Transcript

AI and the Future of Copyright Politics
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Keynote: Professor Pamela Samuelson

https://youtu.be/xjwhv4pjgQI

[00:00:00.24] BLAKE REID: All right, welcome to AI and the Future of Copyright Politics. So two years ago, we did a conference analyzing some of the very challenging doctrinal questions at the intersection of general artificial intelligence and copyright law, notably focusing on whether training generative AI is a fair use and whether AI-generated creative works are copyrightable.

[00:00:28.40] Since then, more than 50 high stakes copyright lawsuits have erupted in the US alone over these issues, and the stakes are enormous. The potential statutory damages in these cases run into the hundreds of billions of dollars. The remedies include the destruction of large language models. There are apocalyptic stakes on the table, even for the biggest AI companies.

[00:00:54.16] We're still in the early days of these cases. We're still trying to understand how copyright law and AI will interact. However, today, for all we don't yet know about the law, one thing we know that has really changed is the political salience of artificial intelligence. AI has become a topic of widespread debate and focus in both our national and international political arenas.

[00:01:22.16] The White House recently declared that the United States is in a race to achieve global dominance in artificial intelligence, an Industrial Revolution and information revolution and a Renaissance all at once. AI has become a ubiquitous and often divisive social and cultural phenomenon. And these dynamics are now bound for copyright law.

[00:01:44.82] Copyright litigation has laid bare divides between creative laborers and industrial rightsholders, between tech companies and their users, and even between the branches of the US government, as everyone impacted by the onslaught of AI scrambles to leverage the copyright system to capture the benefits and mitigate the harms. But the battle over AI is scarcely the first time that copyright and technology have clashed.

[00:02:15.86] So back when I was a student here at Silicon Flatirons, things used to get really bad at our February conference. In fact, things got so bad that in 2011, then-Public Knowledge president, Gigi Sohn, gave her famous, Can't We All Just Get Along? Speech, highlighting some of the rhetoric that happened. The MPAA had accused Gigi and Fred Von Lohmann and others for being professional apologists for online theft.

[00:02:50.32] Gigi responded and said, "facts don't matter to an industry that consistently overstates the cost of online infringement, ignores empirical evidence, and refuses to reveal data on which their evidence is based." And then our old friend, Preston Padden from Disney said, "the thing I love about Boulder is that at 10,000 feet, everything Gigi Sohn says makes sense." Now, in defense of Gigi's accusations that the content industry was not empirically grounded, Boulder is only about 5,400 feet.

[00:03:19.03] Nevertheless, how far have we come in 15 years since the battles around SOPA/PIPA? How far have we come since 1998 when the Digital Millennium Copyright Act was passed? How far have we come in the half century since the passage of the Copyright Act of 1976? Our first panel will try and put into some historical context just how the fights over AI measure up in the copyright battles over new technology that we've experienced over the past half century.

[00:03:52.35] Does AI's arrival portend a remarkable new shift in copyright's politics, or is this just another copy fight? The long-running copyright battles that predate AI also haven't gone away, and so our second panel is going to talk about AI's arrival and what its political impact means for long-standing fights over fair use, the anti-circumvention measures of section 1201, copyrightability, and other issues. And we're going to have veterans from fair use battles, ranging from remix, reuse, and fanfiction to creative labor and unionization, to consumer protection, repair, and competition, and even fights over McDonald's McFlurry machines.

[00:04:33.15] What does AI mean to these battles? What does it mean to the lawyers and advocates that fight them in the communities that they work with? OK, first, we are lucky to have someone with us today who is a true veteran of copyrights intersection with technology. Pam Samuelson is the Richard M. Sherman distinguished professor of law and information at the University of California, Berkeley.

[00:05:02.65] Since the 1970s, when it comes to copyright and technology, Pam has been on the forefront of conflicts, from the copyrightability of computer software to safe harbors for internet providers to infringement and fair use questions about every technology under the sun. From the Betamax to AI, Pam has seen it all and has played a critical role in informing generations of policymakers, judges, advocates, academics, and students.

[00:05:33.67] Pam is one of the leading scholars on copyright and technology in the United States and, I think, the world, and I don't think that is overstating it. And there's really no better person to help us situate our current AI moment in historical context. So further ado would be warranted, but without further ado, Pam Samuelson.

[00:05:55.39] PAMELA SAMUELSON: Well, it's a pleasure to be back in Boulder at the University of Colorado Law School. And thanks for the

opportunity to participate in this discussion. And I want to start by talking about some of the disruptive technologies and the politics of disruptive technologies from the past, and then think a little bit about to what extent generative AI is similar to and different from those disruptive technologies.

[00:06:30.03] I'll go over some of the cases that have addressed the training data issue, which seems to be the big kahuna in these lawsuits, and then talk about the politics of generative AI, which is, as Blake was just saying, a little bit different than the ones that we have thought about before. And I'm going to try to also talk a little bit about the collective licensing idea, which is very attractive, right? The idea that, hey, these guys should be able to do training on data that will give us all these generative AI things, but compensation would be a good idea.

[00:07:11.15] So I see that it's a really attractive idea. The question is, can it work? So I want to point out that the idea that technology threatens copyright is not new. So here is a quote from someone I'll reveal in a minute. Copyright today is under stress. It's also under attack. The stress arises primarily from the rapid succession of marvelous new machines, miraculous enough to delight Jules Verne for copying and, in new ways, enjoying doing protected works. They are, for this reason, a boon.

[00:07:48.06] By the same token, unauthorized copying of print, sound, and cinematographic works has become epidemic. Copyright owners' control has weakened and the domestic and international traffic and piratical copies of films and records has risen to flood tides. And if the source of the stress lies in rapidly-changing technologies and that the political force of the attack draws from commercial and non-commercial self-interest, the assault weapon is the notion that some proof of harm is a necessary condition for protecting a class of creative industries.

[00:08:27.52] OK, so that sound pretty relevant. That was from 1982. And the technologies that were of concern to David Ladd, who was then the register of copyrights, was unlicensed photocopying of journal articles, videotape recording machines, such as Betamaxes, and home audio taping of sound recordings. These were the things that they were really, really upset about at the time.

[00:08:59.00] And there was a fair amount of commentary that says, hey, these things are fair uses. They're not really harming any copyright markets, and so everything is going to be fine. And David Ladd basically said, no, no, these technologies are really causing lots and lots and lots of harm, and they're going to devastate copyright industries. And I just think that sounds familiar, right? We've seen this kind of thing before, and so let me just take you briefly through the history.

[00:09:32.32] And I think I'm going to concentrate first on the Williams and Wilkins versus United States case because that was this case decided in 1974, I think, involving a publisher suing the National Institutes of Health librarians for making photocopies of journal articles for researchers who were using the NIH research facility. And by a four to three decision, a Court of Appeals decided that that was fair use. Because it was a split vote, the publisher petitioned for a Supreme Court review.

[00:10:19.50] Supreme Court took this case and affirmed the lower court ruling by a four to four decision. So we are one vote away from the idea that you have to pay for every photocopy that every researcher might make, that everybody might make. And the pendulum changed a little bit with the Texaco case, which held that was unfair for commercial researchers to photocopy articles without paying.

[00:10:54.68] And so the copyright Clearance Center became the licensing entity for that kind of thing. The copyright Clearance Center also then became the licensing entity for coursepacks. Some of you may remember what a coursepack was. Today, we all do it online. And the Cambridge University Press versus patent decision showed that even though posting book chapters on a course reserve seems like it's a pretty similar thing to coursepacks, which are photocopies, the publishers mostly lost the Cambridge University Press case. And so fair use for educational purposes became much more accepted, I think, at least among the federal courts.

[00:11:49.63] Now, the politics of photocopying sounds so quaint today, OK? [INAUDIBLE], this was war. There was this absolute war, between especially the educators and librarians, who wanted broad exemptions for educational research uses, and publishers and author group wanted everything to be licensed. What did Congress do? It kicked the can down the road by saying, we're going to leave this to the vagaries of fair use and to litigation that happened thereafter.

[00:12:26.50] But it actually was important, I think, this 1970s study by the National Commission of New Technological Uses on copyrighted works, that is to say, CONTU, did a study and basically said publishing's doing fine, and so we don't really think that any additional legislation or a licensing mandate would be necessary. But they were actually hoping that Copyright Clearance Center would actually evolve into a licensing entity for pretty much all photocopying, and that didn't really happen.

[00:13:03.67] Now, home taping of sound recordings and of television programs was also highly, highly controversial. And Universal basically said, every time people use a videotape machine to watch a program at a later time, that's an infringement of copyright. And Sony is contributing to that infringement because they know that people are going to use the VTR machines to make copies of things. And the

Supreme Court's decision was, once again, seriously split. We were one vote away from even making time shift copies of television programs was unfair.

[00:13:50.13] And so that case was decided in 1984. And soon thereafter, digital audio tape machines were about to enter the market, and the recording industry was really, really worried about that, and so brought a lawsuit to challenge that even though DAT machines would have substantial non-infringing uses, there was an argument that the RIAA would probably win this one because most people were using the Betamax machines for time shifting purposes. And if you use a DAT machine, you're basically using it to basically have a copy, a consumer copy.

[00:14:34.89] So the Audio Home Recording Act was packed in 1992 as a compromise to settle the Cahn case. Two things are noteworthy here. One is that while the Sony decision was pending, Congress basically had bills for and against the time shift copying or home copying. And the politics was so intense that if one of the people who sponsored one of these bills wanted to have a discussion about it, other members of Congress would get up and walk out so that there wasn't a quorum, so that they were never able to really have a full discussion of that.

[00:15:17.15] And the Office of Technology Assessment, which used to do studies to inform Congress about what's going on, OTA basically said four in 10 Americans above the age of 10 made home tapes of music. And so as much as the RIAA wanted to make everything licensed, it was like, it's going to be hard to convince the American public to do that. So the Audio Home Recording Act was a kind of compromise. It was like there was a noncommercial copy exemption, but it also was going to tax the DAT machines and tapes, basically, to put money in a fund which copyright owners could then draw from.

[00:16:02.21] But the computer industry successfully lobbied for an exclusion of hard drives, and so technology bypassed the DAT regulations in the Audio Home Recording Act. Now, I'm going to talk about geopolitics of internet first because what we had in the mid-1990s is a report that basically said, hey, there's this internet and easy to copy and easy to distribute, and piracy is going to happen. And so initially, the Clinton white paper said online service providers are strictly liable for user infringements. They were not able to sell that at the international treaty in 1996.

[00:16:50.62] But there was a big struggle that led to a grand compromise in the Digital Millennium Copyright Act. So the copyright industry has got very broad regulations about tampering with technical protection measures and copyright management information, laws that are largely invisible to the rest of the world. But they compromised on the safe harbors for online service providers so that until and unless the

online service provider had information about exactly where there was an infringing file, they didn't have any responsibility to take it down.

[00:17:28.72] And plaintiffs in these cases have tried to narrow safe harbors, largely because the tech industries, they think, have contempt for copyright. And there's been efforts to chip away at them and occasional efforts to pass new legislation, but that hasn't worked either. So we all know that peer-to-peer file sharing actually was a very big deal, and the laws that were on the books actually didn't really address it very well.

[00:17:58.08] But at least Napster and Grokster were eventually shut down. And there's a case pending before the Supreme Court right now in which Cox was found liable as a contributory infringer. And Sony Music was able to get a $1 billion statutory damage award for the works that were at issue. And the question that the court is going to have to address is, is the failure to terminate accounts where there are more than three infringement notices that have been received-- and many of the accounts that are affected here are hospitals, military barracks, universities, and other institutions, so that terminating the accounts basically would have collateral damage for innocent people. And how much should that matter?

[00:18:57.08] And so that's the thing that's going on there. Now, mass digitization, in the interest of time, I'm not going to talk about that, but the fact that the mass digitization for millions of books were found fair use was a very big development and not one to be expected. And there was, again, an effort to end that particular litigation through a collective licensing regime. Court basically disapproved it, so the fair use case was decided instead.

[00:19:39.08] And the Copyright Office tried to get a collective license scheme to do the same thing, but didn't move forward on it because the responses were negative. So quickly, here are the lessons that I at least derive from the disruptive technology cases. Whether the challenged use is affecting markets for the copyrighted work, are they supplanting demand for the original? That's going to be a very big factor.

[00:20:10.04] Speculation about harms is likely insufficient. Just because a large number of copies have been made, that doesn't mean there's any harm to the market. And there is an effort to say, let's look at very carefully what the market harm claims are. And market failure might actually mean that there isn't harm. If you can't form a market, that basically will cure that market.

[00:20:38.72] And courts have also recognized the kind of circularity problem with-- so the circularity problem is, I'm a plaintiff. You didn't license something from me. Because you didn't license it from me. That must mean that you harmed my market because I have now an

interest in a license. And courts have basically said, that's kind of baloney.

[00:21:02.70] OK, so I think the biggest difference between the disruptive technologies before is that they allowed people to actually make consumptive copies of works, to basically be able to have a whole copy of a work and basically consume it for its copyrighted expression. And generative AI, at least when they were using works as training data, is more like the Google Books cases, in that the uses are non-expressive. That is to say the uses are analyzing the relationship among words in text and images in the course of training.

[00:21:54.63] And I'll talk about the pirated books issue in just a minute. But when I wrote these slides, which was like three days ago, there were 56 lawsuits. They are 59 now. Sorry about that. And fair use is the main is the main defense. And most of them are a class action cases, but there are some very notable non-class action cases. And so far, the number of settlements is pretty small.

[00:22:25.23] But the fair use argument runs for the plaintiffs and for the defendants like this. And I'll basically say that the Ross Intelligence case that I'm about to talk to you about buys the plaintiff's theory. And the Kadrey and the Bartz cases, for the most part, buy the defendant's theories. But let me run through them briefly for you.

[00:22:53.33] So the purpose of the challenged use is always a really important factor in fair use cases. And if it's a commercial purpose, then that usually cuts against fair use. Non-commercial purposes are more likely to be fair use. And the plaintiffs basically look at the exact copying, probably multiple times in the training data context as, you're not transforming them to make anything new. You're just using the work as a work. And insofar as there has been downloading of pirated books, I'm sure it's not a big surprise to know that there are millions of pirated books available on certain sites in the dark web.

[00:23:50.79] The nature of the copyrighted work, well, all the plaintiffs are going to say, hey, my stuff is really creative. It's close to the core of copyright, and that should cut against fair use, too. The amount, you're making copies of the entire works, and sometimes, multiple times. And the outputs compete with our work, and we're willing to license this stuff, but you haven't tried to get a license from us and, therefore, it's unlawful. So that's what the plaintiff's theory is.

[00:24:19.31] The defendant's theory is, hey, we're doing something highly transformative. As the courts have understood this concept of highly transformative, it is when you're doing something for a very different purpose. So when an author wrote a book, they did it to express their ideas and to build a world. And when OpenAI basically trains on that, they do it for a very different purpose, right? And highly transformative because of the different purpose.

[00:24:54.21] And the generative AI defendants basically said, look, we don't care about your expression at all, Ms. Author. We only care about works as data, and we're only basically analyzing them. And most of the works that are used as training data were voluntarily posted on the internet. Obviously, not the pirated books, but let's leave that aside.

[00:25:18.06] And the amount that I do it is reasonable in light of my transformative purpose and the outputs don't infringe or supplant demand for the original, and licensing markets are impossible. That's what the short version of the arguments look like. So Thomson-Reuters is the owner of Westlaw, a computer database that many of you are familiar with. And Ross is a artificial intelligence company that essentially was able to get 25,000 Westlaw headnotes from a third-party subscriber to Westlaw.

[00:26:00.42] Ross used those things to train to train the model, but the AI system that he developed doesn't embody or output Westlaw headnotes. The outputs of his AI system consists of passages from judicial opinions, which, as you know, are not protectable by copyright law at all. The trial judge initially said, hey, we have to take this to trial because you argued this and the other guy argues that, but then he changed his mind and decided to rule against the fair use defense. That case is now pending before the Third Circuit.

[00:26:40.60] That decision came down before the Bartz and Kadrey decision, and it will be interesting to see how the Third Circuit grapples with that. So Bartz and Kadrey are our book authors. They sued, respectively, Anthropic and Meta, and they asked-- both the defendants asked for a ruling on fair use. And in June, both did so.

[00:27:10.54] Judge Alsup actually beat judge Chhabria by two days, and I'm sure Judge Chhabria was really unhappy that he got preempted by Judge Alsup. But Judge Alsup actually divided the case into three different buckets. So insofar as the question of making copies of works for the purpose of training models, Judge Alsup said, that's quintessentially transformative because of the different purpose.

[00:27:44.38] He thought the second factor, the nature of the work factor, actually did favor Bartz because you use books because books are expressive, and they're well constructed, so that cuts against. But then he says it's necessary to copy entire works for a transformative purpose, and you're not supplanting demand for the book, so there's no harm to the market. I think one of the most significant things about that decision was Judge Alsup's conclusion that authors are not entitled to control licensing their works as training data, period.

[00:28:24.28] Now, whether that would be upheld on appeal, we don't know. But that's his ruling. And then he said, if you bought actual published books and then you digitize their contents, that's also fair use to do for training data, but you use pirated books.

[00:28:47.52] Now, Anthropic, you have to say they downloaded 7 million pirated books. 7 million is a big number, and Judge Alsup didn't think that was fair. And so I'm sure you've read that Anthropic settled that lawsuit or has sought to settle that lawsuit for $1.5 billion for certain books within the pirated books case. So the Kadrey decision comes down pretty similar, actually, to the Bartz decision, again, highly transformative.

