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Plenary Session III:
Current Developments in Copyright Law

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Catherine Rowland
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Matthew Sag
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PROF. HANSEN: We are going to start the next session on copyright. All the panels have been excellent. This will be excellent as well.

We will start off with Catie Rowland from the Copyright Office.

What do you do at the Copyright Office?

MS. ROWLAND: I am Associate Register of Copyrights and Head of Public Information and Education, so I do all sorts of things. I give legal advice to the Register and oversee the Office's educational efforts.

PROF. HANSEN: Is that a new position?

MS. ROWLAND: This position was established 2014 when we reorganized the Copyright Office. I was appointed in April.

PROF. HANSEN: How can the people in the audience here best utilize your services? When you say "the public," what are you talking about?

MS. ROWLAND: We deal with the entire public, so everyone from elementary school students to law school students to practitioners. Everywhere that anyone is concerned about copyright we are trying to reach you. If you want someone to talk to you about a particular copyright matter or work with you on a program, please let us know. Our goal is to make the Copyright Office the first place you look for copyright information.

PROF. HANSEN: Excellent.

You're interested in talking about the new small claims tribunal, correct?

MS. ROWLAND: Yes.

PROF. HANSEN: Okay. Let's hear it.

MS. ROWLAND: The Copyright Office issued a report on small claims in 2013.[1]

PROF. HANSEN: First of all, how many people have heard about this?

[Show of hands]

This is good.

MS. ROWLAND: Let me give you an example of a copyright small claim. An illustrator draws a picture, puts it on the Internet, and somebody makes an infringing use of the picture. The illustrator would like to do something about this infringement. Currently, under the Copyright Act, the illustrator's only recourse is to bring an infringement case in federal district court.

But, as we all know, federal district court can be incredibly expensive and time-consuming, especially for individuals like illustrators or photographers and small entities. A lot of their works are of pretty low monetary value, one-on-one, individually. Something between $500 up to thousands of dollars would be considered small monetary value. That is what we mean by a copyright small claim.

Research showed that it can cost many thousands of dollars to go to trial in federal court. I am a former litigator and I know how expensive it can be and how many resources it can entail to bring a case.

On the flip side, somebody who may have been accused of infringing a work may believe that what they are doing is fair use, but that person's remedy is also limited to federal district court. That person also is going to have a hard time going to district court and filing a declaratory judgment action or something like that.

The Copyright Office suggested establishing an alternative tribunal, a voluntary tribunal, in which people can have their claims heard by a panel of experts in copyright.

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[1] U.S. Copyright Office, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (September 2013).

There was a congressional hearing and some bills introduced in Congress throughout the years.[2] There is one bill pending now. We don't comment on specific legislation, but we do very much embrace the idea of a small claims tribunal.

PROF. HANSEN: Where is this in the legislative process?

MS. ROWLAND: There is a bill pending in the House, the Copyright Alternative and Small Claims Enforcement Act of 2017 (CASE Act).[3] It was sponsored by Representative Jeffries. A hearing on the bill was held on September 27th.[4] You can go on the House Judiciary Committee website and watch a video of the hearing if you would like. Right now, interested parties are discussing where to go from here.

PROF. HANSEN: You say it's voluntary. Is that because you have Article III problems, so you have an opt-out provision? If I'm a defendant and I opt out — the plaintiff is small and has no money — that's the end of it. Why wouldn't I opt out?

MS. ROWLAND: There are a number of different reasons you would not opt out. One of the reasons you might not opt out is because you don't want a full-blown federal district court procedure. The small claims tribunal that the Copyright Office has envisioned would be streamlined, so you wouldn't have many, if any, hearings and much less ability to go full through the complete litigation experience, so maybe you want to do that.

Also, maybe you think that doing it this way will get you a better result. If you force this person to go into federal district court, you know that they're going to have to spend a lot of money to do that, which clearly is difficult for them. So you might be testing whether this person will actually take you to federal district court.

PROF. HANSEN: What are the chances of these small plaintiffs? Let's say they had a registration and there is an infringement after registration. Statutory damages and attorney's fees are usually enough to obtain a lawyer if you have a decent case. So why wouldn't they choose that because the damages are more than they can get in small claims, right?

MS. ROWLAND: When we did our study we received input from the American Bar Association[5] and the Graphic Artists Guild,[6] and we heard about what would it take, how large a case would have to be, for a lawyer to take the case. I believe something like two-thirds of lawyers would not take any case that

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[2] *Remedies for Small Copyright Claims Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives*, 109th Cong., 2d Sess., Mar. 29, 2006; H.R. 5757, Copyright Alternative in Small-Claims Enforcement Act of 2016, 114th Cong. (2016); H.R. 6496, Fairness for American Small Creators Act, 114th Cong. (2016).

[3] Copyright Alternative in Small-Claims Enforcement Act of 2017, H.R. 3945, 115th Cong. (2017).

[4] *Copyright Alternative in Small Claims Enforcement Act of 2017: Hearing on H.R. 3945 Before the H. Judiciary Comm.*, 115th Cong. (Sep. 27, 2018).

[5] American Bar Ass'n, Remedies for Small Copyright Claims: Response to Notice of Inquiry, at 7 (Oct. 19, 2012).

[6] Comment Submitted by the Graphic Artists Guild, Library of Congress, Copyright Office, Docket No. 2011–10, Remedies for Small Copyright Claims (Jan. 16, 2012).

was under $30,000. So, although there is the availability of statutory damages under the statute, it's not necessarily going to draw the lawyers into bringing small cases that usually involve one-off licensing issues.

