change the Copyright Act. Both of them felt there was the need. But then you see things like the RIAA which is a charity agreement and Google settlement outside of the copyright realm and contractual agreements to circumvent the copyright process entirely. Do you think it needs to be changed? Or do you think it is feasible to be?

ANSWER: I do think that for the first time I really know of in the history of our intellectual property system, we have seen large-scale private ordering arrangements that actually have become a type of self-made law. Think of Creative Commons, or the General Public License on open source or free software. People are working around the system that they find does not meet their needs.

For me, being involved with Creative Commons is one of the most inspiring things that I have done other than raising a family. It is an incredible feeling to invent a tool and have people use it. It is so fulfilling. For the first time, I understood what entrepreneurs feel. You make something and five years later people are talking as if it had always been there. We dreamt this up. This is an invention.



QUESTION: What is your vision of the future of copyright? If you could change anything, what would it be, what is the perfect copyright regime?

ANSWER: Well let me start with the vision. The vision would be that copyright became just like any other area of regulation in that it actually became an area in which we look to evidence. That we actually had an evidence-based policy, which we do not; it is a faith-based policy. We do that in every other area. Here is our new clean water regulation. Here is the new drug. Does it, in fact, increase suicides among adolescents? Do we have data? But in intellectual property, we make policy with no data beforehand and no review afterwards. We make policy entirely about data.

The second thing is balance. I think that we have to come to understand the realm of IP the way that people like Jefferson and Madison and Macaulay did, as an ecosystem in which the stuff that is free is as important as the stuff that is protected. We need a balance between intellectual property and the public domain. We do sometimes grasp that point. The merger doctrine is a good example of that, and so is a lot of patent law. There are moments when we get it but we need to extend them, to make balance a central part of the law. Data and balance: those are the two technocratic points.

But you have been asking great provocative questions, so I should leave my technocratic world and I should go a little further. I think the next thing is, at least within copyright, we have to think about copyright as a way in which we express our common humanity. Hal Abelson has a wonderful quote in a Creative Commons video, “What does it mean to be human if you do not have a shared culture and what’s a shared culture if you do not share it?” I said, “Hal, I have been sitting in board meetings with you for six years and I never managed to put it together as neatly as that.” I think that constantly in copyright law we say, judges say, scholars say, “Well, we cannot make aesthetic judgments. We cannot judge this painting versus that painting.”

But copyright law *is* an aesthetic judgment. When we have a set of rules, we are choosing to say this kind of art, this collage, this rap music, or whatever, does not fit our model. This kind does. I think we actually have to have a conversation about free speech, about the collective cultural expression that says what kind of cultural world do we want to live in.

The point is right now, not only is copyright not evidence based, not only is it not balanced, it is also not democratic. So my world of

intellectual property would be evidence-based, it would be built on a notion of balance and it would be formed by actual democratic debate, a much wider debate than we have now, with citizens knowing the stakes. The last part means actually I do not know what rules we would get. Maybe, for example, we would end up with more control, more moral rights being granted. Maybe people want that. Maybe not. I know what I want, but I genuinely do not know what our society would pick. Anyway, evidence, balance and a more open debate: that is my modest vision.

#### VII. WINNING EXAM BY BLAKE MOGABGAB

After all of the speakers had finished and the information was assimilated, Professor Townsend Gard's Copyright class at Tulane University School of Law wrote an essay in their final exam that brought together all of the contributions of the speakers. Blake Mogabgab's essay was chosen by the JTIP board, which we publish to show the synthesis of these amazing speakers' contributions on the future of copyright.

##### The Future of Copyright: "User-generated Content"

"User-generated content" has been around as long as art itself, and, indeed, the divide between producers and users of artistic content is a very new idea. In ancient communities, tribal chants, folklore, and even visual art such as clothing and any other type of physical decorations were created and shared by all, not simply those who had proven themselves as worthy of attracting attention and selling a product. I would argue that these same types of activities never *really* ceased. Children make collages out of scores of copyrighted material from books and magazines, daringly displaying them from their family's refrigerator without considering the "fair use factors". They perform reenactments of *Snow White and the Seven Dwarfs* and *Beauty and the Beast* without any permission from Disney. Adolescents sing Weird Al Yankovich covers at summer camp without worrying over licenses, and grownups do many of the same things, though typically less publicly (which has less to do with copyright infringement than the tragedy of modesty). Indeed, "user-generated content" is not a novel concept, but rather, the Internet has allowed our "users" to make their work public in a way that does not conform to our traditional copyright law. Technology forces change in copyright, and just as the printing press urged the creation of the Statute of Anne and the Internet spurred the creation of the Digital Millennium

Copyright Act, the “faster, larger” Internet that is on the horizon will require even more flexible legal doctrine.

Certainly, the Internet and modern computer programming go beyond these past platforms in their ability to allow copying and distribution and, thus, copyright infringement. Before, if you wanted to give Mona Lisa a hat, either as a postmodern criticism of Leonardo da Vinci’s portrayal of women or even just because you think it might look funny, you had to repaint her or photograph her and draw a hat on top. Now, you can Photoshop. Previously, if you wanted to put Jimmy Hendrix’s guitar behind your hip-hop track, you might have had to play and record *Purple Haze* yourself. Now you can copy and paste in Pro Tools. And now, of course, if you want others to see or hear your creations, you can always post them on YouTube, or another similar hosting site, and share them with an unprecedented amount of people. The tools for creation and access have improved in such a way that they create problems with our current copyright model; however, these problems do not indicate the “death” of copyright, nor do they warrant stricter copyright protection in an effort to snuff out such activities.

