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Concurrent Sessions III
Session A:
Copyright Issues in Music and Entertainment Law

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Panelists:

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Terry Hart

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James Ginsburg

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MR. PARKS: Welcome to the last copyright panel of the day. You get to go to the cocktail party after our panel. That's all a good thing. I know we'll be able to keep you awake because we have an all-star panel to wind up the day here. As music things go, they always save the marquee act for the last. So here we are.

My name is Kevin Parks. I am a partner with Leydig, Voit & Mayer here in Chicago. We're an IP boutique. And I have taught music copyright and music licensing here at John Marshall for the last fifteen years. I've really enjoyed those opportunities. And, my oh my, how the business of music has changed over the

last fifteen years! We are going to talk a lot about that as we go through our topics today.

Before we go further, I want to acknowledge my associate, Kyle Migliorini. Kyle is an associate at Leydig and did a yeoman's job compiling information so that I could speak intelligently, or at least intelligently enough to introduce these topics today.

We are going to address some core topics on the legislative front, some legislation that just passed, some that is still percolating; and then we'll move into some infringement cases, the litigation front if you will, to wind things up. But first I'll introduce the panelists and then we'll talk a little bit about the state of the music business.

Ed Lee is a professor of law here in town at Chicago-Kent College of Law and he is the director of the program in intellectual property at Kent.

Jacqueline Charlesworth served as the General Counsel and Associate Register of Copyrights in the U.S. Copyright Office for a period of time. She is now Of Counsel to Covington & Burling in their New York office. Jacqueline has been closely involved in a number of the different topics we will be discussing, so she is a real plus for our panel today.

Terry Hart is the Vice President of Legal Policy and Copyright Counsel of the Copyright Alliance, a nonprofit advocacy group on copyright issues. Terry is also an adjunct professor at George Mason University Law School. And he is the owner of [Copyhype](#), a blog dedicated to copyright law and its role in the digital era. Terry has been publishing Copyhype since before blogs were a thing, before they were in style. It is a great blog that I personally subscribe to, and I particularly recommend the Friday's Endnotes feature. It's a great way to wind up the week. Terry does a great job of curating some interesting copyright stories that have accumulated every week. So I've known Terry for a while, but this is the first time we've met.

Scott Burroughs is a name partner at the Doniger/Burroughs law firm in Southern California, an entertainment and technology law boutique. Scott is a litigator and will have much to say on some of the current litigation topics we will delve into.

Sean O'Connor is the Boeing International Professor of Law at the University of Washington School of Law. He teaches and does research that focuses on IP and business law with regard to startups and commercializing technology in the arts and innovation, and his teaching and law practice specializes on transactions and the strategic role of the general counsel.

Sean is also a musician. He should have brought his guitar. I don't think he brought it today.

MR. BURROUGHS: I didn't, no.

MR. PARKS: He can play the opening licks to *Stairway to Heaven*. Next time we'll call on him to do that.

Finally, next to me is Jim Ginsburg. Jim attended the University of Chicago Law School for a year, then thought the better of it and decided that instead of pursuing a law career he would found a classical record label. That was in 1989, and it's still going strong. Cedille Records, located here in Chicago, is a specialized label dedicated to making classical recordings featuring Chicago area musicians, especially those who have been overlooked by major labels. So an interest-

ing niche of the business. And now it's thirty years later, so congratulations on surviving all the changes in the business over those years. Interestingly, the label was founded as a for-profit entity, but it has now been reorganized as a not-for-profit record label under the Chicago Classical Recording Foundation.

I am also confident in saying that Jim is the only participant in today's conference whose parent is a sitting Supreme Court Justice. He is the son of "the Notorious RBG," Ruth Bader Ginsburg. So if we need to get into some prognostications or guesswork about predictions about some of these cases, we may put in a call to the hotline and see what Justice Ginsburg has to say about things.

Let's start by talking a little bit about the state of the music business. In the last fifteen years that I have been teaching the curriculum, the way that music is consumed and that revenue is generated in the music business have changed very dramatically.

In 2003, when I started teaching courses here, about 98 percent of the revenue in the recorded music business was based on the sale of physical goods, in those days CDs and LPs and other physical product. Now it's fifteen years later and, according to the most recent Recording Industry Association of America (RIAA) [Mid-Year Shipment and Revenue Statistics](#) that have just been released, 75 percent of the revenue generated in the recorded music business is by virtue of streaming — not the sale of digital goods even, but streaming. So we have gone in those fifteen years from almost 100 percent sale of physical product to a streaming world.

Before we get started, I would also like to hear from Jim. Maybe on more of a micro level, how's life in the music business? What do you see as the state of the business in 2018?

MR. GINSBURG: Thank you so much, Kevin.

There's one small correction. I started the label as a sole proprietorship. I was not envisioning making huge profits running a classical label specializing in unknown Chicago artists.

MR. PARKS: And now you are.

MR. GINSBURG: Yes. As a not-for-profit business model it has been quite successful because people appreciate our mission of recording and promoting these musicians, which is great.

Kevin already mentioned some of the statistics. What you will find is industry-wide the industry really reached its peak in revenues in 1999, and then for fifteen straight years global revenues dropped. It's only in the last three years — only the last two actually in the United States — that revenues have come up, and that is because the sources that had replaced these physical sales, especially now streaming, are finally generating enough revenue that overall revenues are finally going up.

I have seen it in our own business. I will give one example. I was looking at our August report just from Spotify that our distributor sent us. In that one month, from just one streaming platform, the revenues were the equivalent of a couple years ago what would have been a full quarter from all our digital sources. That shows how quickly the streaming is taking off.