Small copyright creators really do face an uphill battle. There are a lot of people who have issues and have a lot of money, but one of the things that we are very interested in doing is reaching out to small and medium-sized business enterprises and individual creators.

The copyright law is actually very distinct from trademark and patent law in that it is not completely commercial. A lot of these copyrights might not be completely commercial, which draw in people at the beginning, and a lot of the issues that people have are smaller. If you have a trademark, you are only going to have so many trademarks. If you have a patent, obviously you are going to spend a lot of money defending that. But copyright is unique, and so it is really important for the Copyright Office to be looking out for the people who may otherwise be somewhat voiceless and not have the money to adjudicate their rights, or even to speak up for themselves.

PROF. HANSEN: This may also create a culture where people are thinking about doing something in copyright, just hearing about this. It might even lead to more Article III district court cases. It's almost like priming the pump a little bit.

MS. ROWLAND: A lot of people wonder if there was a small claims court who would come, would there be enough people who would want to use it, or would it be overwhelmed. I've heard "Oh, no one's going to show up at a small claims court; why would you bother?" all the way to "You are going to be inundated with a million cases and how are you going to be able to handle it?"

I think what we need to focus on is giving people the ability to adjudicate their rights. And if it does lead to more lawyers who will be willing to take small-dollar-value cases to district court, that's great, too.

PROF. HANSEN: My point was just that it is going to increase the culture of being aware of copyrights and the possibilities, and that's actually positive by itself.

Lisa, what were you going to say?

MS. DUNNER: Further to Catie's point about two-thirds of the lawyers taking cases that are at least $30,000 and up — and this will ultimately segue into my topic of copyright trolls — there is a handful of lawyers who are taking hundreds of cases for less than that because they stand to earn millions of dollars through settlement fees that might be anywhere from $3000 and up, and because of the volume of these settlement fees they're earning a lot of money. I think Catie's statistics are accurate, but we can't forget about the lawyers who are taking hundreds and hundreds and hundreds of cases and going after copyright infringers.

MS. ROWLAND: If I could respond to that, in the context of small copyright claims that is an important issue. Any copyright small claims legislation should take into account what can be done to make sure it doesn't become ruined by trolls. As I mentioned, the Copyright Office does not endorse any specific legislation, but in the current legislation there are some discussions about how to

limit the number of claims that you could have and other safeguards to not allow it to be overrun by those cases.

PROF. HANSEN: Who initiated the idea of the small claims court in the Congress?

MS. ROWLAND: In the last Congress a bipartisan bill was introduced by Representatives Judy Chu and Tom Marino. The current bill was introduced by Representatives Hakeem Jeffries and Tom Marino, as well as Representatives Doug Collins, Lamar Smith, Judy Chu, and Ted Lieu.

PROF. HANSEN: Any questions from the audience?

AUDIENCE: Hi, I'm Steve Fallon. I am an attorney with Greer, Burns & Crain here in Chicago, and a former patent examiner a long time ago.

I have a question about the copyright registration and the possibility of a tribunal. Given that copyright applications are not examined, would it make sense to have a Patent Trial and Appeal Board-like entity that could perhaps look at, say, authorship issues or ownership issues to avoid the high cost of litigation for, say, troll litigation?

MS. ROWLAND: To answer your question about whether there could be a Copyright Trial and Appeal Board, essentially, for those of you who are not familiar with the copyright system, there is no procedure where if you are an opposing party you can attack a registration in a quasi-judicial manner. I think that's a separate issue but something for consideration. I understand your point is that then you would have another avenue, but that would only be for the people to deal with authorship issues versus the owners themselves.

What our study focused on and what Congress has been focused on are the actual infringement matters. But yes, there are definitely opportunities for looking at other options that the Copyright Office could consider.

PROF. HANSEN: Who would adjudicate this in the Copyright Office?

MS. ROWLAND: Our report and the pending legislation both envision hiring three Copyright Board members, one of whom would have arbitration experience, and then the other two would have to either have represented content owners or users or both. So there would be a safeguard to make sure it was not too stacked in any one particular favor.

PROF. HANSEN: Okay. Good.

PROF. YANISKY-RAVID: I like this idea of access to knowledge and access to justice. I wonder if you have considered having it available online to make it more accessible for everyone, similar to World Intellectual Property Organization (WIPO) arbitration. The other thing is, after you make the decision can the parties appeal to courts?

MS. ROWLAND: Yes, we looked at the Uniform Domain-Names Dispute Resolution Policy (UDRP) proceedings as a good way to do it. However, there might be a desire for some discovery because there will be damages allowed. What is being proposed would not allow for extensive discovery, but there would be limited discovery — interrogatories, document requests, that kind of thing — and that is something that would be beyond the UDRP's scope.

We are envisioning it being, not online, but remote. You would not have to show up in person at a hearing. All the hearings, if there were any, could be

conducted by phone or by the Web or whatnot, so it could be done online in that respect.

PROF. HANSEN: Thank you very much.

All right. Lisa, tell us a little bit about your practice.

MS. DUNNER: I am a big firm escapee. I started my own practice fifteen years ago. I have four attorneys. The law firm is named Dunner Law. My dad has accused me of trademark infringement; I accuse him of trademark dilution. We practice everything related to trademark and copyright, and we have a cute little brownstone in Georgetown.

PROF. HANSEN: Your topic is copyright trolls?

MS. DUNNER: It is.