[00:29:26.96] And so even though it's commercial, because it's highly transformative, that doesn't count as bad. Again, books are creative work, so that cut in favor of Kadrey. The market effects factor was a really significant part of that particular decision. So Kadrey said, hey, I've lost some sales, and the judge said, look, Meta showed that its output filters prevent big chunks of expression from books to be out there.

[00:30:04.67] And like Judge Alsup, he said the licensing revenue theory was, one, that the plaintiffs are not entitled to monopolize. But Kadrey failed to plead or offer evidence of what the judge called market dilution. This is a concern that AI technologies will be used to flood the market with competing works and undermine incentives for human authors to be able to do it. And he predicted that if other plaintiffs actually were able to plead that and provide some empirical evidence, that fair use defenses would fail.

[00:30:50.31] So cases are really similar in many ways, but also different. In respect of the pirated data issue, Judge Chhabria, in the Kadrey decision said, the fact that you used pirated books to train doesn't make any difference at all. Whereas Judge Alsup says, oh, definitely not fair use. And Judge Alsup thought that the market dilution theory was science fiction. And so the market dilution theory captured the intention of Judge Chhabria and Kadrey and said that even if they're not direct substitutes, they're indirect substitutes, and it doesn't matter that the outputs are not substantially similar.

[00:31:35.21] Now, the politics of generative AI copyright so far have been less intense, actually, than in some of the earlier fights that I've talked about. Congress has held, I think, three or four hearings. The FTC issued a report. The Copyright Office has issued three reports. And it was the report that the office released in May on training data fair use claims, which endorsed this idea of market dilution as a kind of copyright harm.

[00:32:19.39] And then the register got fired the next day. And as you may know, the register's claim actually that Trump didn't fire her appropriately is now before the Supreme Court. So this is actually an interesting place, where the Trump administration and the tech industry are gung ho about fair use for generative AI uses of copyright works.

[00:32:49.85] And unlike with some of the other cases that I talked about, usually, it was journal articles or the publishers, and the recording industry was about the DAT copies, and the motion picture industry was upset about the videotape recording machines. Now, everybody's upset. So there isn't a single industry sector that isn't at least a little bit exercised about it. But whether this will prevail or not, again, remains to be seen.

[00:33:29.75] Now, I want to actually spend a last couple of minutes on collective licensing because, as I said at the beginning, boy, it sounds like an attractive thing, right? If we think that the fact that 180 million people are registered users of OpenAI and millions of other people use the other generative AI systems, you're going to say, well, the public seems to think this is a good thing, so maybe it's a good thing that they use data to create these models and are able to generate stuff. But isn't it fair that they get some sort of compensation?

[00:34:08.01] So there are four different ways that this collective licensing could potentially be achieved. The Copyright Office and most of the copyright industry groups basically said, voluntary collective licensing, oh, what a good idea. Legislation to create a compulsory license could be possible in another era. Congress is completely dysfunctional. There's no way that this is going to happen.

[00:34:35.87] Class action settlements-- the failure of the Authors Guild versus Google settlement really suggests that that's not going to work so well. And a court could order some collective license in successful infringement lawsuits, but that remedy could only apply to the people who are before the court. So it's not so easy to get this.

[00:35:00.70] So my questions are, who do you get permission from? Turns out that everybody in the world has posted content on the internet, their data is being used as training data. So do we make everybody able to get this stuff? And also, the ownership information about stuff that's on the internet isn't so easy to do. And with respect to even publishers of books and authors, do you have to look at every single publishing contract to find out, or is there-- if it wasn't in contemplation at the time that the publishers and the authors agreed, does that mean that it was reserved to the authors?

[00:35:47.70] And besides which the authors don't have data. The publishers have the data. And what do the generative AI companies need? They need data. They don't think they need rights. They think they need data. Also now in Europe, there are lots of proposals for collective licensing that would happen through collecting societies. But the United States, except for the field of music, has a really, shall I say, undeveloped infrastructure for collective licensing. And so that's a complication.

[00:36:33.74] The publishers and the Authors Guild think that they need an antitrust exemption so that they can basically collaborate in

pricing to set the prices for each industry for the use of works as training data. And then, of course, if you create a licensing mandate now, that creates an entry barrier. So if I did it before the licensing mandate was in place, I get free use, but anybody else has to pay. That's seems like that's a concern, too.

[00:37:06.80] And other efforts to create collective licensing in the US have not been successful, and so I have-- I see the attraction of the solution. I just don't know how we get there. So if you have a great idea about it, let me know.

[00:37:25.24] I also want to raise a question about nonprofit researchers because everybody assumes that this is all big tech against little author, but at Berkeley, and I'm sure at Colorado, there are graduate students, and maybe even some undergraduates, who are using in-copyright works as training data to build their own models because they're doing it as part of their educational experience. And I think it's important to understand that the defendants in these cases has any incentive to push for a distinction between for-profit and nonprofit developers.

[00:38:05.36] So I think the fair use argument is better, obviously, for these nonprofit researchers. But if the courts are basically deciding these cases and issue broad opinions, that could have negative spillover effects for the nonprofit researchers, and I think we just don't know what's going to happen with that.

[00:38:31.42] The other thing I wanted to bring to your attention is what happens to users right now. At the time that the Supreme Court heard the argument in the Sony versus Universal case, 5 million American households had videotape machines embedded in their homes. And obviously, more people than just 5 million were using those videotape machines. So millions of Americans were affected by that.

[00:39:00.35] And Sony's lawyer actually opened oral argument by saying, Your Honors, 5 million American households have these videotape machines in their homes, and the plaintiffs here want to take away all 5 million of those videotape machines. And Universal was planning to get statutory damages for the contributory infringements, which would have amounted to, at the time, hundreds of millions of dollars.

[00:39:32.23] And the question that-- Universal's theory was that everyone who copied was an infringer. And the question I've been puzzling about, well, if OpenAI and other of the generative AI companies have infringed copyrights doing the training data, are the users also infringements by their use of the technologies? Because they're making copies, and they're asking for copies to be made of content. And that content might have indirect market substitution effects and, therefore, do dilute markets.

[00:40:13.99] And I think we don't know about the answer to this question, but it seems to me if we're trying to have a holistic understanding about what's going on, that we ought to think about that, too. So generative AI, only the latest of many technologies to attract copyright lawsuits. Some of the challenges have succeeded. Some of them haven't done that.

[00:40:40.63] I think people can basically say, look, the copyright plaintiffs in these cases have a point, right? You basically made copies of millions and millions of books. You did it for a commercial purpose, and you're now making money off this. And you didn't pay anything to the authors or the copyright owners, even though their works are raw material on which the systems are built. So I don't think there's a simple case either way, but I wanted to lay out the landscape, and we'll have a chance to do some further discussion about this as the program proceeds. OK, thank you.

[00:41:26.99] [APPLAUSE]

[00:41:33.51] BLAKE REID: What a way to get us started. Here at Silicon Flatirons, when we do question and answer, the wiser rule is such that the first question, and maybe a couple of more, will go to students. And some of my copyright students made the mistake of saying hello to me this morning, so I know where you are in the audience. But first question to a student. We'll take volunteers and then proceed to cold calling.

[00:42:00.09] Oh, yeah, the threats abound here. Emily, I'm going to call on-- oh, I've got Adam right here in the front. Let's start there and then maybe I'll go to Emily after that.

[00:42:15.65] AUDIENCE: Oh, thank you. So I ambushed Professor Reid earlier before the semester started with a very similar question about Cox v. Sony. I know this is not an AI case, but it has profound implications for the AI industry. Could you make a prediction? Would you make a prediction about what you think the Supreme Court will likely do? And plus or negative, how do you feel like that case might impact future developments in AI litigation?

[00:42:50.83] PAMELA SAMUELSON: So I think the question that the Supreme Court is addressing is about the scope of secondary liability, right? The question is, is it enough that by Cox not terminating accounts where three or more notices of infringement had been received by Cox, and they didn't terminate them, is that a contributory infringement? Now, there was a finding at the lower court that the accounts that had three or more of these notices were, quote-unquote, "substantially certain" to be accounts where infringements happen in the future.

[00:43:46.46] And so that's where the knowledge comes from. So you're materially contributing by continuing to provide service, and you are substantially certain that some infringements are going to

happen because you didn't terminate. That's the core thing. Now, that actually-- right. So it's material contribution plus knowledge, and that's the basis on which the billion-dollar damage award was made.

[00:44:18.88] And you got to say that some of the Cox employees had some, shall I say, not very wise things to say, which came back to bite them in the jury trial that happened. How much was that going to matter to the Supreme Court? Well, I think unlike the safe harbors that apply for, generally, online service providers, Cox can't control who in the hospital is using the broadband facility at any one time.

[00:44:53.24] And so you have, then, this possibility that one or a small number of users of a particular internet connection, broadband service, are bad guys. But does that mean-- Cox can't do anything, right? I mean, and it doesn't really know that there's going to be additional infringement. So there's a causal nexus issue there.

[00:45:26.18] And also, I think very important in the case is that the Solicitor General filed a brief in support of Cox, basically saying that substantial assistance to an illegal act is necessary, and that merely providing broadband service, which is a broad-- it's a general-purpose thing and has substantial non-infringing uses echoes of the Sony-Betamax case. And so the Solicitor General's brief both says that Cox is not a contributory infringer, and also that the willful infringement finding by the jury that allowed up to $150,000 per infringed work, that that was wrong, too, that there was not willful infringement.

[00:46:27.00] Now, the Solicitor General doesn't always win when it files an amicus brief. But some of you may recall the Twitter versus Taamneh case. That was before the Supreme Court a few years ago. And that was a case in which the provider of a general-purpose technology, namely Twitter, was essentially sued for contributing to the death of the plaintiff's family member because of a terrorist incident.

[00:47:05.22] And so the complaint was that Twitter didn't do enough to monitor, take down, and kick off the people who were doing it. And the court decided, I think unanimously, that was not substantial assistance necessary for secondary liability. So the Solicitor General basically invokes the Twitter versus Taamneh case as an additional secondary liability thing. And then that then raises the question, what does substantial assistance mean?

[00:47:44.16] Aiding and abetting and secondary liability, contributory infringement, they're pretty close concepts, and the court I think will address that. The briefs in the case are really excellent, so if you're interested in that, I would recommend looking at the briefs.

[00:48:02.28] BLAKE REID: Pam, can I ask you a--

[00:48:03.24] PAMELA SAMUELSON: Case will be argued December 1, by the way.

[00:48:05.64] BLAKE REID: And by the way, we'll be doing a listening party here at the law school for those that want to come in bright and early. Can I ask you a quick follow-up? What do you think about the consequences of the ruling in Cox versus Sony, where we have people's internet connections at stake versus the consequences of these fair use decisions in general, artificial intelligence, where the economics of the AI industry are implicated? How do you weigh the stakes?

[00:48:35.79] PAMELA SAMUELSON: Well, I've seen some speculation that whatever the Supreme Court does in the Cox case will have spillover effects because a lot of the claims against the generative AI developers are contributory infringement claims And so what happens with those, I think? Now, most of these cases actually are counting on direct infringement claims, not indirect infringement claims. And there's no question that Cox itself was not making copies.

[00:49:07.13] And the difference between consumptive copies-- that is to say, copies where I get a copy of the whole thing and I get to listen to it and watch it as many times as I want-- that kind of consumptive copying, which is what's at stake in the Cox versus Sony case, is different from the generative AI stuff because in general, the outputs of the general-purpose artificial intelligence systems are not substantially similar to the works that were trained on.

[00:49:41.61] And so the idea that a work that has the same subject matter has now diluted market. Now, how do you decide? So one of the concerns expressed is, what happens to people who write romance novels? Now, me, that doesn't happen to be a genre I really care about. So if that industry or that part of the publishing industry disappeared, it would not affect me or many of us, one iota. But they are copyright owners. They're authors. They're entitled to something.

[00:50:17.57] But how would you know if an AI-generated romance novel-- which of the romance authors are getting diluted? Does everybody get diluted? I don't think we have any kind of empirical information that will let us answer that question with any confidence.

[00:50:37.57] BLAKE REID: All right, continued conversation about romance novels during the reception, but further questions, let's go to Emily. All right, let's go to Aram first-- he's got the mic-- and then we'll go over to Emily.

[00:50:50.65] AUDIENCE: Thank you for a riveting talk and a really detailed overview. I just feel compelled to push back against one small point, which is the premise that we can all agree that there were massive market harms from P2P in the music industry. And that is a claim that is still broadly disputed in empirical research. And there are several exogenous factors that have been left out of that narrative, which I've detailed in some of my work. So I'm always that guy, and I apologize for being that guy, but this is not a consensus opinion.

[00:51:27.43] PAMELA SAMUELSON: Yeah, no, if I suggested that, I misspoke because all of these claims about massive harm are unsubstantiated. The Napster case really came the closest because there really was some empirical data that was presented to the court, but that was a rarity. Usually, it's just, yeah, they made a lot of copies and, therefore, there must be harm.

[00:51:59.99] AUDIENCE: You spoke a little bit about the possibility, if the plaintiffs win some of these cases, that users of generative AI might be contributorily infringing. If it comes down to that, how do they propose to enforce that? And would the industry survive? Could you speculate on that at all?

[00:52:19.96] PAMELA SAMUELSON: Well, I mean, the solution that was part of the Audio Home Recording Act was a tax. But it was a special tax. It was a tax on the machines and a tax on the tapes that people would use to make copies. So the idea behind the Audio Home Recording Act is that people who had DAT machines that were Audio Home Recording Act compatible would be able to make a first-generation copy of their favorite music, but they couldn't make multiple copies from the same copy.

[00:52:57.92] That was the basic compromise. So the hope was that by putting a little friction in there, because you can only make one copy at a time, that people would not do multiple copies, and the recording industry would not fall apart. So that was a theory at the time. But the idea of taxing and then putting that money into a reserve account of some sort, and then having, essentially, an allocation to copyright owners, that was an idea.

[00:53:37.72] And some of my colleagues in Europe are proposing the same thing. Some of them want to put a tax on use of works as training data, but others of them say, look, let's just tax the commercialization of these services, create a big pot of money, and then copyright owners to get some money from that. Now, when we're talking about billions of works, hard to see how-- it's going to cost a lot of transaction costs of trying to get $0.50 to everybody or even $50. That's really expensive, and it's not clear that it's really cost-effective.

[00:54:24.20] On the other hand, I completely understand that-- it's not very sympathetic to say that, hey, I copied billions of things, and because I copied billions of things and it would be hard to form a market, then I get to have it for free, whereas if I did a smaller number, I'd have to pay. That's not very, shall I say, persuasive.

[00:54:49.76] BLAKE REID: Back.

[00:54:54.60] AUDIENCE: Thank you so much, Pam. That was really extraordinary and really helpful for those of us who are teaching these cases. So I think this is a pretty pointed and short question. Last year, I taught Authors Guild. This year, I taught Bartz and Kadrey, albeit excerpts. And the most noticeable thing to me was that Authors Guild,

in my reading of it, was largely-- the Google Books case-- was largely justified, or in large part, justified because Google had this pointing function, the information finding function of directing people who were searching in Google Books back to the actual book from which it was excerpting, such that purchases could be made.

[00:55:30.46] Why do you think that's dropping out of the Gen AI case transformativity analysis? And do you think that that suggests maybe another possible policy intervention that isn't having to license with a gazillion authors?

[00:55:45.78] PAMELA SAMUELSON: Well, I think one of the questions that I grapple with is the question of, do you treat everybody the same? So the general conversation about generative AI, especially about the training data issue, basically, is a broad brush, oh, everything's fair use or everything's unfair use. And I think that's probably not exactly right.

[00:56:09.04] So to me, for example, visual artists are more at risk of market harm than computer program developers who made their source code available on GitHub for free. The software has got a thinner scope of protection than visual art. I think coders are in jeopardy because of generative AI, but it's not really because of the open source code. And so it seems to me that we're-- again, in early phases, all the conversation is all fair use or unfair use, and I think that what we see just in these two or three decisions so far is differentiation.

[00:57:03.81] So in the brief that a couple of colleagues and I filed in the Ross Intelligence case, we basically were saying-- I'm not kidding about this. The judge basically said, it's so creative to read through a legal opinion and figure out exactly which parts of the opinion to really highlight as a Westlaw headnote. It's like a sculptor standing in front of a block of marble and trying to decide how to carve it up.

[00:57:38.11] And I'm going, I'm sorry, that's not even close, OK? That if headnotes have copyright protection at all, it's super thin, and the interest of people being able to get access to law is a much bigger policy reason why we want to have that kind of thing available. So I think we have to differentiate among different types of things and basically say some classes of authors may be more affected than others.

[00:58:08.61] So for example, the Berkeley Center for Law and technology used to have a visual art firm that we commissioned to make logos for our conferences. Generative AI does a pretty good job. And so that's an example of something where-- but how much is there a causal connection between that? Does that one firm have a claim against the Berkeley Center for Law and technology? And for what amount of money? I don't know.

[00:58:40.99] BLAKE REID: All right. I know we've got a lot more hands, but we've got to go to a break. Never fear, we're going to continue in the next panel to react to Pam's talk, and we'll have opportunity for

more questions. We will return at 10:15 Mountain Time for those of you online. See you back then. Let's give it up one more time for Pam.

[00:58:59.65] [APPLAUSE]

Panel: AI and Copyright Politics

https://youtu.be/-o9VOP8f4CA

[00:00:01.24] ADAM LIPSIUS: Thank you all for coming. My name is Adam Lipsius. I am a 2L at the law school, treasurer of Silicon Flatirons Student Group, and for 30 years, a filmmaker. So copyright hits very close to home for me. And I came to see you law in hopes of being on the cutting edge of this very personal issue. And you don't get more cutting edge than this. The panel we've assembled is phenomenal. It is led by Blake Reid, who is my copyright professor. He scintillates us normally with charts and graphs and overviews, but occasionally with an electric guitar, and has brought copyright to life.