Of course, for classical music we have an older demographic, so it's a little bit of a lagging indicator, and there is still a core audience for physical sales. In fact, while streaming last year jumped 40 percent and downloads dropped by

about a quarter, physical sales only dropped about 5 percent. So there is still a core audience for those. And, of course, vinyl is actually increasing. That is, I think, a fair overview.

And then, for us as a small classical label, we went from just in 2014, when physical versus digital sales was about a three-to-one ratio in favor of physical, to now pretty much one-to-one. And that's again with an older audience that still generally likes CDs.

There are two areas that we find that are still successful for physical product: concert sales, where our artists like to sell lots of merchandise, including CDs, at their concerts; and CDs still make good gift items, so the holiday season is really very critical from that point of view.

MR. PARKS: Thanks, Jim, for helping us set the table in that way. It sounds like, even though you are in small corner of the business, your business is developing consistently with the mainstream, if you will.

Having set the table with the state of the music business, let's talk about how Congress has recently dealt with the music business. I refer to the passage of the [Music Modernization Act](#) (MMA), signed into law by President Trump on October 11th side by side — you saw the photo — with Kid Rock. I don't know why Kanye didn't get the nod, but it was Trump and Kid Rock, who was an early supporter of Trump, signing this new landmark legislation into law.

It is the first meaningful music-based legislation in twenty years, really since the [Digital Millennium Copyright Act](#) (DMCA). We have seen this movie many times before, however. Since the [Copyright Act of 1831](#), when Congress first recognized musical works/compositions as copyrightable subject matter, technology routinely runs ahead of the law and then the law catches up. So this is the latest iteration of a movie that we all have seen in history over the last hundred years or more.

I will refer to Jacqueline to get us started by telling us about the MMA. You were pretty deeply involved in a lot of aspects of it. Let's start by giving a little bit of background on the MMA, maybe how you were involved, and the main planks of the new law.

MS. CHARLESWORTH: Sure. For those who are not faint of heart, this is the bill, all zillion pages of it, neatly tabbed because often I get questions and I don't remember what's in it sometimes.

First of all, thank you for having me here. It has been my privilege to be very involved in this bill. Some of this started while I was at the Copyright Office.

The Copyright Office in 2015 put out a big report on the state of music licensing,¹ which involved input from roundtables across the country and a lot of written comments. The Office made various recommendations, which can be summarized at very high levels — such as we need to get rid of the crazy, antique licensing system for musical works that literally dated back to 1909, and update our laws which have been a patchwork quilt that have grown up over time. That set the table.

Congress held hearings on music issues in the context of other copyright reform hearings, and that kind of got the ball rolling.

¹ UNITED STATES COPYRIGHT OFFICE, [COPYRIGHT AND THE MUSIC MARKETPLACE](#) (Feb. 5, 2015).

But what really, I think, prompted interest in reforming the law on the part of the stakeholder community was basically what Jim and Kevin have been discussing, which is the transformation and the move to digital. Digital services — like Apple — will have 40 or 50 million tracks. The system we had for licensing musical works was song-by-song licensing, where you had to serve a notice for each individual work. You had to figure out who owned it. Often there were multiple publishers who owned the rights for a split-copyright song, and you had to find them all and serve them. That is an almost impossible task. That was one piece of it.

The law had a provision that said if you cannot find the copyright owner, you can serve that notice on the Copyright Office and you don't have to pay royalties, which very much offended music publishers and songwriters who would see recent hits on file at the Office and think *Why can't people find me?* What happened about, I'd say, three or four years ago is some of the big services started filing those notices literally in the millions with the Copyright Office. So none of the songwriters or publishers who owned those works were getting paid.

Those were a couple of really important drivers that brought the parties together. The digital services needed a better system and wanted a blanket licensing system, similar to what's used with the performance rights organizations; and the publishers wanted to get paid and the songwriters wanted to get paid.

From there a dialogue developed where the parties literally sat at a table — I was there at one of the early meetings — and discussed what this new framework would look like.

A big breakthrough — this was something that had been suggested by the Copyright Office — was if the publishers were willing to grant a blanket license, where you could basically say, "Here, music service, come file one piece of paper and you're good to go," and shift all the burden onto a new entity, a licensing collective to be run by the publishers to figure out how to find people and pay them, that the digital services would actually fund that operation.

That's the kernel of the bill in terms of the mechanical licensing piece of it. It creates a blanket license. There is a couple years' lead time, so it's supposed to become effective January 1, 2021.

MR. PARKS: This is known now as the [Mechanical Licensing Collective](#) (MLC).

MS. CHARLESWORTH: Yes. The MLC will have a publicly accessible database that will make public and searchable the owners of musical works. It will collect royalties from the digital services and distribute them. Then, similar to SoundExchange, for those of you who are familiar with that, if after three or more years the owner cannot be found, it will divide up the money and send it out proportionately to copyright owners. The unclaimed funds will ultimately go back to publishers and songwriters in proportion to the use of their works for the prior period.

MR. PARKS: Jacqueline, before you leave the database, I'd like to talk about that a little bit.

MS. CHARLESWORTH: Sure.

MR. PARKS: This is a monumental development. For anyone who has ever sought a license for music, you know it is a monumental effort to locate the owners of the musical work that is involved, and, if you need a sound recording

for a pre-recorded recording, to locate those label owners, those master owners. I believe the notion of this database is to have all of that information now in one place that is free, that is public, that is searchable, that connects both sides of music copyright. That is, it will be a database with musical works and sound recordings. Am I accurately describing that?

MS. CHARLESWORTH: The database is mainly focused on musical works. But you are correct that it is ultimately going to include sound recording information.

I said many years ago, when I worked at Harry Fox in the early 2000s (I have a long résumé) “Whoever can match the musical work to the sound recording has the keys to the kingdom.” That’s what we’re looking for here.