PROF. HANSEN: Is that a rare occurrence? Do you think that it's becoming more common, less common, or staying the same?

MS. DUNNER: It's actually very common. Unfortunately, patent trolls take the limelight, but I think copyright trolls are now entering the picture more and more. There is a lot written about copyright trolls and there is a lot more said about them. I think the drafters of the copyright small claims court, in part, had the trolls in mind.

For those of you who don't know what a copyright troll is, it's essentially a person or an entity that is using litigation for the purpose of making money. They are enforcing copyrights for the purpose of making money instead of actually selling a product or a service or licensing that product or service to others.

The $6 million question really is, what is a copyright troll? There are a lot of overly zealous attorneys, the ones who have been handling these lawsuits, and it's really the litigation tactics they undertake that label them as trolls.

Essentially what happens is they have technology that combs the Internet that discovers the Internet Protocol (IP) address of a computer that is illegally downloading movies, typically through BitTorrent sites. All they have is the numeric code for the IP address; they don't have the name of the person who identifies with that IP address.

The trolls file suit in federal district court. About six, seven, eight years ago they would file a lawsuit against maybe 5000 or more John Does, most of whom they didn't have jurisdiction over. They would ask the court for a subpoena to take to the service provider, like Comcast, Verizon, or RCN, and they would ask these service providers to turn over the personal information of the customers that belong to the IP addresses provided to them.

The service provider would say: "Whoa! I can't do that. There are privacy issues with that." So the service provider sends a letter to the alleged infringer, the John Doe named in the complaint — or not named, but identified in the complaint by an IP address.

The John Does receive these scary letters stating that they are now part of a federal lawsuit and if they don't do anything in thirty days their names will be revealed.

Nine times out of ten — maybe even more, nine-and-a-half times out of ten — the movie that was downloaded is porn. So there is great incentive, guilty or not, to settle these cases.

My firm has represented several dozen of these cases. We represent the John Does. A lot of times the John Doe has a security clearance that will be destroyed if his name is revealed in court. We have gotten calls from wives who have said, "There is no way my husband did this, so please fix this." We have gotten calls from husbands who said, "Don't tell my wife that I downloaded this movie." They have been interesting cases.

The tactics that these attorneys are using to extort money essentially are horrible. They are really telling these people, "If you don't settle, we're entitled to statutory damages." Usually the works at issue are registered, so they are entitled to statutory damages. Sometimes they're guilty; sometimes they're not.

But these John Does don't have the money to fight a lawsuit, so almost all the time they settle. I've not been involved in a case that has not settled. We've settled every single case, and the settlement amount can be anywhere from $2000 to $4000 per download. I think our worst case had forty-two downloads, so our job was to get the settlement amount as low as possible.

PROF. HANSEN: How do you make any money on this? Are there many John Does out there? How do they even know about you?

MS. DUNNER: Good question. The Electronic Frontier Foundation (EFF) has a website. I'm not sure how we got on it, but we got listed there as a law firm that represents John Does in certain districts that we're barred in.

It's not a huge moneymaker for us. Luckily, we have big, established clients. We tend to make just a little bit of money on these cases. But really, I look at it as a training tool for our junior attorneys. It gets them exposed to contract negotiation and settlement negotiation and lawsuits and reading a complaint. So, it's not a huge moneymaker, but we feel like we're doing something good.

PROF. HANSEN: You get to see some interesting movies.

MS. DUNNER: We do. We don't watch the movies, though.

MR. KJELLBERG: If you do watch them, you want to watch them online. Don't download them.

MS. DUNNER: Yes, right. Good point.

PROF. HANSEN: Are they that dumb that they're downloading them?

MS. DUNNER: Actually, you raise another interesting point. One thing I do tell our clients — and something you all might want to think about if you have children that are of age, maybe in college, that share a house in a university or an apartment — is to make sure your kid's name is not on the account name for the Internet Service Provider (ISP) account because the person that is named as the owner or the bill payer of the ISP account becomes the John Doe if movies are illegally downloaded. So even if the person whose name is on the bill is not the downloader, if somebody in the house or somebody uses their Internet for that account, whoever owns that ISP account is going to be the one who is going to end up in court.

Also, protect your Wi-Fi because people can get onto your router and easily access your IP address. There are a million things that can happen now. I know all of you are going to go home, you're going to quit downloading, and you're going to protect your IP addresses right away.

PROF. HANSEN: Okay, good.

Matthew, tell us a little about yourself.

PROF. SAG: I'm Matt Sag. I'm a law professor at Loyola University Chicago. I specialize in copyright, intellectual property, and I also teach property law.

PROF. HANSEN: Which do you like better, teaching property or IP?

PROF. SAG: Oh, IP, although property law is easy because it doesn't change.

PROF. HANSEN: Why don't you discuss a few IP liability cases and what direction we're going in?

PROF. SAG: Sure. Back in 1998, very shortly after Google was formed — so a billion years ago in Internet time — Congress passed the Digital Millennium Copyright Act (DMCA). The DMCA has a set of safe harbors for online platforms and for Internet service providers.

Over the past twenty years, that system of safe harbors I think has become completely broken. The Copyright Office is currently looking at all aspects of the Section 512 safe harbors.[7]

The really interesting one is looking today at how the safe harbors are under attack by right holders. Basically, the method of attack is a company called Rightscorp monitors for online infringement in much the same way as the copyright troll plaintiffs, and they flood ISPs with notices that appear to be based on publicly available information, not necessarily of very high quality.