[00:00:45.48] Sarah Jeong, deputy features editor at the verge, is also on the cutting edge of this issue. And I'm sure we have all read many of her opinions and articles about what's happening in copyright. Annemarie Bridy, senior copyright counsel at Google. If you haven't had a chance to speak with her about this, you will not find anyone better informed on the topic. Ben Schaffner, SVP and associate general counsel, law and policy, Motion Picture Association Incorporated. He is a leader in the field and has opinions very close to my own.

[00:01:24.38] And for those of us who were able to attend professor Pam Samuelson's presentation already, she needs no further introduction, though I will point out that her husband let me know that she is a certified MacArthur Genius? And no one in here disputes that. So without further ado, let me present the panel.

[00:01:45.74] BLAKE REID: Thanks, Adam.

[00:01:47.65] [APPLAUSE]

[00:01:50.02] OK, so the [AUDIO OUT] panel was to continue along with Pam's excellent keynote and interrogate from the point of view of let's say-- I don't want to say grizzled, but veterans of copy fights over the last quarter century to keep this conversation going about where AI stands relative to the past. So in lieu of lengthy biographies, I am going to turn to each of our speakers to react to Pam's keynote.

[00:02:25.52] And I think Pam's keynote suggested that our politics are perhaps not all that different that perhaps maybe seeing these things [AUDIO OUT] And so I thought I would start with Sarah Jeong, who has perhaps provocative set of views on this topic. Sarah, I'll turn it over to you to [AUDIO OUT]

[00:02:51.80] SARAH JEONG: So I'm Sarah Jeong. I am a lawyer, but I practice as a journalist. I do not litigate. I do not practice at the moment. I've been interested in copyright law for a really long time. My views on this matter, I think, are maybe a little bit divergent because they connect back to copyright in the sense that the Constitution, the

76 Act, is based on this one line in there about for the progress of the arts and sciences.

[00:03:27.66] And what we have right now is with generative AI, we have an industry that-- I think that it would be foolish not to ignore the fact that this entire industry is reliant. They came in believing that the Google Books cases would protect them. They came in believing that Perfect 10 would protect them. I do, in fact, think that that situation set up where we are at the present day.

[00:03:59.12] And these industries, this industries, the series of upstarts, the many firms involved, they have ushered in a wholesale destruction of human knowledge and culture that is as significant as the burning of the Library of Alexandria. And the paradigm in which this is happening is also completely new. We've never seen things make less sense because there are more things out there, and it is easier and easier to make content that no one really wants, no one really wants to look at that is like disruptive, but more like it's just there to fill space.

[00:04:39.40] And because it's there to fill space, we're just getting less and less intelligent. We read less, we know less. It's hard to find things less. And you can see this-- people in academia will know that this is looming over them One thing, like AI, is getting crammed into every part of our academic institutions, but I think it's most evident in this horrible feedback loop where you have. First, you have-- because of the situation that's set up, where education is considered a commodity and not what it should be, you have students who are using ChatGPT to fulfill assignments.

[00:05:19.28] So they're using the busywork robot to do the busywork because education has been set up into this busywork mind. You have professors who are using ChatGPT to generate exam questions because, again, they're answering the call for busywork using the busywork robot. And then you have them generating academic papers that they send to journals. And the journals are sending them to peer reviewers who are using AI to do the peer reviews, because they're sick of doing peer reviews, because, again, busy work goes to the busywork work robot, but the sum outcome of this is that we're getting-- it's getting harder and harder for us to figure out what's real.

[00:05:59.68] It's getting harder and harder for us to figure out what the world is like. Things are becoming more and more obfuscated. And I think that that has-- we are seeing some really early evidence that shows that we read less, we know less, and we're just shifting away from a culture of literacy into a culture of orality and into oral folk traditions, essentially, because we don't really want to engage with facts with logic, with the world as it is.

[00:06:35.48] And I think we see that directly reflected in our politics as well. And that's also inflected the internal politics around copyright and

AI, frankly, not because of the lawyers who are engaging in Calvinball, but because is fair use itself is a heavily fact-based doctrine when you apply it. But the facts that we're working on come from the industry, and the industry is out there claiming that we've reached AGI, which is a fake thing that is-- it's a series of benchmarks that have a very, very specific financial incentive behind them. It will realign the entire industry because of this deal between OpenAI and Microsoft. AGI is fake, and it also is ridiculous to say that we've reached that point.

[00:07:26.18] How are you supposed to trust those people to give you facts that make any sense or pertain to reality while you're attempting to a fact-based analysis? This is what I mean. We are verging off of this cliff. And when I see this happening and I zoom out, I go, well, what was the point? If we are supposed to have the Copyright Act to progress arts and Sciences, but we are looking at culture falling off a cliff-- and I only talked about being able to know things because that's what I find interesting.

[00:08:02.68] But it's like you are seeing this-- I don't want to say dilution because of the highly specific use in cadre, and also because I feel like it mixes up trademark law in a way that I don't like. But you are seeing a watering down of culture, or maybe a consolidation of culture in a really horrible way from a purely aesthetic sense that I just don't really want to get into. But everything is verging into the same thing that is going to now feed the models and a cement culture in the sameness that does not progress the arts and sciences.

[00:08:43.84] And so that itself, I think, is really hard to measure. So maybe I don't even really want to bring that up. But yeah, I think that we're looking at an apocalyptic event here. And it is one that people went into because they looked at these early fair use cases and went, yes, this is exactly the same thing as what we're doing without looking at the fact that these fair use cases were about providing value to human beings. I look at the secondary liability cases, and they're all proxies for harms to the consumer versus use to the consumer.

[00:09:24.32] We talk about interoperability. Interoperability is good because of what happens to the consumer at the end. But what you're looking at with these cases is companies versus companies. And when I see what generative AI is doing, the greatest harm is happening to people who don't have standing to sue, in which case, again, I go, what are we doing here? What is copyright for? What was fair use for? And so that is my position on copyright and politics.

[00:09:58.47] BLAKE REID: All right, so we have come from we have been here before, nothing to see here to widespread destruction of human culture, destruction of the Library of Alexandria, AGI is fake, complete breakdown and trust verging on fair use is destroying progress and watering the culture down with sameness, apocalypse. OK, within that [AUDIO OUT] I'm going to turn to Annemarie and then

to Ben, where do you find yourselves on the continuum that we have [AUDIO OUT]

[00:10:31.75] ANNEMARIE BRIDY: Yeah, so that's a pretty provocative act to follow. I think that there are some polls in the debates on generative AI and how it will impact, ultimately, the future of human culture. I mean, Sarah is, I think fair to say on the doomer side of [AUDIO OUT] kind of the boosters and the doomers. I am more optimistic than Sarah is, I think, about the potential for this technology to improve our lives. And I don't think that this technology fundamentally undermines in any way the promotion of progress in the knowledge and human sciences.

[00:11:09.39] I just think that we are in the throes of an extremely disruptive moment right now, where I think a lot of the threatening aspects of the technology are in the foreground, and yet people are not yet fully aware of because it hasn't filtered out into the broader culture of the more beneficial uses that we will see for this. So I think ultimately, I'm more optimistic than Sarah about the potential for this technology to improve our lives.

[00:11:40.21] I am more optimistic about human resilience in the face of new technological developments that are disorienting, at first, and also about the enduring value of human creativity. I mean, I think that there's a huge assumption that somehow there's going to be a race to the bottom and that nobody will value human creativity anymore, and that nobody will any longer have judgment about what is quality and what is worthwhile. And I just think I am much-- I just have greater faith in people, I think, to believe that they are not going to be somehow fundamentally destroyed, by what is an evolution in existing technology.

[00:12:22.37] And I guess I'll just say too, I don't think any of the developers went into this thinking, this is like slam, dunk, fair use. There's no question about it. Anybody who understands fair use understands that you never really know when you've got a totally new thing, a new use that hasn't been adjudicated before. What you do is you look at the past cases, you look at what you're doing now and you say, you know what? I think this is like-- we're talking about expanding the horizon. We're asking a new question.

[00:12:53.77] So I don't think it's accurate to think that anybody sort of went to the bank on AGD Google or on Perfect 10B Google. But I do think those cases are supportive of this being a fair use. And so I guess-- and I didn't introduce myself I'm sorry. It was just--

[00:13:17.25] BLAKE REID: I think we all-- [AUDIO OUT] We have got to get one more on the table. So Ben, I [AUDIO OUT] most of the good quotes from the earlier battles, but there was one that didn't make it on the table. So one of your predecessors, Jack Valenti, once testified to Congress that the VCR was to the American film producer and the

American public as the Boston Strangler is to the woman home alone. How have things progressed in your part of the world?

[00:13:52.31] BEN SHEFFNER: First of all, thank you [AUDIO OUT] for inviting me and Silicon Flatirons as well. It's an honor to be here. Luckily, I have a lot of experience responding to that, Blake, so I'm going to that.

[00:14:05.11] BLAKE REID: It's obligatory, I know, but please.

[00:14:07.41] BEN SHEFFNER: No problem. I will get to that in a minute. So I'm an attorney at the Motion Picture Association. As you probably know, we represent the seven major producers and distributors of motion pictures and television shows here in the US. I've now been at MPA 15 years. For the 10 years before that, actually, one of the very first cases I worked on as a young associate at a law firm in Los Angeles was the Grokster litigation on behalf of what were then the AOL Time Warner plaintiffs.

[00:14:42.09] So I've been through some of these battles, and I think that I agree largely with the description that Professor Samuelson helpfully provided us a few minutes ago. And there are parallels between what we're seeing now, but I also think that there are significant differences. As Professor Samuel-- excuse me-- Professor Samuelson mentioned, a lot of those older battles were very industry specific, whether it was the publishers of articles or the motion picture industry, music, et cetera.

[00:15:21.13] AI affects all of them and many more, which is true at a high level. But I think there's a lot of differences once you scratch below the surface a little bit. And let me explain a little bit about what I mean. All these industries are different, and I spent a lot of time in groups of representatives of other creative industries, whether it's music, photographers, graphic artists, authors, et cetera, news organizations, et cetera. And all of them have different creative processes.

[00:15:54.83] All of them have very different economics, and all of them either want to use AI in different ways or will be affected, or already are or will be affected by AI in different ways. And frankly, AI has scrambled a lot of the traditional alliances that we've seen in many of these battles over the past 30 years or so. What do I mean? Let me give a really specific example, and that has to do with news organizations. And I would often be-- I do a lot of IP work, but I also do a lot of First Amendment work and attend conferences of media, defense lawyers, First Amendment lawyers.

[00:16:40.99] And sometimes I'm the odd man out. I'm like the big pro copyright guy where the news organization, lawyers, defense lawyers are oh, it's all fair use. What we've seen over the last couple of years, that's been totally scrambled. Who was first out of the gate with a very aggressive lawsuit against OpenAI and Microsoft? The New York

Times. I believe that was in December of 2022. And a number of other news organizations have filed lawsuits, at least half a dozen lawsuits against the AI companies.

[00:17:14.51] They see it as a very direct threat to their business model. Some of these are producing either verbatim or near verbatim copies of news organizations, taking away traffic to the news organizations' websites itself. They have been extremely aggressive in enforcing their rights, and in some cases, seeking legislation to protect their copyrights. We at the Motion Picture Association, I think, have taken a very judicious view of AI. We were certainly not first out of the gate filing lawsuits against these companies.

[00:17:51.91] More recently, three of our members filed lawsuits against two companies, Midjourney and Minimax, not only on training, but importantly, they had excellent, very strong examples of infringing outputs. And I think in the 59 cases that we have now, I think the strongest case is the ones the plaintiffs are most likely to prevail at the end of the day is ones that are based not just on training, but also on showing infringing outputs. But we've also acknowledged that our members have been using AI for decades.

[00:18:25.35] It's not a new thing, especially in the post-production process. All sorts of AI kind of embedded in the software that does all sorts of visual effects, technical processes like rotoscoping, deep blurring, de-aging, color correction, all that kind of stuff. And I'm sure that AI will be incorporated more and more into those processes in a responsible way that respects copyright. So we can get more into the details. But yes, there are similarities to some of the debates we've had, we've seen and I think a lot of the debate has been very polarized.

[00:19:07.19] I mean, if you read those 10,000 comments or so filed with the Copyright Office back in 2023, there's a lot of them that say training is categorically fair use or training is categorically infringing. We at the Motion Picture Association, we're very careful not to say that. To emphasize that fair use is a fact-by-fact analysis, the Supreme Court has told us multiple times, there are no bright lines in fair use. And we have these 59 cases, and we're not going to get the same results in all of them, based on the particular facts of the case. And we're at a Technology Center, I would say, that is a feature, not a bug of fair use.

[00:19:51.31] BLAKE REID: All right, I think we have teed up three excellent veins, and I'm going to hit them in turn in a slightly different order. We'll talk about tech companies. I think we'll talk about creative industries and then we'll talk about culture. But before we go to that, Pam, I think we have stretched out the window of possibilities here. I want to come over to you for any responses or rejoinders before we move on.

[00:20:15.51] PAM SAMUELSON: So I want to just make a couple of remarks about anxiety and about how anxious people are about AI

generally, but also about generative AI. So there's both excitement and a great deal of hand-wringing. The future of jobs is something that many people, including law students, are thinking about. And so when I think about the political climate about AI and generative AI, I think about that anxiety is like out there.

[00:20:59.15] And this kind of jobs displacement problem is not a problem that copyright can solve. And so I sometimes say myself, copyright is not a jobs program. So I love many, many, many artists and authors. And I'm a big consumer of copyrighted stuff. And I, like Annemarie, think that if you really think that the generative AI is going to turn out slop, then I think human authors stuff is still going to do pretty good. I certainly will be.

[00:21:41.01] So I think we have some regulations to do about maybe about disclosures of the use of AI and generative AI in particular, but also the people who are the most risk of losing jobs aren't the authors and the artists. They're basically lots of white collar people. I think I saw on Twitter recently, here's the 50 jobs that are most at risk with AI systems, and here's the ones that are basically going to be just fine. And artists and authors weren't in the top 50.

[00:22:23.11] And so if we have a general problem about what is artificial intelligence going to do to employment in the US and more broadly, that's a larger problem than copyright can solve. But the anxiety about jobs loss and displacement has been part of what's fueling the unsettledness of a lot of the entities and people who are concerned about this. In terms of culture, yeah, some of the stuff that's been generated is just junk.

[00:23:01.65] But some of the stuff people really value, and people of all different types are using it for everything from planting a garden to planning a garden party. And so I think that we just have to develop some cultural norms about uses that are important. And in terms of the outputs issue, with the first of the cases to think about what can be called adversarial prompting, which is when I'm unable to get the damn generative AI to cough up something that's really like my thing, but I want to say it's an infringer.

[00:23:50.71] So I'm going to adversarially prompt it by feeding some of my work in it, and then asking for it to generate something like it. And that's not the ordinary use of the thing. And one of the issues that will be, I think, interesting in the New York Times versus OpenAI case, is whether adversarial prompting is basically a kind of thing that discounts that you were able to get some outputs. Now, I think I agree with Ben. The question about whether if you're coughing up-- your Midjourney and some of the others are allowing cartoon characters and other visual images to be generated, that looks a lot more like infringement to me than other things.

[00:24:43.07] But again, if some ordinary person uses Midjourney to generate a picture of Superman at the supermarket, I don't know that that I think that that's the kind of commercial output that would be-- that would be the basis to shut that thing down. But I do know that, as Blake mentioned at the beginning, quite a few of the complaints asked for destruction of models as a remedy.

[00:25:19.79] And now that's a remedy that even if infringement is found, courts have discretion not to do it. But I sometimes say that copyright is the only law already on the books that could bring the generative AI industry to its knees, just like that. And now the bubble may burst anyway because you see discussion about the bubble, the AI bubble maybe bursting. So I could get destroyed in more than one way, but I think we're all hoping that maybe that doesn't happen.

[00:26:01.55] BLAKE REID: All right, we have a terrific slate of topics to march through here. Annemarie, I want to turn to you. And I often teach about your company, but it's a very different and a version of your company that is from 20 years ago. And we often talk about factor V of the fair use analysis as the vibes of a fair use case. And when we talk about the early cases, we can't think of better vibes than Google image search when it first comes out, of Google Books when it first comes out. These are magic technologies.

[00:26:38.57] We're now in an area of the tech lash, which Pam mentioned this morning. Pam is talking about anxiety, about jobs, about adversarial prompting. We're in a more complicated time. I'll turn it to you. Try and contextualize what the arc of tech companies looks like in these fights.

[00:27:01.37] ANNEMARIE BRIDY: So I mean, I still think these tools are magical tools, and I still think that they have a tremendous ability to serve the public's interest. I mean, it's not for nothing that OpenAI has a 190 million. I don't even know what their monthly active users are, but there are people who are using this technology, who are finding it beneficial in their lives, who are making new creative things with it, who are using it to help them do their jobs. And so I think that all of these big cases, these are-- at the time that these cases hit the docket of a federal district court, it is a totally new thing that is out there.

[00:27:44.35] And there's a tremendous amount of anxiety around it and opposition. And that's how you end up in court fighting over whether something is a fair use. And I think that over time, even as these cases make their way through the courts, because it takes years for these cases to get from a federal district court up to the Supreme Court, during that period of time, often what happens is the technologies that seem so terrifying, at the moment the case is filed in a federal district court, by the time it makes its way up through the appellate court, or we get to the Supreme Court, the technologies have become embraced and adopted and incorporated into the way people live their lives.