It’s not an easy job. I mean this isn’t going to be flipping a switch; nor was that the case with SoundExchange. In some instances, the data has been withheld—there’s some value to it—so there are pockets of it here and there. Really this just slows things down and puts a drag on the licensing system, which in turn puts a drag on the music industry. Finally we got to a place where people realized it was more important to have the data out in the public.

MR. PARKS: So we have a database and we have a new licensing collective that will extend and collect revenue based on this new blanket license. There are at least a couple of other aspects of it.

MS. CHARLESWORTH: Yes.

MR. PARKS: There are a couple of others that I think we should mention. One is how we deal with rate standards and the Rate Court. Another, which was touched on in one of the earlier panels, is how pre-1972 sound recordings have gotten folded into the new system.

MS. CHARLESWORTH: Right, there are other parts to the bill.

The mechanical rights aspect was the big draw and served as kind of the base for the legislation. There were also a couple other bills floating around Washington that got connected up to it.

As you mentioned, the other really big and significant change is the federalization of pre-1972 sound recordings, which were not under federal law until October 11th. Now pre-1972 recordings, interestingly, are not actually being given copyright status, but they are being federalized and protected largely as though they were copyrighted, so fair use applies as well as the safe harbors under Section 512 of the DMCA.

What’s interesting is one of the compromises for bringing pre-1972 works into federal protection. The terms of protection, as opposed to all lasting until 2067 under the old regime, are shorter for the older works; older works are going to fall out of protection earlier. So pre-1923 works will only be protected for three more years, and then there is a graduated scale. You can look in the bill, but I think post-1956 works are protected until 2067 under federal protection.

It was important to people who are interested in the public domain that they were able to bring some of these older works, which have limited commercial value in most cases, out of protection so that they can be exploited and used much sooner than they might have been under state law, which is where they were protected before. That’s another very big and substantial change.

On the rate setting, when the Copyright Royalty Board (CRB) set rates for the mechanical license and for some of the digital performances of sound record-

ings, they were using the old 801(b) standard, which was a more policy-oriented standard that allowed the CRB to discount rates for industry disruption. The view among copyright owners — and there is some evidence of this if you read some of the decisions — was that it depressed the rates and lowered the rates. So there was a lot of interest on the part of the copyright community to get those rates up to what is at least a hypothetical market standard, which is the “willing buyer, willing seller” standard.

Now all the rates under Section 115 as well as Section 114 of the DMCA — in particular, the satellite and preexisting subscription services that were under the more deferential standard — will be brought into “willing buyer, willing seller,” although the Section 114 change is delayed for a few years due to another legislative compromise that happened at the very end of the process.

MR. PARKS: I wanted to ask you about that. You were part of those last-minute, backroom, arm-twisting negotiations.

MS. CHARLESWORTH: If I could have twisted arms I would have. You know, legislation is a wild ride. It’s really a roller coaster. One day everything’s looking great, the House passes your bill unanimously, and the next thing — I think we really grew up when we went over to the Senate. We thought the House was difficult, but when we got over to the Senate, there were Senate staff who were quite interested in the bill who had ties to stakeholders, SiriusXM being one of them.

SiriusXM, in fairness, had three issues with the bill: they didn’t like the change in the rate standard; they didn’t like the pre-1972; and also there’s another change in the rate standard for the PROs where the sound recording rates can be taken into consideration in setting musical work performance rates. That’s getting very technical. But the bottom line is they had reason not to like the bill and they lobbied hard at the end.

I was sitting at home one weekend, minding my own business on a Saturday night, and I got a phone call, “We need you to help with a new piece, a compromise with Sirius,” which basically had to do with the treatment of settlements they had done for pre-1972 recordings. Under the bill, those settlements are now going to be run through SoundExchange.

That was the weekend before the bill was supposed to be hotlined. For those of you who don’t know, hotlining is a procedure in the Senate where, instead of going to a full floor vote, they send the bill out to all the Senators and see if anyone objects; and, if no one does, then you can quickly pass the bill by what’s called “unanimous consent.”

The bill was just about to be hotlined on the Monday after this last-minute compromise, and there was still more activity down in Washington even after that to delay the change in the Section 114 rate standard for five more years. That’s what got it done in the end. There was drama literally until the last minutes before it passed the Senate.

MR. PARKS: Jacqueline, thank you for the insider’s view and the overview of the very extensive new legislation. There will be a lot of learning to do as we go down the road now to implementation.

I would like to move from passed legislation to legislation that is still pending, the [Copyright Alternative and Small Claims Enforcement Act of 2017 \(CASE Act\)](#).

This was touched on by Catie Rowland in one of the plenary panels this morning. One of the panelists from the Copyright Office mentioned that they supported this notion in theory but they couldn't make recommendations or opine on the specifics. I'm glad we're not constrained by any of that nonsense and we're free to speak our minds.

I'm looking to Terry Hart on this topic. The latest activity with the CASE Act was a House Judiciary Committee meeting in late September.² Terry Hart was there and can fill us in on the status of this legislation, and maybe also highlight, Terry, the problem of rights without remedies and how the CASE Act might address those shortcomings.

MR. HART: Sure. Thank you, Kevin.

Yes, I was at the hearing. I wasn't testifying, but my boss was. We have been working very closely with a lot of our members on this, particularly the photographers.

MR. PARKS: Terry, maybe you could tell us a little bit more about the [Copyright Alliance](#).

MR. HART: The Copyright Alliance is a nonprofit organization in Washington, D.C. We do advocacy and public policy work on behalf of copyright owners to protect their ability to make a living with their creative work and to get a return on their investment.