The DMCA has some provisions about how you should use notice-and-takedown if you want to take down a post on Facebook or something on Twitter or something on a blog. You need to actually write to the website owner and say: "This is the work, it infringes my rights, and I submit this under penalty of perjury." So it's kind of a big deal.

There are no parallel provisions for notifying an ISP because the theory is, what are ISPs going to do? There's nothing for them to look at. The data has already gone through their system.

Rightscorp generates a flood of notices and then uses these to say: "Aha! You didn't respond adequately in our opinion to all of our notices; therefore, you have no safe harbor." That is when the lawsuit for copyright infringement takes place.

No one doubts that there is a lot of copyright infringement that takes place over Comcast's network, for example. But in the recent *BMG v. Cox Communications* case,[8] BMG, a music publisher, shredded Cox's claim to the safe harbor because of the way Cox dealt with claims of infringement, and BMG won a $25 million jury verdict for copyright infringement.[9] That case was appealed based on the contributory liability instructions that the judge gave the jury. It was sent back by the Fourth Circuit and then it settled at the district court.

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[7] United States Copyright Office, Section 512 Study.

[8] BMG Rights Mgmt. (US) LLC v. Cox Commc'ns., Inc., 881 F.3d 293 (4th Cir. Va. Feb. 1, 2018).

[9] BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc., Civil No. 1:14-cv-1611 (E.D. Va., Alexandria Div., Feb. 14, 2017).

But *Cox* was just the first case. There is now a case involving a small ISP in Texas called Grande,[10] and I think we can bet that there is about to be a flood of similar cases against ISPs.

PROF. HANSEN: Is this good or bad or in between?

PROF. SAG: I think it's in between. ISPs used to have a view as to what was an appropriate policy for dealing with notices of infringement. That view is no longer one that the major copyright owners hold.

The question is, what kind of duty do you have to respond to a cursory, low-quality notice of infringement as an ISP? And there is not a lot of good guidance out there.

The practical reality is that if you're an ISP, unless you are scrupulous in responding to every single notice in exactly the way that a plaintiff like BMG would think is appropriate, then there is no safe harbor. You can't practically argue the safe harbor in front of a jury and then turn around and argue that you're not contributorily liable. The jury just gets too confused about the different subjects. They're going to think *Ah, well, if they didn't do everything they could have done to prevent this, then they're contributorily liable*.

Just as a matter of strategy, I think the safe harbor is dead for ISPs. The DMCA was supposed to get us out of having to address the question of when an ISP is responsible for infringement that passes over its network. "When is FedEx responsible for the blackmail letter it delivered?" is a similar sort of question. Now all these cases are going to proceed on that issue.

I don't know if it's good or bad, but it's certainly different.

PROF. HANSEN: It's interesting. President Clinton appointed Bruce Lehman, a copyright person, to be the Director of the Patent and Trademark Office, and he wrote a White Paper[11] that actually said whoever owns the lines it's going over, AT&T's or anyone else's, is completely liable for any infringements because they have the money to check and everything else. That obviously freaked out a whole bunch of people and caused them to get involved in battling this in Europe and here. And, of course, that didn't go through.

Are you saying that will end up being the case?

PROF. SAG: No. When that White Paper came out, the telecommunications companies understandably freaked out. They said, "We don't want to be strictly liable for every act of infringement on our networks." The safe harbor was part of the negotiated compromise there.

If the safe harbor system is not working, then courts are going to have to figure out whether under common law and copyright principles an ISP should be held liable for the infringing use of its network. That probably should require some level of specific knowledge. I think material contribution is a given. The cases are going to be argued that way.

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[10] UMG Recordings, Inc. v. Grande Commc'ns. Networks, LLC, 2018 WL 1096871 (W.D. Tex. Feb. 28, 2018) (Magistrate's Report and Recommendation).

[11] BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE. THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, (September 1995).

What I'm hoping to get from the Copyright Office in the 512 Report is some new, firmer guidance for ISPs, so they can say: "Oh, okay. We don't need to do everything *BMG* tells us to do, but we clearly can't do nothing. Here's a clearer instruction as to what's appropriate."

Just to add one final thought, there's a great Ninth Circuit case[12] that came out just a few months ago where the platform in question was like YouTube but for pornography, and the question is: how were they dealing with notices of infringement? The thing about that case is, honestly, who really cares if a subscriber gets terminated? It's not a huge deal. But if Comcast terminates your Internet access, and that's your phone line, and that controls the relay on your pacemaker, and that's how you work and telecommute and communicate with the world and engage with friends and family, then the stakes of termination are higher. I just don't think that we have really addressed this question yet.

PROF. HANSEN: Five years from now, where will we be?

PROF. SAG: The Copyright Office will have fixed everything.

PROF. HANSEN: All right. Very interesting.

Panel?

MR. PUDELKA: I just have one question. I think in the *Cox* case in particular, though, the facts were important. At least from reading the case, there is one particular person who is infamous in his emails within the opinion being cited constantly saying: "Whatever we do, do not terminate this person, even though we know that they are infringing a lot, and give them one more chance" or "Well, this is their final, final, final, final warning before we terminate them." How much do you think that played into this? At least from my interpretation, the court said, "But you don't really have a termination policy because you never terminate."

PROF. SAG: I had the same reaction when I read the *Cox* case. I thought *Ooh, bad facts. When you have employees saying "F . . . the DMCA!!!"*[13] *and they never actually terminated anyone?*

MR. PUDELKA: Right, they never did.