[00:28:24.50] And they no longer seem like they're some kind of incredibly disorienting adjunct to something that we all were used to doing. We find the ways to make them helpful to us, and to domesticate them and to make them seem not strange and to make them seem not threatening. And so I do think there's a professor at Princeton, Arvind Narayan. I will say his name incorrectly, probably, for which I apologize. But his position is, look, these are going to be normal technologies, that everybody is thinking that this is going to be incredibly apocalyptic.

[00:29:03.70] But what's going to happen is these technologies are going to diffuse their way through culture and society and the economy in ways that previous technologies have done. And there will be displacements and there will be new jobs created, even as old jobs, are phased out. And so I do think that that's what's happening. Like we just seem to be in a moment of extreme kind of intense anxiety about this. But I think that if we look at the arc of the way all these cases have played out, we see that over time people find ways to domesticate these technologies.

[00:29:43.20] And so I think that that's-- I will say that in terms of the adversarial process, that these are general purpose technologies that are capable of substantial non-infringing uses. Copyright law already has a framework for thinking about this. Do we say you shouldn't be able to distribute the thing because some people can make it Infringe? If they work hard enough and they try hard enough, they can make it infringe? Or do we say no. We think there are so many potentially beneficial, cool, non-infringing uses of technology that it would be a net detriment, and would harm human flourishing if the technology is not allowed to continue as people figure out how to make it work for them.

[00:30:33.60] PAM SAMUELSON: Can I just interject here? To tie it back to the Cox case, just for a minute, that's before the Supreme Court, the Solicitor General's endorsement of broadband services as having substantial non-infringing uses draws from the Supreme Court's Sony decision, this particular concept. And if the Supreme Court justices find that meme, that metaphor to be powerful and to sway them, that will have ramifications for the generative AI companies, I think.

[00:31:15.02] BLAKE REID: Well, let's pick up this metaphor of domestication or normalization, because I think that's really helpful. From Pam's talk this morning, I think we've seen a range of technology products that have been successfully domesticated and survived the copyright gauntlet in one way or another. And then we also have a great yarn of technologies. I'm thinking about Aereo. I'm thinking about Napster that have had important effects but are not part of our lives today.

[00:31:46.42] I want to open up to the rest of the panel. How do you feel about this notion of domestication and normalization of generative AI? Where are we on that? Sarah, do you want to kick us off?

[00:31:58.22] SARAH JEONG: Yeah, so I think that humans will survive in the sense that-- I mean, not all of us will be dead as climate change progresses. This is what I mean. There will always be resilience, but that doesn't mean what you have at the end of the day is good. And I actually do agree that copyright is not a jobs program. This is one of the reasons why I talked a lot about the users and what the harm is to society versus creators, because that's like, yeah, things are always shifting and changing.

[00:32:34.78] The thing that I am really concerned about with AI, copyright and so on is that if you pull all of the fact pattern out and you look at the trends and you assume that we live under full communism, is this still a problem? And yes, it is. It is actually still a problem. We still have de-skilling. We still have the slop problem. We still have a decline in literacy. And that seems to me to be very, very alarming. Even if we throw people into full health care, full housing, if we make it so that artists can create their works without-- while having all of their needs taken care of, you still have a problem.

[00:33:20.36] And that, I think, is really bad. The other thing that I'm going to point out is that although there will always be a demand for human works, I think we can see in other industries what has happened to the slopification of an industry. So like fast fashion, for instance, I think is probably the most easy to grasp example, fast food also. But if you create systems in which the worse alternative is just cheap and easy to get, people will take you up on it.

[00:33:56.78] Even if they know that it's not very good for them, or they're like, oh, yeah, I really shouldn't, they'll still do it. And I think right now, we have set up a system of consumption that privileges slop. And that's why we're seeing people sell books that tell you that certain poisonous mushrooms are actually good. It is just, I think, maybe one of the most ironic sort of setups here is the rise of Spotify core and weird slop artists on Spotify where we have set up a privatized compulsory licensing regime with Spotify.

[00:34:36.80] Spotify is just a weird animal. But it's like that was-- Spotify was supposed to respond to the disruptive technologies around Napster and so on. People want to listen to music on their little devices. They want to be able to have access to all of the music, and they are willing to pay a certain price point to get the Napster experience, essentially. That is the solution Spotify-- it now has a big pot of money that it redistributes to the artists. This is how we have domesticated peer-to-peer file sharing.

[00:35:08.22] But we have also now created a structure in which people are incentivized to make garbage and put it through Spotify so

that they can get the plays so that they can get the money. I don't really know what to say about that. I think that's kind of a disturbing outcome. So I do think that we are looking at the ongoing domestication of technologies. I don't know if the outcome has been all that great. Yeah, that's where I am with that.

[00:35:36.28] BLAKE REID: So we've got two votes for domestication going forward, different valences of what that might mean. Ben, Pam, thoughts on this notion of domestication of AI.

[00:35:48.62] BEN SHEFFNER: Sure. And I think there are good examples from the last 20 years or so of domestication of what were once these wild animals of services that engage in blatant copyright infringement, Napster and Grokster are great examples. So those are cases where the plaintiffs sued and won. If those cases had gone the other way, what we would have seen-- the law would have it's perfectly fine to run a peer-to-peer service where millions of people can upload and download songs and other works without permission.

[00:36:27.72] And [AUDIO OUT] peer-to-peer, and it would have been beautifully designed, and it would have cut out all the spam, and it would have been really, really easy for anybody to use. And it would have further destroyed the recording industry, probably the motion picture industry as well. The courts domesticated the online music distribution [AUDIO OUT] perfect right now. We obviously we still have the Cox case, which is about peer to peer. But the fact that courts essentially shut down Napster and Grokster in the form that they were existing at the time enabled the rise of Spotify and the many, many other services.

[00:37:09.48] Another great example is YouTube. Remember, YouTube was not originally a Google company. It was a startup that eventually was acquired by Google. Those pre-Google years, it was a free for all. Remember, they got famous for hosting clips of Saturday Night Live. That's why people would go to YouTube. Google bought them. They also got sued by Viacom. But an interesting point about the lawsuit that's often forgotten is that the claims were cut off as of the date when Google implemented content ID, which is a system that basically filters out works that the copyright owner is identified as not wanting to be on the platform.

[00:37:57.02] And it works pretty well. And because YouTube was essentially domesticated, YouTube has deals with most of our members, the Motion Picture Association. I wouldn't say piracy has been eliminated from it, but content ID has largely taken care of the problem. So there is a history of this. What exactly will domestication look like in the AI world? Not exactly sure. I think, obviously, there's been a lot of discussions about various forms of collective licensing.

[00:38:29.14] I think it's really important to distinguish between those various forms that Professor Samuelson mentioned, whether it is

compulsory licensing, which we at the Motion Picture Association would strongly oppose. But there's various other sort of gradations among that, whether it's completely voluntary collective licensing. There's something called extended collective licensing, which is kind of a hybrid between compulsory licensing and completely voluntary licensing. And I think the answer will, again, probably be different industry.

[00:39:01.66] We've said very clearly in public filings that we do not believe collective licensing is appropriate for our industry. But for others, it may be. But there's still a lot of details to work out. As Professor Samuelson said, it's very complicated and a lot of practical issues to resolve before any of those could really be successful.

[00:39:24.04] BLAKE REID: So maybe even when copyright [AUDIO OUT] patient in the long run. Pam, thoughts on domestication before we switch gears and think about the creative industry.

[00:39:36.10] PAM SAMUELSON: So I think that Ben's mentioning of content ID is a good one to recognize that private ordering can actually be part of a solution, so it isn't necessary that courts or the Congress necessarily has to get in. But there are proposals made periodically about ways in which it's possible to do things through private ordering that you might not be able to do any other way.

[00:40:11.70] So another example is actually robots.txt. So this is a protocol that exists so that if you put content up on the internet and you don't want your stuff to be cached and indexed, you can basically put the tag there. And the tag basically says, don't do it. And it's a private ordering solution. There's a lot of debate right now about, should we have more regulation of scraping?

[00:40:47.52] And I think that the calls for scraping, there have been several different legal theories that have been-- tried to challenge scraping. Obviously copyright only one of them, and none of them has really kind of like taken yet. But I think that people who are thoughtful in this space will be trying to think about ways in which private ordering can do some good.

[00:41:19.02] Also, a lot of the generative AI companies in particular have installed what they call guardrails, so input filters and output filters and other technologies to try to mitigate the outputting of harmful material. And that's not just copyrighted images. One would want them to do a great deal to try to stop child porn and other hate stuff. And so technology can be not only part of the problem, but part of the solution.

[00:42:00.50] And I think that putting on the table that it's not just the courts, not just the Congress, not just the Copyright Office that is involved in this, the domestication process. I think there's also some private ordering. And just to respond briefly to Ben, I would say that the reason that we have these digital music services that are basically

all you can eat is because of Napster. Napster and Grokster basically said, OK, you can have everything for free, but there are some risks that you do.

[00:42:40.94] And so Apple goes to the recording industry and said, wouldn't you like to make at least a little bit of money? And so at the time that Napster was happening, all of the recording industry companies wanted to have their own music service, and they wanted to have really, really, really, really, technically protected and make it sort of difficult to use. And Napster said, hey, lots of people want to use this stuff. Let's make it easy.

[00:43:16.02] And so I would say that Spotify is more a child that happened because of Napster than otherwise. So I do think it's a great thing. And it basically not only protects people from bad stuff that sometimes the copyright owners would feed bad stuff to pollute the files and hurt your hard drive, but also most people just want an easy way of doing stuff. And so if you keep the price low enough and you provide a great deal of variety, then people are willing to do it.

[00:44:01.66] So that was a kind of domestication. But it wasn't just that the music industry kind of like I said, oh, let's just have a real new type of thing. I think that was an evolution also.

[00:44:14.72] BLAKE REID: Ben, I'll give you a chance to respond when we shift to the creative industry. But before we lose the thread, and I think we need to talk about it in the context of technology companies, I want to give Sarah and Annemarie a quick chance to respond on robots.txt, on technological guardrails for outputs, anything on that front. Sarah, do you want to go first?

[00:44:33.90] SARAH JEONG: Yeah, I think, really, robots.txt is an interesting one because up until recently, it was a fantastic example of private ordering, the web organizing itself in terms of, oh, yes, I want scraping, I don't want scraping. And everyone sort of followed it. It was a voluntary norm. And then the AI companies came in, and a bunch of them just decided to ignore robots.txt. And because they decided to ignore robots.txt, this accelerated the decay of the web.

[00:45:06.78] A lot of sites that had permissive robots.txt because they liked being indexed, saw that the scraping was happening and were really alarmed at what that was doing to their own content, their own market. And then they made the robot.txt less permissive, which again, also accelerated the decay of the web because that affects archiving, so on and so forth and indexing because now you're pulling out.

[00:45:37.22] Yeah, I think the story of robots.txt is a little bit sad almost. And it is part of-- the fact that is beginning to crumble, I think, is really alarming. The other part of it that I find alarming is that we saw content ID actually really early in the story of YouTube. That started getting floated pretty early on if you think about the timeline there.

[00:46:07.91] And the guardrails that I'm seeing coming out of the AI companies right now are really low, really strangely low. Google has a very impressive protocol for embedding into AI generated content, essentially a watermark. But that isn't getting deployed in any of the technologies that are coming out. OpenAI-- oh, is it now?

[00:46:36.23] ANNEMARIE BRIDY: SynthID is in every image that's generated by Google Generative AI image tool.

[00:46:41.35] SARAH JEONG: Is it on the phones? Is it on the Pixel?

[00:46:45.31] ANNEMARIE BRIDY: I mean, you need a reader to read SynthID to see it. You know what I mean? But yes--

[00:46:52.87] SARAH JEONG: Yeah, when we reviewed the Pixel last year, you could take photos and automatically add a layer of gen AI on top of it. And SynthID was not implicated in any way.

[00:47:01.99] ANNEMARIE BRIDY: Yeah, so I mean, I don't know. It's probably true that there's going to be an analog hole here, where you can just take a picture of a thing. And what's embedded in the digital code for the thing is not going to show [AUDIO OUT].

[00:47:14.81] SARAH JEONG: I mean, it wasn't like-- I mean, it was all fully encased in Pixel environment is the thing. It was fully in the interface. You take the picture, you dial it in. You're not leaving the Google environment whatsoever. And that, I think, it's remarkable because it's like, oh, this is a voluntary ordering that is above the current watermark. This is a good actor in comparison to the other actors.

[00:47:44.55] ANNEMARIE BRIDY: Yeah, I mean, I think it's a slightly different question, because SynthID isn't a copyright management tool. This goes to the, are we marking AI-generated content because we believe people need to know what content is AI generated, such that there has to be a kind of embedded mark in it? And I think that there are reasons for doing that know, but I think also that there are some strange assumptions that come along with it. But we'll see. But I do think that watermarking is a little different. But I'd like to say something else about guardrails.

[00:48:15.61] And I think it's really important where we put guardrails. Notice that the guardrails that are at content ID are at the point of the distribution and publication of content. So if UGC content, something that users make using a tool [AUDIO OUT] they upload it to the platform, which is the point at which it's distributed and the point at which it's published, which is arguably the point at which there is a copyright harm. Because once that sort of hits the distribution point, then you're thinking about something that threatens the market for the existing work.

[00:48:52.37] I think when you put those guardrails at the distribution point, the advantage that you get is that you're able to protect fair uses

because you're able to, in content ID, if you are the person whose content is affected by a claim, say, hey, no, I think this is a fair use. And so there's a kind of right of appeal that is baked into that system. Whereas if we say, as a matter of law or as a matter of private ordering, we think you should never, user, be able to generate an image of a copyrighted character.

[00:49:25.49] That means if you're the user and you wanted to do that for a fair use purpose for a parody or a commentary or some other kind of transformative use, you would be unable to do that. So I think we need to be really careful when we think about guardrails for generative AI, where we put them. And we need to think about where the harms come from if we put them in the wrong place. And I do think that we need to make sure that when we're working with guardrails around outputs in-- obviously, we don't ever want outputs of sexual abuse material.

[00:50:00.07] We don't ever want outputs of non-consensual erotic imagery. But sometimes we do want outputs of copyrighted content because sometimes that's a fair use. And I think we wouldn't want to see a world in which generative AI tools are not permitted to be used for purposes of making fair use of copyrighted works.

[00:50:22.39] BLAKE REID: So I want to hearken back to Margot's question just a little bit ago about the user interfaces and how they fit into the fair use analysis and how we haven't really seen any indication of that, in part because these initial cases that we're getting fair use results out of are focused on the earlier stages of the AI supply chain, as James Grimmelmann and his co-authors have written about. And then in Judge Alsop's opinion, we see Judge Alsop really slicing the uses into these segments.

[00:51:03.57] Could we see if that approach takes hold where we say we're going to analyze assembling training data, we're going to analyze that differently from the training of models, we're going to analyze that separately from the outputs of a generative AI model, what happens to them? Does that threaten this notion of what you're talking about, Annemarie, that we need to put guardrails in the right place to make sure we don't suppress what users are doing?

[00:51:34.69] ANNEMARIE BRIDY: I'm not sure I completely follow the question. So threaten it in what way?

[00:51:40.21] BLAKE REID: In other words, are we going to see pressure to stop use earlier in the pipeline or stop training or stop downloading? In other words, doesn't Judge Alsop's framework suggests that we need to analyze each little part of it?

[00:52:00.65] ANNEMARIE BRIDY: I think so, and I think that's what the Supreme Court told us in the Andy Warhol Foundation case that when you focus on the use, not on the work. Because remember in the Andy Warhol case, Andy Warhol made, like, 17 or something huge scale

silkscreens of the image that was ultimately at issue in the case. And the court says, we're not saying anything about those and those uses and whether they were transformative or not.

[00:52:30.07] We're going to look at the downscaled sample image that was used as a book cover, and we're going to assess whether that was transformative when it was competing against another downscaled image that was produced by a photographer for the purpose of putting on not a book, a magazine cover. And so I do think Andy Warhol Foundation tells us that for purposes of thinking about transformativeness and fair use, we need to look at what the use is. So you look, and I think that's the point that I'm making about guardrails, is that I use a tool to make a picture of something.

[00:53:07.89] We wouldn't say you can't use a pen to draw an image of a copyrighted character. But we would care a lot about, when you use a pen to make an image of a copyrighted character, what you then do with that image. And I don't think that there's a copyright harm that occurs at the moment that somebody is making a picture on their own computer at home, and maybe they don't even do anything with it. Or maybe they're trying to think through how they would use it.

[00:53:37.65] BLAKE REID: Really quick response--

[00:53:38.75] SARAH JEONG: So I actually think this is a really interesting divergence point in this is one of the places realignment is happening, and it's very, very fact bound. People are using these technologies, and their own behavior suggests that they don't think that what they themselves are producing is user-generated content. They think that what they're doing is there in a closed environment, and they're getting the robot to say things, and it's the robot's speech and not their speech. That's very strange. That's a very strange outcome.

[00:54:11.29] And I'm not saying that happens with all generative AI technologies, but certainly a bunch of them, people are behaving as though that's what's going on. And a lot of the new products that are coming out are like for the consumer. We're not talking about the smaller, frankly, more interesting things happening in the background. Those also seem like the environment is getting more and more enclosed. and it is more and more people are-- especially like the persona chatbots and so on, they're not thinking of these things as things they themselves are producing.

[00:54:47.97] And I think that that's a really weird outcome. People aren't thinking of these things as pens. They're thinking of them as something else, and that something else is producing the content.

[00:55:00.35] ANNEMARIE BRIDY: I think that depends a lot, too, on the user interface, on what the product integration is for the tool. if your use case, when you're looking at that tool, is some kind of therapeutic-- like, a therapy bot, then you're going to think you're

talking to someone else, not that you're transforming your own speech and having the tool assist you into making your own creative content better or more interesting, or helping you ideate before you even actually start the process of composition.