We are a member-based organization. We represent a pretty broad swath of copyright owners: a lot of the more traditional ones that you'll think of in media and entertainment (photography, publishing); but also software; and, beyond that, we represent organizations like the National Association of Realtors, which actually has copyright interests; and our newest member is the National Fire Protection Association, which develops various safety standards that they protect through copyright and from which they get a return on their investment.

We do a lot of work in Washington, D.C., on legislation, on agency proceedings, some amicus briefing, and pretty much anywhere where we could put our voice in and make sure that the voice of copyright owners is heard where it's most important.

This issue of copyright small claims is really important to a lot of our individual creators and small businesses. As you mentioned, a lot of times they feel like they have a right without any remedy, and that's due primarily to the cost of federal litigation. If you are an individual photographer or a songwriter or an author, you really can't afford to go into federal court. When you are talking about the types of infringements and the value of those infringements, you are talking about hundreds of dollars, maybe a couple thousand dollars. As Catie Rowland from the Copyright Office mentioned this morning, there was an American Bar Association (ABA) study done that showed that most attorneys will not take a case if there is less than \$30,000 in damages.³ That's what the CASE Act attempts to try to resolve.

² [Copyright Alternative in Small Claims Enforcement Act of 2017: Hearing on H.R. 3945 Before the H. Judiciary Comm.](#), 115th Cong. (Sept. 27, 2018); [Statement of Keith Kupferschmid Chief Executive Officer Copyright Alliance](#).

³ American Bar Ass'n, Re: [Remedies for Small Copyright Claims: Response to Notice of Inquiry](#), at 7 (Oct. 19, 2012).

Another particularly important aspect here is when you are talking about individual creators and small businesses, it's not just that they cannot get into court and that they have these low-value infringements. It is a low value of infringement comparatively, but to them that's a lot of money. A couple hundred dollars for an individual photographer is a mortgage payment or a healthcare premium payment every month. This is something that really impacts their bottom line and really impacts their ability to earn a living.

The hope with the CASE Act is that if we can create a small claims tribunal that would reside within the Copyright Office, that would provide a really streamlined process — limited discovery, limited remedies, limited claims that it would hear — that this would really improve their situation.

This was an idea that has been bouncing around for about a decade,⁴ but in 2013 the Copyright Office put out a report recommending a basic framework for a copyright small claims tribunal.⁵ Then, in 2016, in the previous Congress, there was a bill introduced that would put most of those recommendations into effect.⁶ The bill basically followed the same framework that the Copyright Office specified and recommended in its report. There were a few changes around the edges, but it was still the same basic idea. That didn't go anywhere in that Congress.

But in this Congress, in October 2017, a bill was introduced again, which again largely followed the recommendations of the Copyright Office.⁷ However, there was still opposition from some groups, such as the Internet Association and the Computer and Communications Industry Association (CCIA), trade associations that represent companies like Amazon and Facebook and Google, which compared to photographers and individual creators have a bit more fire power when it comes to Congress, so there was a problem with moving this bill through Congress.

In good faith, we and a lot of these groups that were supportive of this bill tried to negotiate with these groups, who I think did have some good-faith concerns about the bill — and you heard some of them this morning — about does this open the door to abuse; is this going to give copyright trolls another weapon in their arsenal? Quite frankly, I don't think it will because this is a voluntary procedure, you could opt out, so there's not really much trolling you could do when someone could just say, "No thank you."

But we did want to negotiate and try to address these concerns, so over the last winter there were some negotiations held between these groups. Essentially what resulted was a [Discussion Draft](#) that amended the bill that was introduced in October that basically made as many changes as we could to the bill without gutting it entirely and rendering it meaningless. Quite frankly, there were probably some changes that did go too far, but again the idea was we can't move this

⁴ See [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.

⁵ UNITED STATES COPYRIGHT OFFICE, [COPYRIGHT SMALL CLAIMS, A REPORT OF THE REGISTER OF COPYRIGHTS](#) (September 2013).

⁶ Copyright Alternative in Small-Claims Enforcement Act of 2016, [H.R. 5757](#), 114th Cong. (2016); Fairness for American Small Creators Act, [H.R. 6496](#), 114th Cong. (2016).

⁷ Copyright Alternative in Small-Claims Enforcement Act of 2017, [H.R. 3945](#), 115th Cong. (2017).

through without these large companies that had concerns not standing in the way. This discussion draft came out and was circulated.

Then the hearing was scheduled in September basically to get these groups on the record to state their concerns because they had stopped negotiating and really were not any closer to at least standing down and letting this bill go forward.

I think it's really interesting to watch that September 27th hearing because you do see some of the champions on the House Judiciary Committee who have been very supportive of this bill, including Representative Doug Collins from Georgia and Representative Hakeem Jeffries from New York, who really seemed frustrated at these groups because they were just holding up this bill and weren't coming to the table to try to address any of these lingering concerns.⁸

MR. PARKS: Let's talk about a couple of the provisions of it that are a little more controversial. I'm looking to Scott on these points. Terry and Scott, I've seen you have your friendly debates and banter on social media. Now you're face-to-face, you're shoulder-to-shoulder.

Scott, I've seen a couple of articles that you published on the CASE Act,⁹ and, in particular, a couple aspects of it that you think are less than perfect at this point. Let's talk about those.

MR. BURROUGHS: From a litigator's perspective, and particularly a litigator who represents a lot of small artists or a lot of artists who are on the precipice between having or not having a case that's worth filing in federal court or not — as the ABA Report indicated, it is really difficult to bring a copyright lawsuit to trial for less than \$150,000 or \$200,000 — for an artist who doesn't have that sort of money socked away to litigate a case, the CASE Act is a great idea. It just has a couple of issues that need to be addressed or else instituting it will actually make it more expensive to litigate cases.