PROF. SAG: Everything they had on paper seemed to be about not terminating people. There were bad facts in *Cox*. They probably didn't deserve the safe harbor.

PROF. HANSEN: First of all, e-discovery is going to discover everything, so that's a whole new world. But they're not unusual. YouTube, when it was taken over, said, "We have to have this illegal stuff, otherwise we can't survive, so we're not going to mess around with it." That was the first look at it. It was an important investment aspect of it.

If there's a financial/commercial reason not to look at it, then maybe we do need more vigilance — or less vigilance — I don't know.

PROF. SAG: The difference there is the difference between general knowledge of infringement and specific knowledge. If I'm Avis and I know based on reading the newspaper that a lot of people are renting my cars in order to

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[12] Glacier Films (USA), Inc. v. Turchin, 896 F.3d 1033 (9th Cir. 2018); *see also* Cobbler Nevada LLC v. Gonzales, 901 F.3d 1142, 1144 (9th Cir. 2018).

[13] BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc., Civil No. 1:14-cv-1611 (E.D. Va., Alexandria Div., Feb. 14, 2017), BMG's Mem. in Supp. Fees at 5 (quoting PX-1392.0001).

deliver drugs, then "Yes, I get some general benefit, I might have some general awareness, but am I really responsible for the fact that a drug dealer uses my car?" But what if they turn up at the counter and say, "What's the best car for delivering cocaine?"

PROF. HANSEN: Isn't that vicarious liability? Oh, no, but you can't control it. Fine. All right. Good point.

PROF. SAG: That's the question. There are many, many things that will grind to a halt in our society if general knowledge of some infringing use is enough.

The question that I don't think we've fully addressed yet is when have you actually achieved specific knowledge.

PROF. HANSEN: To the extent that you fight it in litigation, is it because the damages are going to be horrible or the defendant really needs the source of income? They could settle and do something — I don't know what. What are the alternatives open to the defendant when someone comes after them for this? Or is it nothing is realistic other than just fighting it out? But, if you settled, then you're going to be violating the settlement agreement.

PROF. SAG: Whether settlement is realistic depends on the positions of both sides. I think that the problem for ISPs is they are put under the microscope one by one. It would be better for the ISPs as a group, and probably for society, if we could solve this issue collectively, if we could set a clearer collective standard, rather than fighting it out through piecemeal litigation. Whether people should settle just depends on whether there is a reasonable settlement on the table.

PROF. HANSEN: It's somewhat similar to businesses that take in a lot of cash and it's recognized they're not putting all that into records for tax purposes — and maybe that's how they survive, bars or something else — I don't know. But nobody's going crazy over it. So yes, they're violating the law, but they're good people and this and that.

If in fact it's good guy/bad guy — if you're viewing the ISP as a bad guy, I think the result is going to be preordained. But is there any way to look at the ISP as "I'm between a rock and a hard place; I can't do this; I can't exist without this" or anything along those lines?

PROF. SAG: I think the case for the ISP is not that it can't exist without these customers. The case for the ISP is that its customers do all sorts of things and it's not its job to spy on its customers and to monitor its customers. It's the ISP's job to connect the customers to the outside world. If the customers choose to engage with the outside world in a way that violates people's rights, that is, at least initially, a matter for those people and their customers. The question is, to what extent are we bringing in the platforms purely on a secondary liability basis?

I reject the idea that the ISPs are the bad guy. At the very most, they're someone who hasn't done enough to stop the bad guy.

PROF. HANSEN: Okay, good. Thanks.

MS. DUNNER: There is a question.

AUDIENCE [Monica Thompson, TottisLaw]: Companies like YouTube have found a way to monetize the prevention of copyright infringement, haven't they? They let the songwriters register on its platform or on a program that it has

to prevent people from infringing it on YouTube, and that is one of the best ways for the music industry to keep massive infringements offline. Of course, you get to pay, or you get to contribute to YouTube's welfare for them to do these things. I don't think the ISPs are the ones that are suffering in this.

PROF. SAG: That's a great point, except that the ISPs are in a totally different situation. YouTube, through Content ID, can monitor works that are submitted by their users. They can run them through their Content ID filter and determine how they should be treated.

ISPs can't filter all of the Internet traffic that they get on-the-fly. They don't have that kind of relationship to the content because they are a conduit; they're not a host.

YouTube, as a host, has it easy. If you want to send YouTube a takedown notice, then there's a whole set of rules you need to comply with. If you want to send a conduit a notice, there are no rules that you need to comply with apparently. It sounds like you might think, *Oh, yeah, they should be able to do what YouTube does*, but they are actually not in a position to do that.

PROF. HANSEN: All right. I think we're going to have to move on.

Tom, tell us a little bit about yourself and your practice.

MR. KJELLBERG: I'm a copyright lawyer at Cowan, Liebowitz & Latman in New York City. I work on copyrights big and small, from little jewelry designs to major motion pictures to records to traditional publishing. I should point out I was a second-career copyright lawyer. I went in my late thirties to Fordham Law School. I wasn't sure exactly what I was going to do.

PROF. HANSEN: You had some incredible professors at Fordham, right?

MR. KJELLBERG: I took Hugh Hansen's copyright class.

PROF. HANSEN: And the rest is history.

MR. KJELLBERG: And the rest is history. I forgive him.

I'll be talking about the Classics Protection and Access Act, which was part of the Music Modernization Act, which I read in its entirety on the plane on the way here. I want points for that.