From monks transcribing Aristotle, to Gutenberg’s printing press, to the photocopier, to the Betamax, we have seen striking similarities in the way various societies have feared the effects of new technologies and then created law in reaction to these fears. Yet, as we know now, many of these fears have simply not come to fruition. Therefore, it is troublesome to presume that the Internet will cause chaos, and that the sky, this time, will fall. As James Boyle points out in his book, *The Public Domain*, the threat of the Internet plays an important part in why our laws seem sluggish in reacting to the reality of society’s use of the Internet.<sup>199</sup> It is for this reason we saw the tightening of copyright protection in the Digital Millennium Copyright Act in 1998. Overly receptive to the fear that an untamed and unrestricted Internet would cause the demise of U.S. publishing industries, the legislature failed to see the benefits of a less restrictive Internet. The result, unfortunately, turned many ordinary citizens into criminals, and, as Boyle argues, it is irresponsible to make a majority of the population law-breakers.<sup>200</sup> It seems then that as the global and personal benefits of advanced technology become more and more apparent, the legislature will simply have to catch up.

Somewhat ironically, the hope for the Copyright Act of 1976, as Pamela Samuelson notes in her article, *Preliminary Thoughts on*

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199. See Boyle, *supra* note 164.

200. *Id.* at 54-64.

*Copyright Reform*, was that it would be flexible and adaptable as new technologies enable the creation of new kinds of works.<sup>201</sup> She argues, however, that “thirty years of experience with the 1976 Act has shown that this was an overly optimistic hope.”<sup>202</sup> Rather, she argues that copyright law has become much too long at over 200 pages and far too complex, edging towards incomprehensible. While she does not support the scrapping of copyright law entirely and beginning anew, she supports a model copyright law that could provide interpretative comments and guidance to a legislature that has been overly susceptible to the publishing and movie industry lobbyists.

Of course the legislature is not the only resource for change. Diane Zimmerman, in a talk given to Tulane University School of Law students, demonstrated some of the human resources that can affect society’s general perceptions of copyright in the age of technology. To this end, Zimmerman categorized copyright owners according to their relationship with copyright law and the Internet to illuminate how society may effectuate change in our copyright regime. “Subverters,” as she named them, use tools like Creative Commons licensing in order to circumvent the heavy-handed protection of copyright and generate a breed of personalized protection that lets them choose the rights in their work they wish to keep while opting out of others. “Explorers” disregard copyright in general and seek to make money through other means, for example, the donation based distribution used to great success by performing artists Radiohead and Nine Inch Nails. The “locksmiths” on the other hand are the copyright holders who have vigorously tried to protect their content in the wash of Internet technology. And while it appears as if the “locksmiths” have prevailed in recent years, an increasing number of “subverters” and “explorers” will play an important role in challenging how modern courts view “user-generated content,” and more importantly, what they consider to be the “fair use” of copyrighted material.<sup>203</sup>

In a similar way, the proliferation of “user-generated content” will continue to alter society’s perception of copyright law. As the landscape of personal entertainment changes and more individuals benefit from “user generated content” that borrows from copyrighted material, we will see a general shift in society’s perception of “borrowing” and “fair use”

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201. Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 551-71.

202. *Id.* at 551.

203. Diane Zimmerman, *Finding New Paths Through the Internet: Content and Copyright*, 12 TUL. J. TECH. & INTELL. PROP. 145 (2009).

of that copyrighted material. This change in society's perception should, in turn, affect courts' "fair use" analysis.

The doctrine of fair use, like the judiciary itself, is meant to be flexible and help analyze individual issues on a case-by-case basis. For this reason, fair use is the best source for creating a legal standard that gives "user-generated content" less rigid treatment than other works. The "purpose and character of the use" is typically harmless in "user-generated content." Furthermore, with "user-generated content," the "effect of the use on the market" is typically marginal, if any at all. As these considerations take the forefront in judiciary analysis, "user-generated content" will receive less intense scrutiny.

In conclusion, while the advancement of technology presents ongoing challenges in administering copyright law, the necessary tools exist to continue a copyright regime that serves the general public interest. Copyright is not dead, but it needs to be more adaptable. As time goes on, people's behavior will continue to change, the judiciary will adapt, artists will continue to profit, and YouTube, in all of its absurdity, will survive as "user-generated content" continues to flourish.

## VI. CONCLUSION

Each one of the speakers were able to speak to an aspect of the future of copyright so that, together, all of the speakers provided a comprehensive view of the future of copyright. Peter Jaszi discussed the future of fair use and the shift from modernism to postmodernism. Graeme Dinwoodie discussed the international aspects of copyright law. Diane Zimmerman explained why traditional rules of copyright do not and will not work on the Internet. Mark Rose provided a historical analysis of copyright and authorship. Pamela Samuelson gave a map for how copyright reform can be implemented. James Boyle provided insight into the future of authorship and the public domain. Thus all six of the speakers furthered the dialogue on the future of copyright.

These esteemed scholars identified what does not "work" in the current copyright regime, what they feared in the future of copyright, and what their hopes were. Finally, and most importantly, these speakers gave suggestions for the future of copyright and how to implement them. It is the hope of JTIP that these interviews will further the scholarly debate in copyright and spur developments in the future of copyright.