The first issue, which was already indicated, is that it is voluntary. So if my artist — let's say a photographer — files under the CASE Act structure and is suing Google, Google could wait twenty-nine days and then simply file the opt-out paperwork removing it from within the structure of the CASE Act and then we have to go to federal court. So now the attorneys are being paid, or doing it as a pro bono contingency type project, to file under both the CASE Act and under the federal court rules and pay those fees. So it actually makes it more expensive and it creates more of a delay than if you would just file it in federal court.

MR. PARKS: So a well-heeled defendant will almost always opt out; there would be very little incentive not to?

MR. BURROUGHS: Right. I think they will do a risk analysis, look at what they believe the plaintiff's resources to be, their financial wherewithal to be, and then nine times out of ten absolutely will opt out, and then you'll be in federal court, where you would have been without the CASE Act. So that's a problem.

There is also the issue of the statutory caps that are in place, \$15,000 per work or \$30,000 per case, which dovetails closely with the \$30,000 limit that was

⁸ Video available at <https://www.facebook.com/housejudiciary/videos/case-act-hr-3945-discussion-draft-of-may-18-2018/546718595786638/>.

⁹ See Scott Alan Burroughs, *CASE In Fact: Small-Claims Copyright Court Conundrums (Part II)* (Oct 25, 2017); Scott Alan Burroughs, *CASE In Point: A New Hope For Copyright Holders?* (Oct 18, 2017).

discussed earlier as being the low point of what a litigator will take. But, with a \$15,000 limit on a CASE Act claim, you are looking at one-tenth of what you would otherwise be able to recover in a federal action.

Having those caps in place isn't where you are going to end up at the end of a case. So if you have a \$15,000 limit per work or a \$30,000 limit per case, you are going to end up settling for a percentage of that. And if you are advocating on behalf of the artist, having a \$150,000 cap gives you a lot more leverage than having a \$30,000 cap. So it is actually going to work to the disadvantage of the artists to the extent that the attorneys advocating on their behalf, or even when they are advocating on their own behalf, are going to have a lot less to work with. They are going to get offers of a couple hundred dollars, \$1000, numbers that are very low and are much less than what they would have received or been able to negotiate had they gone into federal court.

The third issue is somewhat of a corollary of that. If you are a plaintiff with the wherewithal or the foresight to register your work before it is infringed, that will cover your costs and fees in federal court, and oftentimes those greatly exceed the damages available in the case. Under the CASE Act, at least in its current iteration, you are not entitled to those whether or not you have a registration.

Again, that takes away a strong piece of leverage that you have on behalf of an artist who may have a claim — let's say you're suing Google for having something on YouTube — well, that's going to be a safe-harbor case. Let's say that you are suing CBS for putting something up online, a short video or a film, that you would generally license for \$500 to \$5000, somewhere in that range. If the fees that you could recover should you prevail are going to be \$100,000, and of course there will be defense fees of \$100,000, that changes the metrics of how these companies look at litigating these things. If you remove that from the plaintiff — the plaintiff is always going to be the artist — that takes away a lot of your power to resolve cases.

There are other issues, but those three issues from a litigator's standpoint and from a practical standpoint seem like the biggest at this point.

MR. PARKS: Terry, two minutes.

MS. CHARLESWORTH: I have a couple comments also. You can go first, Terry. You're the real person here.

MR. HART: Now I want to hear what Jacqueline has to say.

On your second point, as far as the leverage you have with statutory damages, this is voluntary for the plaintiffs too, so they would always have the option of going to federal court. Having this second option of a voluntary small claims proceeding doesn't take away that avenue for them, so they will still have that available.

MS. CHARLESWORTH: I oversaw the Copyright Office's report that generated the bill. If you read the report, you will see that the cap and a lot of the other concepts grew out of a very long study that involved input — I'm also a litigator by training — from a lot of people who litigate. Also we had public roundtables.

There is a real issue with removing copyright infringement claims from federal court. There are constitutional issues. There is a right to a trial by jury and Article III concerns. So I think it would be very, very difficult to make it mandatory. Therefore, really what it amounts to, if you want to think of it this way, is

government-sponsored arbitration. It definitely says right in the bill that it doesn't take away any rights.

There is also a piece that got added later that says that if you do end up in federal court and you are applying for attorney's fees, the court can take into consideration that you refused to participate in the small claims court, which is another incentive.

The only other comment I have is that a lot of the input we received from participants at the roundtables was that they wanted it to be a system that would be accessible to people without attorneys. They wanted it to be user-friendly so that an individual creator could make a claim without having to have an attorney. A lot of it was designed around that concept.

MR. PARKS: On that last point, I note that the legislation calls for, or allows for, representation by law students who are overseen by a practitioner. This would create a nice environment for copyright clinics in schools like this, where their students could really get their feet wet in some small claims litigation and start to experience how that process works.

Let's move from that into the federal court litigation front by shifting gears to the *Fourth Estate* case. This was talked about to some extent in earlier panels today, but I want to hear some of these folks weigh in on *Fourth Estate*.

Jackie, can you set up some basic facts of the *Fourth Estate* case?

MS. CHARLESWORTH: *Fourth Estate* is a case pending before the Supreme Court that involves the copyright registration system.

The basic question arises from a split in the circuits, which some of you are aware of — I'm sure you are, Scott, because you are a litigator. The Copyright Act says you have to make registration before you can file a claim for infringement.¹⁰ The Fifth and Ninth Circuits read the language as saying you have to submit an application fee and a deposit copy — meaning you have to apply; you don't actually have to wait for your certificate to arrive, which can take on average seven or eight months but sometimes a lot longer, before you can sue. The Tenth and Eleventh Circuits say no, you have to actually have your certificate in hand, and this can take a while.¹¹

Fourth Estate case came out of the Eleventh Circuit.¹² Someone applied for a database registration and it was pending for, I think, sixteen months before they got an answer. Actually, the decision didn't come out until after the Eleventh Circuit had dismissed the case.