It's very interesting when you start to dig into it — at first, I was going to say, "Wait, this is copyright lite," but that's not true — because it's almost the full Monty of copyright protection for pre-1972 sound recordings which have not been subject to federal copyright protection up until now. They were protected by the proverbial patchwork of state law, in some cases statutory, in some cases common law, protected under various theories like unfair competition in some cases, in some cases under state copyright law, which all preempted when the 1976 Act passed.

This has obviously been a long time coming. When was the Copyright Office report?[14]

MS. ROWLAND: That was in 2011.

MR. KJELLBERG: In 2011, right. And obviously well before that. What are we going to do about this sort of disparity in protection among sound record-

[14] United States Copyright Office, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011).

ings based only on when they were first fixed? That's part of the Music Modernization Act, one of four major legs of the Music Modernization Act.

What you get is, in effect, the same set of exclusive rights under Section 106 as apply to all sound recordings. Again, it's not the full slate of 106 rights because sound recordings are treated differently, but you get a reproduction right, a distribution right, an adaptation right, and you get a digital public performance right.

Again, like all sound recordings, there is no general public performance right. The most significant effect of that is, of course, that terrestrial radio performances are not monetizable by the copyright owner of the sound recording, whether it's pre- or post-1972.

You also get protection under Sections 1201 and 1202 for circumventing technological protection devices and for tampering with copyright management information.

It gets interesting. You get a uniform term of protection. It's uniform in the sense that the term of protection is nationwide, but it's not exactly uniform for all pre-1972 sound recordings. The basic rule is it's ninety-five years from the first publication of the sound recording, and "publication" is defined by basically deferring to the definition of publication in Section 101 of the Copyright Act: "the distribution of phono records to the public." So that makes perfect sense. If the record was first sold in 1932, then ninety-five years from 1932 is the term of protection for the sound recording.

But then they've got what they call "transition periods," which are added to that ninety-five-year term for sound recordings, depending on when the sound recording was first published. There's a three-year transition period for pre-1923 sound recordings. So, say a 1920 sound recording gets ninety-five years plus three years, which gets them to 2027, again a very short term of copyright protection; five years for sound recordings published between 1923 and 1946, a 100-year term of copyright protection; and fifteen years for sound recordings published from 1947 to 1956, which is 110 years of copyright protection. Everything ends. The latest that any copyright in a pre-1972 sound recording can last is until February 15, 2067. That's unusual, right? There is no other type of copyrighted work that has a copyright term of 110 years when it's pegged for publication.

PROF. HANSEN: Sound recordings are losing a very big marketplace of non-digital, public performance. The reason they didn't get it is because the American Society of Composers, Authors and Publishers (ASCAP) went to Congress and said, "We don't want sound recordings to get this because there's only so much pie; other people are going to get paid for these, and we want to get the whole pie." It was literally that.

But there's no logical reason why sound recording shouldn't have a public performance right.

MR. KJELLBERG: General public, absolutely.

PROF. HANSEN: They gave it the digital public performance right, which then was thought to be nothing. Maybe eventually it will be. So to some extent they are not getting all the money they should get from normal exploitation of the work.

MR. KJELLBERG: That's correct. I think that as well as ASCAP — and I recall this from your class actually.

MS. DUNNER: That's scary.

MR. KJELLBERG: In the early 20th century, the then-nascent radio industry was very effective in saying: "Hey, look, we've already got to pay performance royalties to the music publishers, to the musical composition copyright owners, and we also have to pay the record company," which in a lot of cases then were the same entities.

PROF. HANSEN: They were also in on that, yes.

MR. KJELLBERG: It was a precursor to the notion when the Internet came in: "Oh, we have to be very protective of this new technology and not saddle it with any fees."

I have to say that one other interesting point is you get all your civil remedies. Statutory damage is interesting because, as most people know, the availability of statutory damages and attorney's fees is conditioned on the copyright having been registered prior to the commencement of the infringement.

Since these are not being accorded full federal copyright protection, they are not eligible for registration, but instead there is a filing requirement whereby the sound recording copyright owners have to file a schedule with the Copyright Office with certain information. I think they will be working out those regulations in the next — what do you have, 180 days or something?[15] Not nearly enough time.

It's interesting. The one comment I have is you just wonder why they chose this approach instead of full copyright protection. Who knows? The answer may be, as people often say, "Congress doesn't legislate; the interested parties come up with the legislation and Congress blesses it."

PROF. HANSEN: Do you have any comments on this? It has already happened?

MS. ROWLAND: Yes, it has already happened.

I think that there are a lot of patent people here, so I'm not so sure how many people are very steeped in the music law angle of this. I want to point out for those of you who are not aware that there often are two types of rights implicated in musical works; there may be a copyright in the musical composition in addition to protections for sound recordings.

PROF. SAG: Are those royalties going to be collected by SoundExchange?

MR. KJELLBERG: I believe not, correct?

PROF. SAG: Right.

PROF. HANSEN: Okay. Thanks.

Glenn, digital first sale: what are we doing, not doing? Where is that going?

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[15] See United States Copyright Office, Open Rulemakings: Interim Rule Regarding Pre-1972 Sound Recordings (Oct. 16, 2018); Notice of Inquiry Regarding the Noncommercial Use Exception to Unauthorized Uses of Pre-1972 Sound Recordings (Oct. 16, 2018).

MR. PUDELKA: First, I will say I'm also a second-career lawyer, but I wasn't as smart as Tom to go to Fordham. I ended up going to Boston College Law School. My first career was a children's book editor, which brought me to copyright.