[00:55:32.43] There are ways to use these tools where you're not even as an artist making direct use of the outputs. You could just be using them to help you think about how you're going to do your own composition. And so I just think that the product integrations matter a lot to how users are thinking about what they're doing when they're using these tools.

[00:55:50.15] BLAKE REID: All right, we've kept the technology and [AUDIO OUT] barrel for a while now. And I promised we would get to the content industry. So Pam, in your talk this morning, you alluded to a number of wars-- I know you used the word the word war several times. And I know when I wasn't a law student and I saw Preston Patton and Gigi Sohn fighting every year on the stage, I learned that the content industry and the technology industry [AUDIO OUT] that was how it was presented to me.

[00:56:20.43] Ben, you started in your introduction by saying, actually, the technology industry and the creative industry are quite aligned. And indeed the creative industry might be one of the biggest customers of generative AI as things progress. Tell us how things have changed on the side of the creative industry. What does that look like now?

[00:56:49.89] BEN SHEFFNER: Sure. We certainly don't view the technology industry or Silicon Valley as our mortal enemy. Our companies are in business with many of the major technology companies I just described. They have a very productive relationship with YouTube, for example. And I mean, our companies are also technology companies. They have been at the forefront for over a century of developing both in-house and with outside vendors, the use of technology that enhances the production process, going back to the advent of sound and color and all these different technologies over the-- really over the last century, or most of our companies were founded in the 1920s.

[00:57:35.43] So that's nothing new. But again, they've been using AI for decades, mostly kind of in the background in some of these more technical, as some people like to say, boring parts of the industry in the post-production process, again, things like color correction, deblurring and de-aging, rotoscoping, which is the process of aligning computer-generated images and real life images in a particular frame through machine learning that can be done-- used to have to be done by hand. Then it was done frame by frame with using editing software.

[00:58:10.35] Now it can be automated through machine learning and applying-- the machine is essentially applying what it learned in the first

few frames to thousands of frames. It can be done much quicker and more efficiently than it's been done in the past. So again, our studios have embraced AI. They're bullish about AI. But there are responsible ways to use AI and irresponsible ways to use or develop AI. Again, three of our members have filed lawsuits over the last several months or early this year, I guess, against two AI companies that, in their view, were not behaving responsibly, obviously, that completely lacked guardrails against production of characters and other material on the output side that are clearly infringing.

[00:59:01.41] There's a lot of complicated legal issues embedded on that about on the input side and the output side, direct liability versus secondary liability that I'm sure will get litigated over the next several years. But yeah, I mean, I think the message is overall, we embrace that new technology when it's used in responsible ways, when it's developed in responsible ways. But the fact that this is there's this amazing technology obviously doesn't obviate copyright law.

[00:59:32.19] And a lot of these older doctrines still apply with equal force today. The precise details, of course, will be worked out in those now 59 cases. That will take probably several more years to come to a clear conclusion.

[00:59:49.23] BLAKE REID: Pam, I want to come to you on this. It feels [AUDIO OUT] of the creative industries on stage, extolling the virtues of technology that makes widespread use of copyrighted works. [AUDIO OUT] conferences where that has not been a feature before. What's your reaction to that?

[01:00:13.67] PAM SAMUELSON: Well, I think that there have definitely been times when the tensions were extraordinarily intense. And I would say that in the 1990s, with the white paper's extremely broad interpretation of copyright as applying to every temporary as well as permanent copy of works in the world, and the notion that online service providers should always be strictly liable for infringements, even if their users did stuff that they didn't know about and that they were unhappy about.

[01:01:05.53] And I would say the rhetoric about copyright back then was pretty intense. I'm going to tell you my favorite insult that has ever been lodged against me. So I was at a conference in Los Angeles during the height of this war, and one of the speakers actually said some nice things about me. And then the next speaker got up, and he was a vice president at Columbia TriStar. And he said, in the circles I travel in, Pam Samuelson is known as the Joan of Arc, of the people who want to steal other people's technologies.

[01:01:47.29] [LAUGHTER]

[01:01:48.67] And on this issue, I stand with the church.

[01:01:51.09] [LAUGHTER]

[01:01:52.91] OK. Burn that bitch.

[01:01:56.21] [LAUGHTER]

[01:02:00.71] It was such a vivid image that [AUDIO OUT]

[01:02:05.99] BLAKE REID: All right, Sarah, tough one to follow. But [AUDIO OUT] about the entertainment industry [AUDIO OUT] competition and consolidation. What do you make of this sort of alliance between technology companies and the content industry about-- around generative AI?

[01:02:29.37] SARAH JEONG: I mean, I think that what we've seen is that with consolidation with the deals that these companies have made, we still think of FAANG as tech and we think of Disney as content, but that's like simply not the reality, when you look at how the economics play out. What is actually the difference between Netflix and Disney? They're branded a bit differently, but they both produce content in the form of studios. They both have streaming platforms, competing streaming platforms.

[01:03:08.65] I think that what you're seeing is that all of the content industries that have aligned themselves with the tech companies are content industries that have themselves converted into technology industries. The remaining industries that have realigned and shifted on fair use, especially the news industry, New York Times and so on, they are industries that have not quite made the move over into also being a tech industry. They have made significant progress.

[01:03:44.03] The companies that are surviving are the ones that have converted themselves into partial video game companies. But what else is Wordle, but one massive subsidy for journalism? However, the industries that remain upset about generative AI are the ones that haven't quite reached the hurdle. And I think that's one way to make sense of how weird the realignment is. Because it's weird. It is weird. Nothing about this is the same as the last time.

[01:04:20.07] BLAKE REID: Before we leave this topic, Annemarie, there's probably a day where I might not have sat you and Ben right next to each other on the panel, out of an interest in preserving civility. Yet today, how does it feel to be on the tech industry side of this alignment?

[01:04:36.88] ANNEMARIE BRIDY: I mean, it feels good. There are still challenges, and I think we are finding our way with partners in terms of [AUDIO OUT] build mutually beneficial relationships and products. I think Google's now having cloud as a major part of its business, has caused a lot of this realignment. A lot of these major companies that are content creators or cloud customers. And so it's not just the relationships with YouTube. It's a lot of relationships with Google Cloud as well, where cloud is helping these companies leverage

Google generative AI models and fine tune them for their business purposes.

[01:05:16.82] So I think it's a good thing. I think we'll probably all do better when we try to cooperate and work together. I think are kind of like a necessary way of working things out initially when everyone is freaked out. But then I think as they make their way through the courts and as this process of domestication happens, they fade into the background. And often by the time they reach the Supreme Court, the industries have already kind of realigned.

[01:05:51.40] I think Netflix started out as a tech company that just did distribution but realized that it wasn't a working business model if they couldn't also create content. So I think there are also a lot of convergences that happened. And it was an important moment, I think, when Netflix joined the MPA, because I think that altered the relationship between other tech companies and the MPA, because Netflix was there in the MPA as a company that was situated in both places and understood both points of view.

[01:06:24.76] BLAKE REID: Ben, one more question for you before we [AUDIO OUT] primarily a plug for the afternoon's panel. But one issue that [AUDIO OUT] put on the table is the copyrightability of AI-generated works. And this feels like a pretty [AUDIO OUT] the notion that we have a technology whose outputs are suddenly really questioning whether they are going to get copyright protection. And indeed, early signs suggest the Copyright Office is not so much on board with that. And obviously, the creative industry has been quite on the side of copyrightability. Give us a preview of that issue and how you're approaching that.

[01:07:10.58] BEN SHEFFNER: Sure. So this is the issue of if you use an AI tool in some respect to create a new creative work, does that ultimate work still merit copyright protection? And in March of 2023, which is only, what, about five months or so after the release of ChatGPT to the world, which kind of sparked all this debate, Copyright Office put out guidance, and they took a pretty hard line. What they said is that if you use a generative AI tool and prompt it with a prompt, then the output is not protected by copyright. End of story. Full stop.

[01:07:53.58] In a number of subsequent sort of internal cases at the Copyright Office, where people tried to register works that they identified as having been created using AI tools, the Copyright Office sort of went even further and said, it's not just that if you use one prompt, it's not copyrightable. In one case, which is actually the subject of litigation right now, the prompter did 624 iterative prompts, make this a little bit bigger, make this a little bit bluer, et cetera, et cetera, 624 times. My understanding is that some of the prompts themselves were hundreds of words long.

[01:08:32.04] Those prompts were probably copyrightable. But the Copyright Office said, nope, I'm very sorry, that is not your original intellectual conception, going back to the Sarony case from, what, the 1880s, I think about photography. And end of story, you don't get a copyright certificate. At the end of the day. We at the Motion Picture industry are quite concerned about the standards that the Copyright Office has laid out. And the reason for the concern is, again, because as I've talked about, making a major motion picture in these days usually involves use of AI tools, and some of the content may be either generated or altered using AI tools.

[01:09:25.50] And the nightmare scenario for a movie studio is they spend $200 million producing a movie, and then at the end of the day, the Copyright Office says, I'm very sorry, but that's not protected by copyright because you use too much copyright or, as also part of their guidance, the copyright-- the registrant or the applicant did not disclaim the use of copyrighted-- I'm sorry, the use of AI-generated material in their application.

[01:09:54.90] To be clear, that hasn't happened yet, and our members have not encountered those kinds of significant difficulties that I think they had feared when that original guidance came out. But it's a real issue of concern. And the Copyright Office may not have the last word on it. As I mentioned, there's this case actually being litigated right here in federal court in Denver involving the plaintiff, I believe, won the Colorado State Fair Art Competition, again, with his 624 prompt AI image. And it's still in District Court. And who knows how that will come out?

[01:10:31.28] BLAKE REID: In Colorado, we take quite a pluralistic view of different varieties of art. So I think we'll pick up in the next panel, the question of what that has done internally in the creative industry to structure the relationships between creative workers and studios. But--

[01:10:52.92] PAM SAMUELSON: Can I please interject about how new this issue is? There was an AI summer in the 1980s, and it was a hot topic back then. And I wrote an article in 1985 called Allocating Ownership Rights in Computer-Generated Works. So it's new as in, OK, it's not a toy problem anymore. It was a toy problem at the time that I wrote that paper, because there weren't any commercially significant outputs that were being generated.

[01:11:28.96] And then AI winter happened. The last time I bubble burst was in the 1980s. And then it kind of stayed winter for a really long time. And it's only really recently that the AI summer has gotten out there. And so that's why it's like it's new, but it's old.

[01:11:51.94] BLAKE REID: Well, [AUDIO OUT] says as well. They say we have been writing about this issue since Barbara Ringer back in the 1970s. And so I want to take our last few minutes before we go to Q&A to bring in the Copyright Office. So when we think about politics, and

this is the capital P Politics of it all, we have the episode that Pam referred to this morning, where the librarian of Congress, Carla Hayden, is fired by the president.

[01:12:23.40] The next day, the Copyright Office releases a sort of unusual pre-publication status report on fair use and generative AI. And then the next day after that, the register is fired. And I think I've got the timeline right the next day after that, the president purports to appoint an acting librarian an acting register. Did I get the timeline. Pam?

[01:12:49.46] PAM SAMUELSON: Spot on.

[01:12:53.00] BLAKE REID: The Copyright Office, not an agency that we frequently see the White House descending upon in such a visceral sort of way. How do we make sense of the broader politics that have led to that incident, which is now sitting before the Supreme Court on the emergency docket? And, Sarah, I know you've thought a lot about this, if you want to kick us off.

[01:13:20.28] SARAH JEONG: Yeah, so we broke the story that the people who were appointed, I think, the narrative early on was that essentially the Elon Musk, David Sacks contingent had gotten Shira, at least Shira Perlmutter, the register fired up. And that was what our reporting bore out as well. But we broke the part of the story where the people who came in and replaced the Hayden and Perlmutter were part of a different faction inside of the palace, essentially like the news corp types had intervened and they had gotten their guys in who were people from the Justice Department whose bonafides were that they were kind of antitrust guys, which meant that they were anti-tech.

[01:14:10.38] And therefore, they had stuck their thumb in the eye of the Musk, Sacks alliance. That's a very weird outcome. I think that that might be the epitome of copyright politics in the new era. You've got some very strange bedfellows through that entire thing. And yeah, I don't even know what to say about that. I'm not sure any of these people are even particularly engaged with the law of fair use, to be honest.

[01:14:41.32] Someone who had any, I guess, big picture insight into how copyright works would not have fake fired Shira Perlmutter, because the Copyright Office doesn't determine what copyright law is. This pre-publication report doesn't actually do anything. So what's the point? And because of that get a lot of actually some very fascinating folk theories around what happened here.

[01:15:11.46] From people outside of law and copyright law, I've heard people say like, oh, didn't they do that so that they could take over all of the works inside the Library of Congress and train on them? And I'm just like, oh, my god. If you know anything about the technology stack inside there, you go, wow, if only. If only that was possible because

then it would mean that things had gone much better inside of that tech stack than they currently are.

[01:15:43.38] I don't think that the people who targeted Hayden and Perlmutter understood what they were doing and what was at stake. And then I don't think that the people who came in and got their replacements in understood either what was at stake or how any of this works. And yeah, it's a very strange degradation of the political situation.

[01:16:06.36] BLAKE REID: So maybe before we go to Q&A, Pam, any thoughts on the significance of this intervention at the Copyright Office and what that means for the future of copyright politics?

[01:16:19.80] PAM SAMUELSON: So I think the people in the Copyright Office were trying to keep their heads down, like in a number of other places that are kind of a little more on the obscure side and not as wokey worrisome for the Trump people. But a dynamic here that I think was significant is that the Library of Congress and the Copyright Office are at least officially part of the Congressional branch of government.

[01:16:56.72] And the Senate doesn't seem to be doing anything except that they don't like the idea that the president can basically come in and mess with their people. Now, when it comes to the firing of the librarian of Congress, that's actually something that the president has the authority to do. You don't have the authority to fire Shira. And so that's the issue that's before. But I think that the Congress may not be willing to stand up and fight for snap benefits.

[01:17:40.02] But they don't like the idea of their own authority being undermined by the president as directly as these firings seem to suggest. So there was just a teeny bit of backbone shown by Senate Majority leader later when these things were announced. And I think the people in the Copyright Office have just tried to keep doing what you're doing and keep going and until the shutdown, obviously.

[01:18:15.26] But I think that the expectation is that if and when a new librarian is appointed, that that new librarian can fire Shira and put somebody else in. But so far, that hasn't happened. But I think there is that other dynamic in addition to the thing of the certain MAGA people wanting to get rid of anything that's cultural, and the tech people saying, excuse me, you owe us, and therefore, you got to come out in support of fair use. And so that's actually a tension within the Republican Party right now.

[01:19:02.90] ANNEMARIE BRIDY: I think there was one other aspect, though, the Congressional-- I wouldn't call it a backlash, but a little bit of the pushback that came from that, which is that they were concerned about the Congressional Research Service.

[01:19:13.56] PAM SAMUELSON: Yes.

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[01:19:13.82] BLAKE REID: Mm-hmm.

[01:19:14.46] ANNEMARIE BRIDY: And that I think, is something that they really, really want to protect. The Congressional Research Service is an arm of Congress that provides expert guidance and writes reports for Congress people to help them understand how to come out on certain policy issues. And I think they were very worried that something was going to happen to the CRS.

[01:19:35.90] PAM SAMUELSON: And the Copyright Office [AUDIO OUT] for Congress also. And so that's a place where they have some common interest, yeah.

[01:19:46.22] BLAKE REID: I cannot help but plug my own [AUDIO OUT] separation of copyright powers coming out in the Seattle University Law review. With that, I'll open it up to questions. And I see a student hand right off the bat. Let's go to Max.

[01:20:01.00] AUDIENCE: Sure. Thank you all for that wonderful panel. I'm thinking of what Pam was saying about the days of Napster and how users drove the music industry and many industries in some ways, to change with different models and convenience. Even though it was blatant copyright infringement, convenience won out, and users wanted that. And I'm thinking about the fair use factors and. As Professor Reid calls it, the hidden fifth factor of maybe vibes and how with Google Books, Perfect 10, there's this clerks, researchers. People really love these products. People love iTunes. People love what Spotify became. People loved Google Books.

[01:20:40.32] And with AI, I know there's a lot of LinkedIn thought leaders who tell me I should be using it in many ways, but the public reception seems more mixed. I mean, obviously it's not just the creative community. It seems users are kind of skeptical about Google AI summaries. Maybe they're better now, but when they launched, that was a big controversy. Lots of these features, the existence of the term slop is really the public pushing back on industry. So keeping that in mind, how do you think that factors into how judges and the law might think of public interest with fair use?

[01:21:15.70] BLAKE REID: Factor V, jump ball.

[01:21:22.96] SARAH JEONG: I think that you would have to see some significant evolution in the law. I think that's actually what the Khadr case is, where I mean, it was a weird swing, but I think that they're looking at the facts and going, well, this is really strange. How can we make things look in a way that's not totally discordant with how the public perceives this stuff? I think you're right. I think the users are showing in their revealed preferences.

[01:21:55.36] And it's very hard to see the revealed preferences because of the way these platforms are set up. They're owned by companies that are pushing their own Gen AI products. But I don't

know. You see one slop video. All the comments are people yelling about how it's slop. And I find this really fascinating. It's half people saying, oh, this is slop. That sucks. And then tons of people going, how could you waste 5 millions gallons of water by generating this?

[01:22:24.40] They'll talk about the environmental implications, like the carbon implications, the threats to the artists. And just like, I don't think you actually care about any of these policy concerns. You're just trying to find a reason why you hate this, and you've seized upon what people have reported as this is why AI sucks. And so you're seizing on this reason. But ultimately, you just don't want to look at this content. But there's no toggle like on TikTok to be like, oh, yeah, I never want to see slop ever again.