Because of the split in the circuits, the Supreme Court took the case.

The primary question is one of statutory interpretation. The Copyright Act uses the word "register" a lot. Some interpret this as saying the copyright owner

¹⁰ *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, [606 F.3d 612, 619](#) (9th Cir. 2010), *cert. denied*, 562 U.S. 1062 (2010); *Positive Black Talk Inc. v. Cash Money Records Inc.*, [394 F.3d 357, 365](#) (5th Cir. 2004).

¹¹ *La Resolana Architects, PA v. Clay Realtors Angel Fire*, [416 F.3d 1195, 1197](#) (10th Cir. 2005); *Pet. App. 1a-10a*; *La Resolana Architects, PA v. Clay Realtors Angel Fire*, [416 F.3d 1195](#) (10th Cir. 2005), *abrogated on other grounds* by *Reed Elsevier, Inc. v. Muchnick*, [559 U.S. 154](#) (2010); *Kernel Records Oy v. Mosley*, [694 F.3d 1294](#) (11th Cir. 2012), *cert. denied*, [569 U.S. 919](#) (2013).

¹² *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, [856 F.3d 1338, 1341](#) (11th Cir. 2017), *cert. granted*, 138 S.Ct. 2707 (2018).

makes registration. There are other places where it could be read to refer to having the Copyright Office register a claim. So there are arguments on both sides about how to read that language.

I should issue a disclaimer. I worked on a brief on behalf of the music community that supports what is called the “application rule,” the Ninth and the Fifth Circuits’ interpretation, partly because it can take years to get a registration certificate and if you are delayed in suing all that time you are losing valuable rights.¹³

MR. PARKS: Let’s start with the Eleventh Circuit’s view of things. I note a couple of weeks ago the [Solicitor General filed its brief](#)¹⁴ urging the Supreme Court to affirm the Eleventh Circuit and take what they say is a plain text or a bright-line rule approach that says if you don’t have a registration, or at least an action by the Copyright Office on your application, you can’t sue.

What’s wrong with a bright-line rule that’s consistent with the text?

MS. CHARLESWORTH: I happen to love the Copyright Office. I came out of there. Although I will say on a personal level — this issue didn’t arise while I was there — that I think people within the Office, including me, perhaps have had disparate views on this subject.

The government is defending the Office’s view, which has actually long been the view of the Copyright Office. I think that the language really — if you are interested, you can read the [brief](#) that we filed — better supports the view that the application rule should prevail.

If you look at Section 410(d)¹⁵ — it is interesting because it is elliptical in the government’s brief when they quote Section 410(d) — it says that the date of the registration is effective when the Copyright Office or a court of competent jurisdiction decides you have submitted appropriate materials. In other words, I think right on the face of the statute — I would argue, and did argue — there is definitely support for the view that the statute specifically contemplates that a court rather than the Copyright Office could be looking at the materials and say, “Yes, this is a good registration; this is valid; you’ve met the criteria.”

There were a couple of important cases. [Washingtonian](#),¹⁶ which was decided by the Supreme Court in 1939, talks about the fact that if you can’t

¹³ Fourth Estate Pub. Benefit Corp. (Petitioner) v. Wall-Street.com, LLC, No. 17-571, On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, [Brief for the National Music Publishers’ Association, Recording Industry Association of America, American Society of Composers, Authors and Publishers, Broadcast Music, Inc., Nashville Songwriters Association International, and Songwriters of North America, as Amici Curiae in Support of Petitioner](#) (Sept. 4, 2018).

¹⁴ In the Supreme Court of the United States, No. 17-571, Fourth Estate Pub. Benefit Corp. (Petitioner) v. Wall-Street.com, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, [Brief for the United States as Amicus Curiae Supporting Respondents](#) (Oct. 18, 2018); [Motion of the United States for Leave to Participate in Oral Argument as Amicus Curiae and for Divided Argument](#) (Oct. 18, 2018).

¹⁵ [Pub. L. 94-553, title I § 101](#) (Oct. 19, 1976,) [90 Stat. 2582](#). 17 U.S. Code § 410 - Registration of claim and issuance of certificate: “(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.”

¹⁶ [Washingtonian Publ’g Co. v. Pearson](#), 306 U.S. 30 (1939).

enforce your copyright it really doesn't have much value. I think that's a very strong and important precedent.

But there are also some important policy concerns. Our brief — and I'm sure others, the government's for one — discusses the legislative history behind the 1976 Act.¹⁷ Congress amended the Act to specifically ensure that people who didn't get a registration could sue. Some courts had held that before you could sue you had to bring a mandamus action against the Copyright Office and get your registration and then file another suit. It is very clear in the legislative history that Congress rejected that approach and wanted to ensure that people could get into court.

So that, and obviously the equities — a registration could be pending for more than three years, which is a complete loss of rights — is something else we mentioned.

MR. PARKS: Let's leave *Fourth Estate* at that.

But I do want to add, Jim, if you're around the Thanksgiving table and you get any insight into this, feel free to shoot me a line and let us know what's coming.

Let me turn to Sean to introduce an interesting case, again pre-1972 sound recordings in the picture here, [ABS Entertainment v. CBS Corp.](#)¹⁸ Sean, what's going on there?

PROF. O'CONNOR: To understand what is interesting about this case you have to understand a bit how music is produced. Jim, you should be talking about this more than me.

MR. GINSBURG: I'll be happy to.

MR. PARKS: He has been talking to his engineer.