I think the comment that Judge Newman made today about technology and how it is changing so rapidly and goes faster than the law maybe makes my topic obsolete since I'm talking about digital first sale, and digital first sale, at least as we know it right now, in connection with music, and do you own, say, your iTunes library and could you sell it as a "used" song? Of course, who uses an iTunes library anymore? People now use Spotify and Apple Music. I'm old enough that I still do use my iTunes library.

MR. KJELLBERG: And your cassettes.

MR. PUDELKA: Yes, and my cassettes and my LPs and my 8-tracks (I'm still hoping for that to make a comeback).

The reason I think it's interesting, though, is because obviously it doesn't just deal with music. It deals with e-books, it deals with movies, and it deals with all of this due to the fact that everything now is electronically transferred, and you don't have a physical copy of anything anymore.

The case that I want to briefly talk about is *Capitol Records v. ReDigi*. It is now on appeal to the Second Circuit.

For those of you who don't know, ReDigi's technology basically created a database, and it had a computer file that was downloaded onto your computer that would basically upload to its database the songs that you had purchased legitimately through iTunes. It wouldn't pull up the songs that you had, say, ripped from your CD onto your iTunes account, because that would have meant that you had made a copy from your CD and put it on iTunes. But if you paid $0.99 or $1.29, or $0.79 when they're on special, for those songs, you could say: "I don't like listening to that song anymore, and I'm going to sell it to Tom. He likes that song. I'll sell it to Tom for $0.40."

ReDigi was sued for copyright infringement. Its defense was that the first-sale doctrine under Copyright Act Section 109[16] says that the distribution right was exhausted once I purchased my iTunes song, and so I can turn around and sell it, like I could take my Beatles album down to the record store and sell it.

The district court said: "No, because first we have an issue where we're not talking about first sale really. We are talking about a reproduction right because when you make a copy of the song and upload it onto ReDigi's servers you are making a copy, and the reproduction right is the exclusive right of the copyright holder, not you; therefore, you don't get to a distribution being exhausted because what we have is direct infringement of the reproduction right." There is also a fair use argument that didn't go over very well.

So the question really has become, going back to my first point, whether or not you own your iTunes library and what you can do with it. This only arises

[16] The first-sale doctrine, codified at 17 U.S.C. § 109, provides that an individual who knowingly purchases a copy of a copyrighted work from the copyright holder receives the right to sell, display or otherwise dispose of that particular copy, notwithstanding the interests of the copyright owner.

because of technology. Obviously, no one would question that I could take my entire record collection and sell it to somebody else because I would no longer have the physical copies. But that's not the case in the digital world. I could have taken all those songs that I downloaded from iTunes, I could have burned them onto a CD, put that in my CD drive, uploaded them to ReDigi, and said, "Oh, I don't have that copy anymore."

ReDigi then takes your copy that you uploaded — the way they described it was like a train: it literally takes it bit by bit — I always picture it as some sci-fi movie of a song being digitized into little pieces and, like in a *Star Trek* movie, being beamed up into another place. ReDigi said, "So there is no copy there." The court said, "No, you're making a copy and you're just deleting the other one."

Obviously, technology can work its way around this. What happens if the song gets uploaded to a server initially, so that's the copy, and it gets turned on and off? So the song never sits on my computer, it just sits in the cloud, and when I decide to sell it to Tom, whatever company decides to do this can just shut my access off and turn Tom's access on. Now we don't have a reproduction anymore.

MS. DUNNER: That sounds Napster-like.

MR. PUDELKA: There's a legitimate copy that I bought, and I am now saying, "I don't want it anymore, so I'm just going to not have access to it anymore and now Tom will, and he'll pay me $0.30 to have that access."

MR. KJELLBERG: It sounds like a license, where everything is going anyway.

MR. PUDELKA: Exactly.

MR. KJELLBERG: Your license ended.

MR. PUDELKA: My license ended, right. So maybe I don't own that song when I buy it. As you can imagine, obviously this a huge issue with e-books, as I mentioned before.

I think Europe is also interesting. There is a Court of Justice case where they said, "No, there's not a distribution exhaustion." So that is a little different than the *ReDigi* case. In the *Allposters* case,[17] they had technology that could take the image off a poster and put it onto a canvas. The Court of Justice said, "No, you're making a copy out of that, even though you're changing the medium."

PROF. HANSEN: You asked whether I own my record collection. Yes, I own the tangible object. I never owned the IP, so all I am doing is selling a tangible object. As soon as you go to digital, basically I have a digital real first sale of a digital object: I buy it. If I am free to publish that, it's going to destroy the music industry. So it's not a small thing. It's a very big thing.

What do you predict?

MR. PUDELKA: I am not a litigator, nor do I have any skin in this game, so I can make a prediction and probably be wrong and not have it come back and bite me. I think the appeals court may uphold the district court.

The Copyright Act in the definitions of "copies" and "phono records" does say "material objects." As someone who thinks we are supposed to read statutes

[17] Case C-419/13, Art & Allposters Int'l BV v. Stichting Pictoright, Judgment of the Court (Fourth Chamber) of 22 January 2015.

and take them at their face value, I'd say a "material object" is not a digital file; that's an intangible object.

I just want a decision. I went on ReDigi's website today, and they have a countdown clock there "waiting on the appeal verdict …" showing the time they have been waiting for the appeal verdict. I can't remember how many weeks it has been now. It's more than sixty weeks. It has been a long time.

PROF. HANSEN: Thanks.