[01:22:56.09] Or more frankly, the problem would be, like, Instagram or one of the-- or YouTube or so on. Yeah, it's really weird. It's a really weird outcome. And every layperson can see for themselves the difference between Google Books and ChatGPT. And yet the law doesn't differentiate as cleanly. And that's weird. That is a very, very weird outcome. And I think that is driving a lot of the splintering also. We're trying to make sense of what it is that all of the laypeople understand and trying to put that into words, and it's not coming so easily.

[01:23:41.57] BLAKE REID: OK. Next question, I got one from Zhun in the back.

[01:23:49.05] AUDIENCE: Hi. OK, so, Sarah, you started your talk by talking about the progress clause. And I think maybe part of the reason we feel like copyright doesn't have the right language for us is because we've never really had a definition of what it means to have progress in the sciences. So I think AI boosters typically will point to AI-generated content and say, look at how great this is. Consumers have voted with their preference. Everyone's using it. We have millions and millions of users.

[01:24:19.77] They use it every day. People like the content. But I also think we've seen the failure of that type of consumer welfare language in other areas like antitrust, which I know you're interested in, and how the past decade has really seen a failure of the 1980s Burkean style consumer welfare, where what we're really talking about is more output is good output, and if consumers vote with their wallets, that's also positive. But of course, I think the counter critique to that is that outside of measurable outputs, quantity, how do we figure out if something is good in the abstract or bad in the abstract?

[01:24:59.85] Although in other areas, I would say, outside of antitrust and IP, we don't really point to consumer preferences to decide whether we like something. It's not like in the tobacco industry, we said, look, everybody's buying packs. It's amazing. So what would you

advocate is a definition of progress that would be satisfactory to replace maybe consumer preference?

[01:25:23.13] SARAH JEONG: So this is the part where I get to pretend I'm not a lawyer and not have any policy recommendations. I think this one's a really dark one. I think that we have never seen a paradigm shift like this before, and therefore, we don't really have adequate tools to address it or conceive of how to address it. I would love to hear your own thoughts on this one. I do think that the revealed preferences thing, though, is complicated because they say, like, 180 million active users.

[01:25:55.79] But if you look at how people are using ChatGPT, aside from the problematic uses, which that's not going to be like the majority of uses, the majority of users are using ChatGPT as a search engine, and they're using it as a search engine because the premier search engine apologies of the past 10, 20 years, it no longer works particularly well. And it no longer works particularly well because its results are flooded with AI slop. So it is ultimately a very circular problem here, and I don't know if we are actually seeing revealed preferences by those daily active user numbers, because it is like, that is so weird to measure.

[01:26:38.11] I do think, though, that things are maybe moving so quickly that we are-- we might have a problem in being able to measure progress because the tools are disappearing to be able to measure anything, really. And that's pretty scary. That's a scary place to be. Maybe we'll be fine in the end because the bubble will pop tomorrow, and then we're just going to be left picking up the pieces. But yeah, I'm not really sure what the right definition would be.

[01:27:13.49] ANNEMARIE BRIDY: Yeah, I think we might be overindexing on chat bots when we think about the value of AI and how AI can promote the progress of science. Because there are tremendous strides being made now. The LLMs that are underneath chat bots are also underneath discoveries related to protein folding, to drug discovery and development, to weather prediction, especially in the era of climate change and how important it is going to be able to predict the weather.

[01:27:43.33] So there are just a huge number of scientific uses of this technology that are not related to whether or I'm making an image of Mickey Mouse [AUDIO OUT] I just think we have to be careful not to forget or downplay all of the amazing things that are happening in the sciences and engineering with these models that are not the g-AI models that are making it into the pages of The New York Times every day.

[01:28:12.07] BLAKE REID: [AUDIO OUT] isn't it the case that all the copyright fights that we're having are about the chat bots? In other

words, we're not seeing litigation over the use of AI and the pharmaceutical industry, that sort of thing.

[01:28:27.25] ANNEMARIE BRIDY: But the base models are needed to train with copyrighted materials. So it's the use of the copyrighted materials to train these models. These are like the same models. They're being fine tuned for different purposes. They're being developed for different purposes. But all of the models, for weather prediction and everything have ingested huge amounts of copyrighted content too. And sometimes they are the same models that are underlying the chat bots and the consumer-facing products that are generative tools.

[01:28:58.09] I'll let Zhun bring this up later. But at our talk yesterday, I think her observation was and a lot of these more sectoral models, that the copyrighted works are actually licensed, because the licensing, the collective licensing issues look really different. But I think we have got time-- I'm looking down the panel for any other reactions. Seeing none. I think we've got time for one more question before we go to lunch. Why don't we go right here?

[01:29:25.73] AUDIENCE: So my question was you had spoken-- and this is for Annemarie principally, but welcome to any respondents. Annemarie, you had spoken principally about this concept of AI being very valuable because it can produce parody, it can produce transformative works. But to Ms. Jeong's point, I know oftentimes these users who are producing these works aren't seeing these as works that they are producing themselves. It's not their individual speech, but instead, something that they are somehow prompting to receive from the system.

[01:29:55.17] I'm wondering if you see sufficient listener value in receiving that parody in order to protect it under fair use, or if you see a more-- because this was under the topic of guardrails-- if you see a more efficient place where we can put these guardrails, where we can protect that fair use but still prevent it then from being taken and used for copyright infringing purposes.

[01:30:22.71] ANNEMARIE BRIDY: So I think the framing of your question really kind of conflates the First Amendment speech questions with the Copyright questions. And although they're related, they're a little bit distinct, I think. And any sort of copyright lawyer who reads the copyright precedents will tell you that we don't make aesthetic judgments when we assess when something is copyrightable or copyright infringing. What is protected as a parody, whether you think it's a parody or not, actually doesn't matter for purposes of a fair use analysis. And so I do think we need to use a lot of care about where we put the guardrails, because I think that the speech issues are a little bit orthogonal to the question.

[01:31:09.29] BLAKE REID: With that, it is time for us to break for lunch. But before we go, lunch will be upstairs. So if you walk out these doors, for those here in the room with us, up the stairs behind them and then take an immediate U-turn, you're literally right above us. We are going to reconvene at 12:45 Mountain Time for our second panel. And before we go, please join me in thanking the panel for a wonderful conversation.

[01:31:37.07] [APPLAUSE]

Panel: Copyright Politics Beyond AI

https://youtu.be/GLVJ7AxkA6M

[00:00:00.48] SARAH HANSEN: Good afternoon, everyone. My name is Sarah Hansen. I'm a 2L here at Colorado Law and the Secretary for the Silicon Flatirons Student Group. I'm delighted to be introducing our next panel, Copyright Politics Beyond AI, which will explore how debates around AI are changing the politics of fair use and copyright policy.

[00:00:20.32] We're fortunate to have with us an extraordinary group of experts guiding the discussion. Casey Fiesler is an Associate Professor in the Department of Information Science at the University of Colorado Boulder. Casey's research has made her an influential commentator around technology, ethics, AI, creativity, and inclusive platform design.

[00:00:40.72] Meredith Rose serves as Senior Public Policy Counsel at Public Knowledge, where she uses her expertise in copyright, AI, licensing, free expression, and fan cultures to help shape public policy in DC. Aram Sinnreich is an author, musician, professor and PhD director at American University's School of Communication. His scholarly work focuses on the intersection of technology, law, and culture, with an emphasis on music, data surveillance, and copyright.

[00:01:14.14] Xiyin Tang is a Professor of Law at UCLA, whose prominent scholarship focuses on how intellectual property law should respond to AI and its impacts on creative labor markets. Moderating this panel is Gabrielle Daley, the Director of the Experiential Learning Program and fellow with Silicon Flatirons at Colorado Law. So please join me in welcoming our fabulous panelists.

[00:01:37.36] [APPLAUSE]

[00:01:42.14] Thank you so much, Sarah, for that kind introduction. Welcome, everyone. So the goal of our second panel here is to explore how these debates about AI that we've been hearing so much about are changing the politics of fair use and copyright policy. We're going to try and dig into the implications of these realignments for areas ranging from transformative works to remix culture, consumer protection, labor, accessibility, and whatever else we want to pick up along the way.

[00:02:08.49] We'll be trying to pull in some themes from our wonderful keynote this morning, as well as the first panel on the copyright politics of AI. So I'm hoping that we can kick things off and maybe further deepen our introductions by hearing from the group about what kinds of fair use advocacy you have been involved in prior

to the arrival of AI sort of changing these dynamics. So, Meredith, could you kick us off by talking a little bit about how fair use advocacy has played out in your career?

[00:02:40.21] MEREDITH ROSE: Chaotically. Yeah, so one of the interesting things about copyright policy, more generally, is that there are very few people who, both in the field and in policy making spheres, including lawmakers, who think about copyright qua copyright or fair use qua fair use. It is very situational. And so people really care about fair use when it starts to impact things that they particularly care about and couldn't really care less usually when it's over dealing with something else.

[00:03:11.27] Having said that, obviously, it's a huge underpinning of a lot of work. And one of the interesting things about copyright is that it does touch way more policy areas than people expect. The classic example is right to repair. This is the copyright policy that everybody cares about, at the end of the day, which has led to some very interesting coalition work with the Idaho Potato farmers and their ability to repair their tractors and working on McFlurry machines and McDonald's.

[00:03:45.35] It is an interesting field because fair use as a legal concept feels very abstract to folks until all of a sudden it collides into something that they happen to already care about.

[00:03:57.09] Having said that, there are folks on the Hill specifically who are genuine fair use defenders. So Ron Wyden is kind of a classic example of a guy who has very strong opinions about copyright policy that I tend to agree with and about fair use as well, but he's really kind of an anomaly. So one thing you get very good at in advocacy is trying to explain fair use as succinctly as possible, which is an art form I have yet to master.

[00:04:25.73] GABRIELLE DALEY: I think you gave us a pretty good start there. Thank you for the examples with repair. So, Aram, could we come to you next? What kind of fair use fights have you been involved in in your career?

[00:04:35.69] ARAM SINNREICH: So I kind of came into the subject of copyright during the Napster years. I was a market researcher. This is before my academic years. And I published what I think is the first commercial research on Napster. Bear in mind that all of the major record labels and publishers were my clients at the time.

[00:04:53.42] I worked at a firm called Jupiter Research in New York City, which was the premier dot.com consultancy at the time. And I fielded a big survey. And what I found out was that Napster users were 45% more likely than identical internet users to have increased the amount of money that they spent on music in the past year.

[00:05:14.20] And I was in my 20s. I was very naive. And I ran to my clients all excitedly and guys, you'll never guess. The best thing in the world just happened. You're about to increase your sales by 45%. And all of my record label clients were like, you're the devil. Fuck all the way off.

[00:05:33.28] And no, I literally got Ted Cohen, who's a music industry consultant and analyst who's much better at gladhanding than I am, actually invited me, I don't know, 10 or 15 years ago to co-keynote a big music industry conference with him. And his pitch was, I'll be Jesus. You be Satan. And I was like, OK.

[00:05:53.38] So what ended up happening was because I had published that research and I did more along that line, I ended up being an expert witness on some of the initial court cases that had to do with peer-to-peer file sharing, including Grokster, which was my very first case, had no idea it would become a Supreme Court case. And I probably would have said different things at deposition if I had known that they would be debated among the Supreme Court justices.

[00:06:20.66] But then I ended up that became a little bit of a cottage industry for me. So I was an expert witness on LimeWire and more recently on some of the ISP cases like Bright House and Charter and Altice. But once I moved into academia, more and more of my research was about so-called remix culture. And that's a very broad umbrella but let's say using quanta of digital cultural information as an expressive communicative form or art form, including memes, mashups, remixes, et cetera, et cetera.

[00:06:55.52] So I ended up working as an expert witness on a bunch of those cases as well. There were two cases I did, and this is, I think, directly relevant to some of the conversations we'll have about the AI companies. But I worked for a client that I absolutely reprehend and disagree with 99% of the time, Fox News.

[00:07:15.80] But they were defending the fair use rights of some of their anchors who had used 9/11 memes featuring a copyrighted photograph on Facebook. And I argued as an expert in these cases that memeifying an image and posting it to a social media site is a definitively transformative use and that it should be protected by fair use.

[00:07:41.52] So I've done advocacy in that capacity. But most of the work that I do is actually research, not advocacy. I don't work for CSO. And to the extent that it is advocacy, I, like many researchers and academics, believe myself to be advocating for sanity and the truth and consistency of intellectual analysis and not for one side or another.

[00:08:05.94] GABRIELLE DALEY: Excellent. So we've heard now about right to repair. We've got music and remix out on the table. Casey, can you talk to us about transformative works?

[00:08:14.18] CASEY FIESLER: Yeah, so I have been involved in the organization for transformative works for a very long time. One of the things that this organization is responsible for is Archive of Our Own, which is a gigantic fanfiction archive that was built, in part, so that fans could have a platform that they owned the servers for and could create policy and advocate for themselves.

[00:08:40.78] It very explicitly is about non-commercial fanworks, which does make a difference legally sometimes. I tend to let the real lawyers over there do the real lawyering. We've assisted on briefs and in favor of various fair use-related cases.

[00:09:03.49] For me personally, I've also done a lot of research that relates to fair use. I mean, to the point about how difficult it is to explain to people, some of my work has been about how fair use is challenging for creators to understand and how that impacts how they use technology, experiences that people have with inappropriate takedowns, for example, on YouTube and other user-generated content platforms.

[00:09:32.45] So I have always been a very rah-rah fair use person. I always say it like it takes a lot for me to be on the other side like I don't know, Richard Prince, maybe. But I will say, and I'm sure we'll get into this in more detail, the conversations around generative AI in particular are quite different than what you might expect in the transformative works community.

[00:10:00.79] GABRIELLE DALEY: Perfect. And yes, we are definitely going to get into how things are changing. But first, I want to finish laying out how things used to be. And Xiyin, during your lunch talk yesterday, you talked so eloquently about the era of free culture on the internet. I'm hoping you could say a little bit more about the era of fair use that you came up in.

[00:10:19.43] XIYIN TANG: Yeah, so as I mentioned yesterday, for those of you who were there, yeah, like Aram, I was also a child of the Napster era. And I think a lot of us who grew up in that time period fundamentally viewed fair use as a means of asserting individual autonomy and authority over the expansive corporate overreach of record labels and music publishers and major motion picture studios.

[00:10:46.69] So in my mind, and even if you look at famous fair use cases like Stephanie Lenz against Universal Music, even ones involving potentially a reprehensible artist, Richard Prince, most of these fair use disputes are either an individual pushing back against a corporation or individual to individual.

[00:11:08.03] Obviously, this is not to say that all fair use cases are this way. But I do think that the systemic defense of fair use by large AI companies, I think, has introduced a rift into this scheme in a way that also tracks some interesting developments in the way that online culture is created.

[00:11:30.83] And so, obviously, during the Napster age, also around the same time that YouTube was coming up, it was a free culture of sharing where mostly people who were posting videos were amateurs. That is not the world that we live in today. People view platforms like Instagram and TikTok and YouTube as fundamentally no different from platforms like Uber and Postmates, an ability to gain some sort of autonomy while also importantly, making a living for themselves but maybe under their own terms.

[00:12:01.92] In that sense, they've been met with the black box of algorithms, demonetization, unfair revenue splits. And I think it's fundamentally changed the nature of the user on the platform in such a way that I think to engage in that type of labor on those platforms and then to also have those very same companies who are really amassing these treasure troves of creator data and turning it into valuable monetizable content and mining it for data value, to have those same platforms turn around and assert a right that I think many of us grew up with as thinking of a fundamentally individual user-based right has flipped the scales, such that it doesn't really-- that old dichotomy between who's a rights holder, the big bad corporation versus the individual user, that sort of breaks down now in these contemporary fair use debates.

[00:12:56.78] GABRIELLE DALEY: Perfect. And that's a great bridge for us to start talking about how things are shifting with these realignments. I don't want to retread ground, but just as a recap of what we were talking about with the keynote this morning, AI advocates are saying that all of the works that their models are going out there and hoovering up that this is training data, that this is transformative, that this is a fair use, and therefore it's permitted under copyright law without the need for licensing or permission. And of course, this is working its way through the courts.

[00:13:26.30] I want to focus in on how this background context is impacting nonAI fair use advocacy. Aram, we were talking about this a little bit at dinner last night. Would you mind kicking us off? Like, how is this working in remix spaces? How is the shift going?

[00:13:42.96] ARAM SINNREICH: Well, so remix spaces were never pure spaces. I mean, yes, there was a narrative about we're the little guy and we're fighting back against Disney and the big three record labels. But even at the time, a lot of the litigations were being these individual creators who were being supported by what we now call big tech companies.

[00:14:05.58] And it was very clear even 15 years ago that this was essentially a showdown between Northern and Southern California economically. And it was like, who's going to be reaping the billions and billions of dollars of rewards from engagement with online expressive and creative forms?

[00:14:23.84] I think if we really want to go back and talk about the kind of proximate circumstances, I think we actually have to go a little bit further back because I think remix and AI are both epiphenomena of these two major tectonic shifts that have been going on for an entire generation really since the turn of the century or since the mid-90s.

[00:14:42.59] One of them is the deregulation and consolidation and rise in labor exploitation in the creative industries. When I started researching-- I'm not that old. I'm older than most of you in this room. But when I started researching the music industry, there were six major labels. Now there are three. There are three major publishing groups.

[00:15:04.75] There are a tiny handful of companies controlling video games, controlling movies, controlling software, pretty much every expressive form. And when you look at news and journalism, it's all billionaires and private equity that own all of the major organs of journalism. And that has led to mass layoffs.