PROF. O'CONNOR: You can chime in on this.

Artists perform a composition and then it is recorded. Most of the creativity in the sound recording happens when the artists are recording their tracks — the guitar player is playing his track; the drummer is playing his track — but then also the choices that the producer makes. The producer in the studio can also be an artist. I often self-produce my own material and I have an engineer to help work the board. There are a lot of creative choices about the kind of reverb sound, the echoey sound you put on it; the kind of equalization — does this instrument sound more trebly or more bassy. There's all sorts of studio wizardry you can do, and that really contributes quite a bit to the overall commercial appeal of the recording that comes out.

This is why we have the [Allocation for Music Producers](#) (AMP) Act as part of the MMA. I'm a fan of the AMP Act because producers play a huge role in creating the sound that you love to hear.

Different from that is once the artists have recorded and once the producer and the engineers have done what we call a mix — how loud the instruments are relative to each other; what they sound like in the background and in the foreground; the stereo field, one instrument is over here and another one over here, what we used to call a two-track master, left and right channels — after you have

¹⁷ 94th Congress, House of Representatives, [REPORTED SESSION. NO. 94-1476](#), Copyright Law Revision (Sept. 3, 1976).

¹⁸ 900 F.3d 1113 (9th Cir. 2018).

that done song by song, you want to put all this into some medium. Vinyl, cassette, MP3 — all those formats will sound quite different if you take the raw mix and you just dump it onto them. They have different ways that they can handle the sound you have put together.

Then you have a mastering engineer who comes in after the mix is finalized whose job is to try to make sure that that mix as much as possible is faithfully transcribed into vinyl versus cassette versus (in the very old days) eight-track — all of the different mediums — so that then a listener, no matter what format he is listening to, will say, “Oh, that sounds like the same song and the same mix.”

Now, that first mastering engineer may at least put some creativity in, they really do an incredibly important job, but they are not trying to change the overall sound recording, the whole tonality of it.

But in *ABS Entertainment v. CBS Corp.* it was wild because then they took it even further. Somebody was taking old recordings that were finally done and finally mastered and was “remastering” them, changing them around, but again just to fit different formats, and there was an attempt to say that creative choice is enough to merit its own copyright. In other words, now you would have a copyright for the original sound recording that the original producer and engineers and artists wanted, and then this remastering would have some kind of derivative copyright. I think quite fortunately that got shot down; there was just really not enough creativity.

MR. PARKS: Jim, do you want to chime in?

MR. GINSBURG: Sure.

You remind me that the reason why in the early CD days transfers of older recordings sounded so crappy was because they didn’t do the proper changes. Those older recordings were equalized for LPs and nobody thought *Well, gee, we have to remaster that properly for the new medium.* But that’s really all it is. Of course, the reason they are doing this is they want to get these pre-1972 works under the post-1972 regime.

I presented this question, the idea that remastering these would somehow create a new derivative work, to my engineer.

He replied: “I had to read this a few times to make sure I didn’t miss something. Mostly what I was looking for was evidence that CBS had paid off the judge.” [Laughter] And, by the way, this opinion that came out of the Ninth Circuit two days ago is a brilliant takedown of the [district court decision](#). It is a good read if you have time for it.

To address a couple of the specific points, he says: “This is like you get a patent for something and then somebody takes that machine and paints it a different color. Can you get a new patent? That’s pretty much the level of what we’re talking about here.”

It is interesting that the district court only accepted the experts of one party in the case. The expert spoke about the mastering engineer’s artistic choices in adjusting the equalization of various frequencies in the recording, etc., to which my engineer replied: “While it is true that mastering engineers do adjust EQ of various frequencies, they do not adjust the spatial imagery of sounds or the amplitude levels of various instruments and voices. That is in the original mixing process where sounds are placed in stereo and balanced against each other.”

To the second point, that these differences are not trivial, but, according to the lower court, “reflected multiple kinds of creative authorship,” his answer was simply: “No.”

MR. PARKS: The word you used in an email, which I had to look up frankly, was “daft,” ludicrous.

MR. GINSBURG: Remastering involves EQ, it involves dynamic range, it may involve the stereo image a little bit, but you are not changing the balance between individual sounds.

Basically, the conclusion my engineer came to was: “Adjusting the EQ, running it through a couple of limiters, while possibly enhancing the original recording, does not change the creative content.” That was really the key, this idea that somehow the creative content had been altered in any way.

MR. PARKS: Your engineer’s final word is consistent with the Ninth Circuit’s final word. The request for rehearing in the case was denied on Halloween, so that is going to put an end to that, at least for the time being.

In the last several minutes I want to get to Led Zeppelin. They always act as the cleanup hitters. I’ll look to Ed down on the end to give us a little information on the [Led Zeppelin case](#),¹⁹ the “Stairway to Heaven” case, and what recent developments there have been on that front.

PROF. LEE: In the interest of time, I want to provide at least an overarching couple of conclusions to draw on from [Williams v. Gaye](#), the case involving Pharrell Williams and Marvin Gaye’s Estate,²⁰ [Petrella II](#), as well as some of the other lawsuits taking place in music.

I think one thing that is clear is that in many of these music cases part of the problem is that there is no definition of “musical work” in the Copyright Act. The Copyright Office has a definition, but it doesn’t define what is not within the scope of musical works.²¹

Both in the case involving Led Zeppelin’s “Stairway to Heaven,” in which Spirit, another band — this is a [1909 Copyright Act](#) case that actually was revived because of the *Petrella* case²² — there was an issue about whether there was a laches defense in copyright lawsuits.