We will now turn to another interesting topic. Shlomit, what do you want to say about artificial intelligence (AI)?

PROF. YANISKY-RAVID: It's like envisioning the future.

But first, as the last speaker, I want to say thanks to John Marshall Law School and to all the organizers and Daryl for this very interesting and impressive conference.

I focus on AI and IP. I don't know if you heard about it, but last week a portrait of Edmond de Belamy created by AI was sold at auction at Christie's in New York for $432,000, which is forty times more than the original estimate.[18]

It's not the first time that paintings produced by AI systems have been in the market, and I think it will change the entire copyright regime soon. I have been a visiting professor at Fordham for ten years. Every year I take my students to see an exhibition of paintings made by AI. Not only were these paintings made by AI and produced by AI, but also the other system that filters, and then the painting was another AI system. So I think we are facing a new reality, and we are seeing how works of art change.

It is interesting to think about. Before the invention of the camera, art was more focused on portraits and trying to copy, then the camera was invented, then digital means, and now it's AI. This will totally change the way we reproduce art.

I think it's very interesting because AI is not just about drugs or autonomous cars, but it can be creative.

To understand its implication, we first have to understand how AI works. I was using my scientific background to study the way it works. I invested a lot of time creating a lab and programming AI. When you understand the technologies you understand the great potential.

The way it works is really interesting. It starts with software. The software is just finding pattern similarities. To produce the painting that was sold at auction last week they used software, the algorithms, the AI system, and provided it with 50,000 paintings.

That is not enough. Usually we need a massive amount of data, which can result in malicious uses of AI. We start with a massive amount of data, like facial recognition and other paintings. For this specific painting, the set of data included copyrighted works. The AI system finds patterns and similarities and starts producing new, autonomous, creative, and evolving patterns.

The first question for the copyright regime is ownership; then comes the question of accountability because we are using other sets; and questions of databases and privacy and copyright issues.

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[18] BBC News, Portrait by AI program sells for $432,000 (Oct. 25, 2018).

There are certain venues I would bring some of my writings, my conclusions, after dealing with that for three years. It is a bit contradictory because I'm on the journey to find the right solution.

I coined the term "multiplayer model." It starts with the software, but the software has nothing to do with the end product. It doesn't know what's going on. It can be used in many fields. It's like saying that a software program has some derivative work right for the end product. Many people don't understand how it works. It is like saying that someone who is using a camera is really the right holder of the photo, or someone who is using a computer will be author of the script written by the computer.

One take is just to look at this multiplayer model and say "software programmer." If we distinguish one from the other, because if all the multiplayers are embedded in one theorem they might or might not have a right, this is the software parameter.

The most important figure in this process is the data provider, whether you are using it for a painting or music. In our lab we reproduced jazz melodies because we exposed this AI system to swallow jazz melodies that already exist. But the data provider has nothing to do with copyright, so I think it is just provided as the teacher.

Now we are more focused on the user and attempting to see what the user's affiliation with the end product is.

One option is saying that copyright is not applicable anymore because copyright is following the monkey selfie case where a monkey took a selfie — I think everyone is familiar with that — and the Ninth Circuit[19] held that the monkey lacked statutory standing because the Copyright Act does not expressly authorize animals to file copyright infringement suits. This court decision leaves a lot of open questions: What is it in? Is it in the public domain and everyone can use it? Who is accountable? That is one take.

We have published an article in *Cardozo Law Review* – you can read it — saying that copyright, and even patent rights, would not be applicable when AI produces works of art or patents.[20]

The other idea that we had is that we would like to reproduce copyright in a way that will be more applicable to these cases when AI — which is autonomous and evolving and creative — produces art, and we thought about the "work made for hire" doctrine.[21] If the AI was a human who was working and produc-

[19] Naruto v. Slater, No. 16-15469, 9th Cir., Order (Aug. 11, 2017).

[20] Shlomit Yanisky-Ravid & Xiaoqiong (Jackie) Liu, *When Artificial Intelligence Systems Produce Inventions: The 3A Era and an Alternative Model for Patent Law* (Mar. 1, 2017), CARDOZO L. REV. (forthcoming).

[21] Section 101 of the Copyright Act (title 17 of the U.S. Code) defines a "work made for hire" in two parts:

(a) a work prepared by an employee within the scope of his or her employment or

(b) a work specially ordered or commissioned for use (1) as a contribution to a collective work, (2) as a part of a motion picture or other audiovisual work, (3) as a translation, (4) as a supplementary work, (5) as a compilation, (6) as an instructional text, (7) as a test, (8) as answer material for a test, or (9) as an atlas,

ing, his employer would get the right. So we tried to use this doctrine of work made for hire and think about new legislation that will treat AI as work made for hire.

AI is fascinating. I wish you all could pursue a subject that you love so much.

PROF. HANSEN: Any comments, discussion, questions?

AUDIENCE [Professor Marshall Leaffer, Indiana University]: I agree that trying to engraft AI into the current copyright statute is not going to work. It needs special legislation. Is there any such legislation that has been proposed or is on the books?

PROF. YANISKY-RAVID: Yes. The United Kingdom and New Zealand and other countries amended their copyright law to say that the copyright holder would be the one who made the arrangement for this system to work.

But I tend to disagree with this approach because I think it still reflects the idea that you always look for the person behind the machine, which is not the right take when you understand how AI works, which is really creative and evolving and autonomous in many ways.

PROF. HANSEN: Thank you, Shlomit, and I want to thank everybody on the panel.

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if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.