[00:15:22.65] It has led to precarity among professional, creative and journalistic laborers. It's led to entrenched exploitative relationships that vastly predate the AI era and that gave some of what Xiyin was referring to, some of that kind of moral impetus to the remix moment.

[00:15:46.73] But at the same time, there's this other tectonic shift happening, which is the quantization of culture, essentially our ability to use computational analysis to make sense of cultural expression, which has a number of side effects, one of which is our ability to chop it down into little itsy bitsy quanta that can then be fed into a machine learning model or remixed in a remix or mashup but also creates this new set of knowability or a set of metadata about cultural information that then becomes a new form of commodity, which can also be monopolized and can lead to exploitative labor relations.

[00:16:26.03] So I think those two tectonic shifts kind of came to a head in the remix moment. And as Xiyin was talking about, there was this perception that the quantization of culture was enough of an epistemological shift or enough of a shift in the means of production, that power relations could be realigned and monopolization of cultural expression could be broken up and redistributed to the people.

[00:16:50.23] This time around, the same thing is happening. We have the same potential for realignment, but nobody actually believes that it's going to lead to greater power realignments, in part, because as Xiyin was talking about, this time, it's not individual creators but Sam Altman and Mark Zuckerberg who are going to the table claiming fair use.

[00:17:10.27] But also because fool me once, shame on you, fool me twice, won't get fooled again, people are just kind of exhausted from those battles. And anybody who remembers them knows that we shouldn't expect any kind of meaningful redistribution of social power resulting from them.

[00:17:27.70] MEREDITH ROSE: Actually, do you mind if I piggyback on that a little bit? We've had this very unique, I think, kind of rhetorical inversion about-- and as somebody who spends a lot of her time not only in the policy thinking about copyright world but it's in the real nitty-gritty of politics, even just in the last decade, we have shifted from a model where fair use is seen as a bulwark against an oppressor, like a socially more powerful oppressor, now that has flipped. And individual copyright claims are seen as a bulwark against oppressors, except the oppressors are bigger tech companies. And sometimes they are also entertainment companies.

[00:18:07.06] You do occasionally see, not nearly as often, but you do see folks trying to flex individual copyright claims against much larger entertainment companies. But it is seen as this now this tool of individual autonomy in a world where the walls feel like they're kind of shrinking in on folks all day.

[00:18:27.12] And the reality is that copyright is a very powerful tool. People in various formats-- and I can't speak to all of them because I am fundamentally a copyright nerd. But I think the sense is that today, people feel like they have less access to redress, that they have less autonomy, they have less control over the political and material realities of the world that they live in.

[00:18:50.64] And we see this-- I mean, AI is the exemplary case. It's one of the only tools that folks have in the toolbox. And I've had plenty of conversations with news publishers who say, look, we're facing down an existential threat right now. And we can talk about making new laws, but this is what we have. And so this is what we are going to use.

[00:19:09.92] And whatever collateral damage comes out of it, I don't care because if I don't use it, I won't be around to see the collateral damage. And I think that speaks to a broader systemic breakdown and not to go full political science rant on it, but just the way that our government or governance model has completely broken down in the last 10 years. No, we'll be here a lot longer.

[00:19:33.22] But no, I do think that we've seen this like really, to me, very bizarre rhetorical shift as somebody who came up in the Napster era when it was this kind of cool web 1.0 Wild West. Everybody was doing really funky thing. I remember when YouTube was like brand new. And now, we are seeing this like people flexing their individual copyright rights as the only thing that lets them stand up to, in this case, a tech oligarchy.

[00:19:58.42] And that's very difficult to fight against rhetorically and politically. And so you have, all of a sudden, the progressive division of labor is now starting to hinge on, well, if we value labor rights, then we need to value strong, enforceable copyrights with fewer exceptions

and limitations because that is a tool that an individual worker can use to increase their autonomy.

[00:20:23.33] Politics is always more oriented towards the ends than the means, but that's a very difficult thing to have to argue against from a political perspective because we are in geopolitical crisis right now. And to have to step in and say, well, I get why you think that, but here's all the negative knock on effects of the world you're envisioning, that's a really hard argument to have to make.

[00:20:44.73] GABRIELLE DALEY: So we're starting to hear some themes emerge about consolidation, about scale, about labor. Xiyin, I want to make sure we come to you about labor. But I want to get some of the research that Casey's been engaging with about labor on the table first. Could you dig in for us?

[00:21:00.05] CASEY FIESLER: Yeah, I mean, so and I'll start with I agree very strongly with everything that Meredith just said. This is such a weird moment. Fair use is typically seen as, in a way, the little guy. It's like David versus Goliath. And you've got like the remix creator against the big media company or the mom with the kid and dancing to the Prince song against Universal Music.

[00:21:29.23] And that has sort of flipped in this interesting way, in a way that I think has sort of emphasized that this is just a law. Fair use copyright, it's a law. It has never been about ethics, really. And so that's one of the things that has changed now is like people are now seeing this sort of ethical argument being different. And I think one of the things that this emphasizes is like, is this even about copyright at all, much of the time.

[00:22:04.07] So I think what you were referring to is-- I've recently done some survey work hot off the presses. This is still in Qualtrics. We have not written a word of this paper. We were asking people how they feel-- like their perceptions of training data when that training data is not published books. It is all the stuff on the internet. It's like your photos on Instagram and your blog posts and all the fanfiction on Archive of Our Own.

[00:22:32.87] And we wanted to understand, are people actually thinking of this as property? And the answer is no, not really. We asked about a sort of series of metaphors of how they think about this, and it's much more common for people to think about it as labor or even as research data compared to property.

[00:22:52.73] And I think that one of the things that synthesizes for me, and also just the many conversations that I've had with people, especially in social media comments over the past few years, is that there is this copyright question because that's what we have. That's the law we have to deal with this right now. That's why this is happening.

[00:23:13.25] But I feel like the more ethically profound thing here is you are using my stuff to create a technology that could replace me. That's why people are so upset. I mean, I think that even writers-- and I have a lot of professional author friends who have talked my ear off about how much they hate AI.

[00:23:37.39] But even then, it is about copyright a bit. But I think that it's more about that. And so the way that people feel about this, I think, is about so much more than copyright. It's about labor and autonomy and dignity and these kinds of things as well, which we don't have laws for dignity and autonomy, at least not in this way.

[00:24:03.03] GABRIELLE DALEY: Perfect. So, Xiyin, we've been talking so much about IP as a form of labor law. And I know that your piece is squarely focused on this. So could you talk a little bit about how the AI's fair use dynamic is creating political capital for artists? Or how are they dealing with the existential threat from AI to their livelihoods?

[00:24:22.18] XIYIN TANG: Yeah, I mean, maybe I'll take a broader frame first and start with how I think copyright is really relevant in the fight that labor is currently having against AI. And so I interviewed a lot of the striking writers who went on strike in 2023 when their collective bargaining agreements were up with the major motion picture studios.

[00:24:43.58] And from where I sat and from where they sat, the copyrightability, or the lack thereof, of AI-generated works, the fact that you cannot protect AI-generated works, which is a core facet of copyright law and is one that is debated and obviously in flux, as we heard this morning, was the number one thing that gave the writers the leverage they needed to bargain with the studios.

[00:25:07.52] The studios gave and gave a lot of concessions on AI, which was the number one thing that writers cared about. They went into the strike caring about this thing called residuals, which is basically about how much they get paid for reuses of their material. And then when GPT launched and it was amazing, they pivoted. And the only thing they cared about was AI.

[00:25:26.20] And from the studio's standpoint, they were like, oh, these are actually easy gifts because AI-generated content isn't copyrightable. So we're going to agree to things like even if we use AI-generated content, we are still going to pay writers the same residuals that they're owed anyway and credit them on the script.

[00:25:41.74] Why would they do that? It's not altruism. It's because they have to credit the writers on the script. Otherwise, it doesn't get copyright protection. So to me, copyright is actually a core part of what allows for labor bargaining. I think if you take that away and if the law changes, as it very well might in common law or by statute, the workers are going to lose a lot more leverage.

[00:26:04.56] And then on the consolidation point, which I 100% agree with, I also think that's a problem of copyrights making. Copyright has been for so long focused on the creative output, the work itself, that they have not cared at all. These firms have gotten larger and gobbled each other up.

[00:26:20.24] As I mentioned yesterday, the entire premise of copyright is we want to put as many works out there as possible, and bigger firms are just better positioned to do that. They can do that because obviously, they have more resources. They can do that because they can spread risk across many different projects, all of which means that we will allow Sony to buy up EMI and for the six record labels to shrink to three and the six music publishers to shrink to three.

[00:26:47.72] What does that do on the labor bargaining side? It means that there are fewer buyers of labor. And antitrust has long cared about that. And it's just not something that we've talked about, even though we agree, from an IP perspective, that consolidation really hasn't been great for creators.

[00:27:05.62] GABRIELLE DALEY: So I want to start talking about venue a little bit more specifically because I think we've sort of been talking about the political context writ large. And to start making this transition, Meredith is a fellow copywriter. Can we talk about the troubling triennials?

[00:27:18.87] MEREDITH ROSE: Oh, boy. Can we?

[00:27:21.11] GABRIELLE DALEY: So we are both done with the latest triennials and of course necessarily gearing up for the next triennials in 2027. Any thoughts on how these dynamics are going to be impacting some of the arguments for longstanding exemptions like repair, access for people with disabilities, nonprofit text and data mining research.

[00:27:41.85] MEREDITH ROSE: Yeah, so I think it depends. I think this is one of those situations where, unfortunately, and due to the structural nature of 1201, we have had to re-argue the same sets of exemptions that have won since literally the beginning of this millennium, so things like accessibility and right to repair. And we have to relitigate those every three years.

[00:28:03.65] Slightly broader in scope, gaining a couple inches here and there, but we have to keep revisiting these things. And one of the values of repetition, as exhausted as it makes the advocates, is it does really drive home just how stupid some of these fights are.

[00:28:16.99] Copyright very frequently runs up against common sense and in a way that is very powerful for folks who pay attention to this. I mean, so, again, right to repair, it feels like such a slam dunk to a lot of folks. And it is becoming closer to a slam dunk nowadays in a weirdly bipartisan way because everybody's got something that has

been impacted by it. And the response of like, well, what do you mean I can't fix my combine? What do you mean I have to wait three months? My crops are in the field, and I need them out now. That seems nonsensical to a lot of folks, correctly.

[00:28:52.51] But the reality of 1201 is that a lot of what we fight about has been the-- I don't want to say largely static, but the increased scope that folks had been trying for over the last decade or so has really kind of shrunk. So it's more like we're getting an inch here, we're getting an inch there.

[00:29:12.21] I was on the group that put together a very broad right to repair exemption petition last year. And the Copyright Office, to give them a little bit of grace, they are required, by the way the statute is written, to only consider basically hyperspecific exemptions, like to the extent where there are exemptions that you can have for DVD that you cannot get for Blu-rays, hand to God.

[00:29:37.27] And they have to come in and argue about Blu-rays. And people have been doing it for over a decade now. And every year, it's like, no, we're still going to give you Blu-ray, but you can use a DVD. And so it becomes very silly very quickly. And I think some of that is just exhaustion. The process itself is very taxing. It is less taxing.

[00:29:54.51] They've done some structural reforms so that it does not suck up quite as much time as it used to, but it is still very annoyingly intense. And it still falls into this sort of trap of if the rightsholder decides not to participate, then definitionally, the Copyright Office cannot get all the information they need, and the petition will be denied.

[00:30:13.32] We have had this happen. We worked a couple of years ago on a petition for an exemption for avionics, which the very short version is that all on board aviation computers are really made by-- all engines, essentially, now come with a bunch of computer parts that take in sensor data from the wings from different parts of the plane. Some of these are federally required for safety metrics. And as part of the federal safety requirements, you have to audit them periodically.

[00:30:39.92] Now, because of the way that they have constructed these computers, they have a digital lock around them. They have a TPM under the 1201 language. And the only people who are allowed to access those TPMs are registered technicians. And that means you either work for GE or you work for Boeing. And that's it. Those are the only two companies that are allowed to conduct these mandated by law safety checks on these planes. And so it's put a lot of people out of business.

[00:31:03.26] And so we actually worked with a guy who used to be, before he was driven out of business, an independent airplane inspector. Essentially, he was a tech. And he would do the mandatory,

again, by law, safety checks for different plane operators. And he couldn't do those anymore.

[00:31:18.58] And we put in a petition. And the Copyright Office had some very valid questions about, well, when you get around these TPMs, what actually do you have access to. Is it a software interface? Is it raw data? Because that's not copyrightable. So what are we talking about here?

[00:31:32.86] And he very honestly was like I haven't been able to get around them for three years now. So I actually can't tell you what you see now because no one who doesn't work for one of these companies can tell you what's on the other side of that. And they reached out to GE and Boeing, and they said, we decline to participate. And so the petition was denied because they just couldn't get the information they needed. And that's this weird catch-22 that we are in.

[00:31:56.58] Now, to be clear, there are certain exemptions. So things like right to repair is actually in a funny space where the Copyright Office all but begged Congress to please just create a permanent right to repair exemption because they're really tired of dealing with this every three years. They really don't want to see my face anymore, and I don't blame them.

[00:32:16.44] And so yeah, so we run into this problem where we're kind of doing the same old song and dance every three years. TDM exemptions for AI training are one of the rare-ish new use cases that has actually popped in. And that gets very snarled very quickly, partly because, again, AI is still, by the standards of tech policy, a pretty fresh field.

[00:32:40.58] And two years ago, we were still developing vocabulary to even address some of these questions. And also, the Copyright Office is, perhaps unsurprisingly, given recent political developments and staffing developments, a little hesitant to weigh in on anything that has to do with AI. In theory, they have assured me that the last part of their AI report is, in fact, extant and will emerge and see the light of day sometime. We don't know when.

[00:33:07.35] But yeah, it's a very messy process. There has been some push to reform procedurally right now, but I think the reality of the stalemate, as Professor Samuelson described in her keynote, the grand bargain still holds. And everyone is afraid of staring too directly into the sun, lest all of a sudden, everything get blown apart.

[00:33:30.39] GABRIELLE DALEY: So let's start talking about how things are maybe falling apart or realigning. And to do that, I want to talk about as an advocate, when you're showing up, whether it's at the 1201 training or you're talking to a policymaker, are you trying to align yourself with AI in your nonAI fair use arguments? Are you trying to distance yourself? What is the strategy that you're thinking through as a nonAI fair use argument person?

[00:34:03.41] MEREDITH ROSE: It depends on who you're talking to. My colleague, Carolsfeld, I think has one of the great truisms of policy work, which is that policy isn't about getting people to do the right things for the right reasons. It's about getting them to do the right things for their reasons.

[00:34:17.69] And their reasons may include yay AI, and they may include screw AI. As long as they get to the right answer, they can have whatever reasons they want behind it. So I think it depends. I will say AI companies, despite being folks that we agree with in a lot of cases, are also our worst enemies in terms of just being a palatable messenger for some of the same arguments that we would like to make. So it really depends on who you're speaking to.

[00:34:47.67] I think there's a sense, certainly, on the progressive of wing of the Democratic Party right now, there's a lot of skepticism about AI. Republicans are a mixed bag. But copyright has always been a weirdly very strange sort of partisan valence. It can go both ways. So the unsatisfying, very lawyerly answer to that is it really just depends.

[00:35:05.93] GABRIELLE DALEY: It depends. So I want to get our other panelists involved in this part of the conversation. How are you feeling about these longstanding fair use fights that we've been having in this new era of AI arguing for fair use?

[00:35:23.87] ARAM SINNREICH: Well, I'm still pretty firmly convinced that machine learning is fair use. I mean, we call AI AI, but it's not AI. Unless you're drinking the Kool-Aid, nobody actually believes we're anywhere close to artificial general intelligence. And the kind of spicy autocomplete crew has demonstrated I think pretty consistently that their analysis is correct.

[00:35:48.77] These are statistical models trained on billions and billions of individual works. And I think if you were to reframe it like, is it fair use to run statistical models on the entire corpus of published books? Of course. Commonsensically, the answer is yes. That is fundamentally transformative. And it's not even clear that copyright statute or common law grants authors the permission to license or prevent those kinds of uses.

[00:36:23.42] I say this as a professional musician and book author. I have books that I could claim that are in the Anthropic Bartz settlement. And I haven't claimed them because I think it's poppycock. And that's not to say that I'm an AI fan. I fall somewhere between what Sarah and AnneMarie were saying on the first panel.

[00:36:45.90] I think that most of the destructive potential of AI vis-a-vis creative industries has already been recognized by the concentration and exploitation that I talked about earlier on this panel. We're approaching an asymptote of maximal concentration and exploitation. AI is not going to push it much higher. Those jobs are already being

lost by the tens and hundreds of thousands left and right. And AI isn't going to destroy many more of those jobs.

[00:37:17.74] By the same token, I think that AI is unlikely to be culturally generative in a way that leads to new styles, new genres, new ideas, new cultural imaginaries because, again, by its architecture, it's not thinking. It's not innovating. It's not intelligent. It's a regression toward the mean engine that finds common patterns and tells you what those patterns are and is willing to build cultural expressive forms on the scaffolding of those patterns.

[00:37:48.08] So all you're going to get from AI ever, as long as it's built according to the specs of today's LLMs and text to image engines, is pablum. And that's great if you want music for a TV commercial and you don't want to pay a musician for that. And that's a job that will be lost. But those jobs are like hen's teeth anyway. It's like the much ado is made about the loss to coal miners from renewable energies, but the number of coal miners in the US is vanishingly small. It's a moralistic argument, not an evidence-based one.

[00:38:27.78] I'm beginning to be optimistic that the rise of AI-generated content is actually going to spark a cultural techlash where more and more people value human labor and human creative expression in a way that we have not collectively done for several generations due to the massive concentration, exploitation, and pablum generation of Hollywood and associated industries.