One of the points of reversal was the jury found no infringement by Led Zeppelin of the copyright to the musical work for “Taurus,” but part of the problem was that one of the jury instructions that was requested but was not granted defined and stated that even if you have unprotectable elements in a musical work, it can become protected and copyrightable expression based on the selection and arrangement.²³ I think that part of the decision is correct and that part of the Ninth Circuit’s decision was proper.

MR. PARKS: Which vacated the jury verdict.

PROF. LEE: Yes, and they actually sent it back for a retrial.

The ambiguity in what is a “musical work” creates these problems. It happened again in the *Pharrell* case involving Marvin Gaye’s Estate, where basically

¹⁹ Michael Skidmore, as Trustee for the Randy Craig Wolfe Trust v. Led Zeppelin, 905 F.3d 1116, 1125 (9th Cir. 2018).

²⁰ Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018) (“Blurred Lines”).

²¹ U.S. Copyright Office, [Copyright Registration for Musical Compositions](#).

²² Petrella v. Metro-Goldwyn-Mayer, Inc. (*Petrella II*), 134 S. Ct. 1962, 1970 (2014).

²³ 106 F. Supp. 3d 581 (E.D. Pa. 2015).

Pharrell and Robin Thicke admitted that they were trying to copy the so-called “groove” of Marvin Gaye’s musical work. Their argument was based on the argument that what they were copying was not protected expression. So we see again this ambiguity in what is the “musical work.” I will commend to all of you a recent article by Professor Joseph Fishman in the *Harvard Law Review*,²⁴ which discusses this very issue, that courts over time have swayed back and forth in understanding what is a musical work. That has affected, I think, the outcomes in some of these cases.

Another overarching point I want to make about these recent cases is notice that they involve often high-profile artists. This is sort of like Matisse suing Picasso or Oracle suing Google. I think one reason why this is happening — and Sean can speak to this too — is that it is characteristic in the nature of a musical work that composers are dealing with a finite set of notes, and a finite set of notes that are harmonious together as well as popular to the public. This is, to borrow a concept from trademark, kind of aesthetic functionality. If the consumers like this certain sound in terms of the marketability of musical works, there is a reason why composers might gravitate toward sounds that are successful or similar.

Last year I published a study on all musical work copyright infringement lawsuits in the *Boston College Law Review*.²⁵ What we have seen in this past year is not much different from previous years. Roughly 4.5 decisions in musical work copyright infringement cases are handed out each year, and that is a relatively steady number, a high number, and I think it is going to continue based on this ambiguity in the definition — or lack of definition — of “musical work.”

One final overarching point, which is the subject of my article, is that the sleeper in the area of copyright infringement is the lack of fair use defenses being raised. Now, the fair use defense was raised in the answer in the *Led Zeppelin* case, but it was not pursued at trial. Pharrell and Robin Thicke did not pursue a fair use defense at all.

In the last panel we heard a discussion of appropriation or similarities, and the crucial issue in those cases was based on fair use. But in the music area, except for the copying of lyrics and except for parody fair uses, in straight-out non-parody musical works cases we have yet to see defenses raised of fair use go all the way to a decision. My prediction is we will see it in the near future.

MR. PARKS: Sean, do you want to weigh in on this?

PROF. O’CONNOR: I agree in large part. I have some thoughts where I am a little bit of an outlier.

I do think that what you are really seeing with the recent music cases, as Ed pointed out, is the question “what is a music work?” I am a fan of the fact that there are different parts to any given work. There are guitar hooks or there is a particular horn line that really sell a song. So the challenge is we are not really thinking monolithically about the song as just one overall composition. That’s what you see in the “*Blurred Lines*” case, and the same in the *Led Zeppelin* case. What is really at issue is that the things that are possibly copied are only elements of the songs, not the entire songs overall.

²⁴ Joseph Fishman, [Music as a Matter of Law](#), HARV. L. REV., Vol. 131, 1861–923 (2018).

²⁵ Edward Lee, [Fair Use Avoidance in Music Cases](#), 59 B.C.L. REV. 1873 (2018).

I think it's really fascinating to think back to the memes that have been on the Internet recently: "[The Dress](#)" photograph, whether the dress was black-and-blue or white-and-gold — does anyone remember that? — and then, are they saying "[Yanny](#)" or "[Laurel](#)" — do you remember that recently? It's fascinating that people go back and forth on those, but it depends what your ear is attuned to or what your eye is looking for.

In these music cases that's the problem. It's not a monolithic work. Instead it has lots of different elements to it, and which elements are in play, which are *scènes à faire* that no one should give protection to, and what might be infringed. I think we are going to see much more of this.

MR. BURROUGHS: What I think was at issue in the *Led Zeppelin* case was that basically every element in a song is going to be a *scène à faire* or generic, a snare beat —

PROF. O'CONNOR: No, no, not every element.

MR. BURROUGHS: Sitting alone maybe, right? It is hard to argue that a single Hi Hat hit is protectable. But the issue on appeal, I believe, is the Ninth Circuit panel said, "You need to instruct the jury that it's not these elements individually, it's the plaintiff's selection and arrangement of those elements that may be protectable. In not giving a selection-and-arrangement instruction but giving a *scènes à faire* instruction, you actually mis-instructed the jury because the jury is supposed to look at the elements and the selection and arrangement of the elements to the extent that's a creative selection and arrangement."

PROF. O'CONNOR: I still disagree. I do this in my class all the time. Take the "Day Tripper" riff from the Beatles; play that on its own and people say, "Oh, I know that riff." Is that not protectable? If somebody plays that exact riff but they don't do anything else with the melody line from the vocals, is that not infringement?

MR. BURROUGHS: That's certainly protectable.

PROF. O'CONNOR: That's what I mean by an "element." I don't mean just a single snare hit.

MR. PARKS: We'll leave it at that.

Thanks for such an informative and really well-articulated panel.