[00:38:52.46] And that we are newly investing valorization in human creative work that's going to lead to not only new economic opportunities for creative laborers but new expressive and imaginary opportunities for culture that had been kind of structurally prohibited by the ossification of content industries for the last 30 years.

[00:39:19.32] And there's some evidence that this might be the case already. There's new research that's been emerging just in the last year or so. There's one research study that shows that when people are aware that work has been created with generative AI, they assign less economic value to it than if they're aware that a human has made it.

[00:39:40.66] And even more interestingly, there's another study that shows even if people are unaware of the provenance of a piece of work, they tend to disproportionately devalue work that's been produced by AI relative to work that's been produced by humans. So there's something ineffable and subliminal about the human spirit as it's instantiated in creative works that we don't even need to know consciously what the provenance is in order to recognize the kind of I thou nature of that creative expression.

[00:40:14.19] So I've really started turning a corner on this. And I think we entered into a devil's bargain 500 years ago when art entered the marketplace after the Renaissance. And I think it's been downhill ever since for the capacity of creative workers to impact the quality of

human life in a meaningful and positive way. And I think this might actually be like we're hitting rock bottom, maybe. And the direction from here is up, not because AI is going to save us but because humans are going to save ourselves from AI.

[00:40:48.49] XIYIN TANG: So, Gabrielle, I think your earlier question to me, I purposefully skirted around the fair use question, and I'm going to come to it now, which is that we talk about copyright being an imperfect tool for protecting the human workers that we care about. I think fair use is just fundamentally the flat out wrong doctrine for talking about training and whether we think it should be legal or illegal. And that's for reasons that I think have come up in earlier conversations today, and I'm working on a project about it now.

[00:41:17.89] So fair use is a highly fact-specific case by case adjudicatory mechanism. It is being asserted in over 50 pending cases. As a practical matter, we can't imagine that every judge is going to come out the same way. So what are you going to do when you have a pockmarked landscape where one judge, even in the same judicial district says, oh, it's fair use. This is not fair use.

[00:41:41.67] But when we talk about the question of should training be fair use, I don't think we're ever asking the question of, is Meta's training fair use? Is Google's? Is Anthropic? We're asking for what class action scholars call global peace. So the ultimate question of should LLMs pay something to rightsholders or should they not, that is just not a question that fair use can answer.

[00:42:03.65] It can't answer it because these classes are enormous. As Pam mentioned this morning, there's so many different types of works. Fair use cares and has cared in doctrine about what types of works are being used. If it's purely factual works, Google v. Oracle tells us that this might get a bigger pass under fair use than if it's highly creative works.

[00:42:21.99] In the past, we've had means of dealing with this question. In these enormous class actions, we just don't have the means of adjudicating it. Worse still, bad facts make bad laws. So even in the shadow library situation, some people argue, well, that was kind of ancillary to the fair use determination or to the training question at all.

[00:42:39.86] I don't really think it was that ancillary to training because both Meta and Anthropic had downloaded mass libraries of pirated books and left them sitting around. And in the Meta case, it just was irrelevant to the judge at all. He didn't want to send that through to a trial. And the Anthropic judge said, yeah, I'm going to send it through to a trial.

[00:42:55.76] So then they settled. And that case is just-- the settlement is just going to be precedent for other companies, some of which

might anti-competitively enter into new licensing agreements with rightsholders with the intention of shutting out new AI entrant startups.

[00:43:12.96] And so I think what we really need is one blanket system akin to some compulsory licensing system. And I'm a little bit more bullish on that than Pam is. But I think we need one system that might tier rates, for example, for uses of different types of copyrighted works, but I don't think that we can solve this problem with the case by case adjudication fair use system that we have now.

[00:43:35.32] MEREDITH ROSE: I just want to piggyback on that because it is interesting because I have spoken to my colleagues who are much smarter when it comes to the actual state of the art on AI in this. And one of the things that I have heard quite a bit on is this idea of the initial base model training is going to be a self-limiting question pretty quickly because we are nearing the end of the era where new base models are meaningfully being trained on these enormous data sets.

[00:44:01.58] We are entering an era of fine-tuning of things like RAG, Retrieval-Augmented Generation, where you ground the AI's answers against a set database of approved sources or you send it out into the web to get it. And so I think this is one of those questions that is going-- by the time this works its way through the courts, which if we do not get some kind of Supreme Court weigh in on this, I will eat all of the Silicon Flatirons hats that are still here.

[00:44:29.24] It'll take a decade, at a minimum. I'll be happily employed that entire time filing amicus briefs. By the time they answer it, not entirely clear it's even going to be a live question anymore. I think the technology will probably have moved on to the next shiny fights that we have had.

[00:44:45.10] And so some of the most interesting conversations right now in politics around copyright have been essentially kind of acknowledging that we are looking at a very long tail fair use litigation for this question of base model training. And so while that is going on, and because fair use is fundamentally going to be resistant to any laws that Congress passes, you can purport to pass a law that limits fair use in certain circumstances.

[00:45:10.76] But fundamentally, as the Supreme Court has pointed out, fair use is the First Amendment shaped safety valve on copyright law. And so they're going to have a weigh in on this, whether we like it or not. And so the conversations have moved on to well, what do we start doing about these edge cases, things like RAG, which is obviously a really hot topic for journalism in particular?

[00:45:31.97] And the actual political debates around the fair use question seem to have largely died down, partly out of a practical sense of just nothing is happening right now and partly out of the fact that this particular issue, nothing can really happen because we're

going to have to wait for the Supreme Court to eventually weigh in on one of these. And if it's a Google Oracle situation, we'll be here for a very long time.

[00:45:52.85] And so yeah, it's just a very interesting dynamic right now where everybody's got a very, very strong opinion on base model training. No one can really do anything about it unless you're an active litigant. We all just say like, well, I think this is what the answer should be. And in the meantime, let's have this conversation about this other thing that's happening off on the side.

[00:46:09.45] GABRIELLE DALEY: Casey, I want to give you a chance to weigh into these sort of questions. But I'm hoping that we can take this thread of looking around the corner to let's say that we do have some settled court precedent and returning to thinking about our prototypical nonAI fair uses and what those are looking like. But Casey, first, do want to jump in on this point?

[00:46:30.95] CASEY FIESLER: Yeah, maybe I can segue into that next one too. Yeah, I mean, I have always been able to buy a fair use argument for training data. I don't think it's a slam dunk in either direction. I can see the argument either way. And I think actually that licensing is an interesting solution to deal with the kinds of things that we're seeing in the litigation, which is like, many, many book authors and this sort of thing. But licensing isn't going to help the person posting photos on Instagram.

[00:47:10.99] And so I've been thinking a lot about again, sort of beyond copyright like what's happening here. And part of the issue is that copyright and IP in general is based on the assumption that someone wants to profit from the thing that they're doing. If you go back to the story of the person who spends 10 years writing a novel, and then if someone could copy it right away, they can't make any money.

[00:47:39.77] And what that has always missed are all the people who want to create things for lots of reasons other than making money. I mean, and this is one of the reasons we ended up with Creative Commons. And I'll go back to fanworks creators again because I think they're an excellent example of this. They exist in this gift economy.

[00:48:03.63] So you create and share fanfiction and other types of fanworks, not because you want to make money from it, but because you want to give something back to the community. And what you get back is adoration. Rebecca Tushnet refers to this as payment in credit.

[00:48:27.44] So actually, one of the things that I found in my research a decade ago was that there's two extremely strong social norms in fandom communities related to copyright. And one is noncommercialism, and the other one is attribution. And Gen AI systems destroy both of those.

[00:48:48.40] And again, it's just like moral thing. It's this ethical thing. Attribution isn't even part of a fair use analysis. And so I always thought it was interesting. Very early on, people were surprised to hear that fanworks creators seemed to not support the idea of training data as fair use because this is a community that exists because it's the only reason they can do what they do.

[00:49:18.56] My friend, Mel Stanfill, who is a fan studies scholar I knew had just done a survey of fan works creators about AI. And so I messaged them a couple of days ago and asked if they had findings. And they sent me a draft of the paper, which was very cool. 2,600 respondents to the survey. And on a Likert scale of how do you feel about generative AI, 85% extremely negative or somewhat negative.

[00:49:52.18] But-- and this is one of the things that I thought was interesting-- when you pull out different types of Gen AI, it matters. So people felt much more negatively about image generation and text generation as opposed to things like captioning and translation.

[00:50:13.06] And so one of the things about a lot of these arguments around copyright and fair use is this idea that it doesn't matter what you're doing with it. And I do think that that matters in terms of a moral argument. But in theory, it should for copyright as well. I mean, I feel like one of the points that people make about transformativeness is that comparing this to Google Books and that kind of thing, there's a difference between using text to create a search engine and using text to create more text or using art to create more art.

[00:50:54.88] And so I feel like there are also some opportunities to think about how the end use cases impact things, which I think points to something that hasn't really come up a lot, which is that what we're probably going to get are a bunch of different fair use analyses because these are very case by case.

[00:51:14.56] ARAM SINNREICH: Just to add a little bit of extra research to support the point that Casey was making, a while back, I did a series of surveys within creative communities, both with creators and with fans. And I avoided using any legalistic language, A, because it comes kind of pre-packaged with hot takes, and B because nobody understands the law outside of rooms like this. And I barely understand the law.

[00:51:41.03] So we asked people, well, when you look at these kind of remix art forms, when you look at sample-based music or you look at mashups or what have you, how do you evaluate whether the creative reuse of a work is legitimate or not legitimate? That's the kind of language that we use. And we offered people the opportunity to write in responses and then qualitatively analyzed all those thousands of responses.

[00:52:09.57] And what we found was that there were actually a set of very easily identifiable 11 different gauges that everyday people use to

evaluate whether creative reuse is legit or not. And only one of them had anything to do with the law. They had issues to do with how much labor did you put into it. Were you doing it for commercial reasons or not for commercial reasons?

[00:52:36.55] Were you paying homage to the original work or insulting it? Are you disrupting an art form or continuing an art form, all of these very subtle-- and we are cultural beings. We swim in an ocean of culture. And that's our native language.

[00:52:53.25] And so everyday people have a very nuanced understanding of the ethics of creative reuse that is not reflected in the law and has mostly not been used in jurisprudence around fair use but that might actually be a useful beginning of a framework to establish new regulatory apparatuses around AI.

[00:53:16.05] XIYIN TANG: Can I bring it a little bit back to what Meredith was saying about case by case adjudication and whether the Supreme Court is going to step in? I mean, it's possible that they will step in. I am not optimistic that if they issued a ruling on this, that we will get any clarity on this question.

[00:53:30.77] You look at a case like Warhol v. Goldsmith. Warhol v. Goldsmith did not tell us that anytime an appropriation artist takes something, that it's not fair. You might read the ruling that way because it came out against Andy Warhol, but that's not what it said. Warhol v. Goldsmith did not say, anytime you profit off of someone else's art, you have to pay a license. Why? Because Netflix is currently fighting through litigation that is now up for en banc review because we couldn't get the appellate court to decide whether or not Netflix was allowed to use a clip in Tiger King.

[00:53:58.49] So I don't think when the Supreme Court speaks, it's a model of clarity. I think you're going to see a lot more litigation around this. And I guess I question whether that's where the resources are best spent is just having a lot of lawyers duke it out in the courts versus I make a parallel analog case to the Spotify music litigation in this project that I'm working on that I think is a really good counter example.

[00:54:20.55] So when music streaming came into play, there was a lot of questions about section 115 of the Copyright Act and whether all these streamers had to issue these individualized what's known as notices of intent. And so plaintiff's lawyers exploited this. And they filed pending lawsuits against every single music streamer. There was something like 12 pending lawsuits, 15 pending lawsuits at the time that the services and the music publishers got together, lobbied Congress for legislative change, passed this thing called the Music Modernization Act.

[00:54:49.89] Spotify had individually already settled at that point. Full disclosure, I was at the law firm that was representing Spotify working

on this settlement. And so Spotify was out of the game already. But obviously, you have one party that settles that does not answer the question of the overall question of whether streamers need to issue these individualized notices of intent in order to license works for their platforms.

[00:55:12.86] And so only the MMA solved that problem. And then as soon as the MMA was passed, instant end to litigation. And I just don't think if you even get the Supreme Court ruling that we're going to get there in that safe world where we know exactly what the rules are.

[00:55:27.46] MEREDITH ROSE: Oh, I 100% co-sign that. We're going to end up with an 11-step test. I remember Star Athletica. We took 10 tests, and then we came out with an 11th and didn't even really obviate the first 10. That was my first SCOTUS amicus case. What a time.

[00:55:44.28] I think one of the things-- and this is to loop back around to the bigger question of politics. And I think everybody and Casey in particular touched on this is that copyright law, as a general matter, has been one solution duct tape to another for well over 100 years at this point.

[00:56:02.64] But it was built with a very specific economic model in mind, an economic model of creation, which was arguably not even true at the time that it was developed. But it was for a very long time seen as industrial policy for a reason, which was that we had these major-- we always, in some sense, had this romantic notion of the person who goes off and sequesters themselves for 10 years and comes out with the great American novel.

[00:56:28.74] But the reality is that when we legislate, we tend to legislate toward the biggest interest group that we can in order to simplify the problem. And I think AI has really-- if it's good at anything, it has been good at highlighting exactly where all the cracks in the system are. We're speedrunning every crack in the copyright system right now. And I think everyone's got different opinions on what those cracks are, but we're all very aware of them.

[00:56:54.98] And so copyright as a model is a very bad fit for creative expression as an entire class. And now that we are all online and I am, whether I am conscious of it or not, generating copyrighted material all the time, which then other people are interacting with all the time and potentially bumping up against copyright law all the time, it's got a lot more immediate-- I don't know if there's a better word for this. It's got more oomph to it as a policy person and a lobbyist.

[00:57:29.80] I will give credit to one of the major sea changes that we've seen in even the last decade that I've been working on copyright policy is that we have shifted from this model where it really was industry against industry fights, and it was treated as such. And who the opposing industries are are going to be different at any given time.

[00:57:49.90] Everybody, if you have not read Jessica Litman's Digital Copyright, please go read it. It's fantastic. You have a never ending cycle of you've got allocation of rights and responsibilities. And then there's a new industry upstart that comes in. And they eat everybody's lunch, and they flip over the table. And then people spend several decades screaming at each other about player pianos. Those are some incredible hearing transcripts, by the way. The player pianos ones, people were about to throw hands.

[00:58:19.07] And then you spend several decades arguing about it and horse trading in back rooms and then for a system that is not ultimately rational but kind of buys everybody off. And then before the ink is even dry on the new Copyright Act, there's a new technology that shows up, eats everybody's lunch, kicks over the table, and then we just begin the cycle again.

[00:58:37.95] But that has almost always been industries versus industries. Now, like educational institutions and libraries have always been the black sheep of this entire model, but at no point were end users really a consideration in any of this up until very recently. And I would say the last 10 years in at least the political valence of these debates have actual consumers and internet users been seen as a constituency in this.

[00:59:06.81] And AI is really putting-- you cannot talk about AI training without talking about the fact that they are trained on the data just put out by regular schmucks like me. God help them, my Reddit comment history got ingested by something. And so all of a sudden, yeah, it's a very, very real thing. I am a stakeholder. Casey is a stakeholder. We're all stakeholders because all of our stuff has been ingested by this.

[00:59:31.81] And when we see attempts to legislatively address the problem, unsurprisingly, they tend to be led by industry. They are trying to solve a portfolio of problems that are faced either by large AI developers or trade associations for major entertainment groups. And so that's when you start seeing things like name check it, NO FAKES, which is an attempt to deal with deep fakes, for lack of a better term, but sort of like name, image, and likeness.

[01:00:01.27] It is talked about as though it is going to solve the problems of everyone who may face the risk of a deep fake. But the reality is, it's built on a threat model that is very specific to specific entertainment industries. It is not reflective of the threat model faced by myself as a private citizen with a middling social media profile, and definitely not reflective of the threat model faced by my friends who don't have social media profile.

[01:00:28.83] And so I think those cracks of there's almost like a stratification of not only prioritization but of just what the reality of the problem is for each class of people affected by this, I think it has never been clearer how big those gaps are.

[01:00:46.87] GABRIELLE DALEY: So one of the tensions that I think we're identifying and doing a pretty good job pulling the threads on here is so maybe copyright isn't a perfect solution for all of these issues. We've been talking about how there's a mismatch between the norms of different communities.

[01:01:05.40] And I have artists in my family who I also have had some fascinating conversations about what is moral in art creation versus what is fair use and how those things don't map neatly onto our copyright law. And we've been talking about antitrust and concentration of these industries.

[01:01:24.58] And also, as copyright does, it has showed up. It is the thing that we have. And it is the tool that is trying to tell us whether these uses are fair. And we've talked a little bit about the different interests that are behind those and pushing on those things. But I want to try and peer around the corner a little bit and say like, OK, whether it's a collective licensing solution or our 59 different cases, let's try and imagine a world where we have some settled law saying, yep, AI, this is a fair use.

[01:01:59.84] How do you feel about your nonAI fair uses at that point? Do you think this bolsters the arguments for remix, for repair, for fanworks? Do you think this bolsters labor? How are we feeling in a world where we land on, yep, this is settled fair use?

[01:02:19.92] MEREDITH ROSE: I think legally, it's extremely dependent on how the courts decide to square that circle because fair use is a tangled spider web. And if something vibrates over here, you're going to feel it over there. I think politically, I've heard people use, especially around the time of the register of copyrights getting sort of unceremoniously "dismissed" in scare quotes purportedly fired.

[01:02:48.96] There was a lot of fear about fair use becoming MAGA coded, that because of the alignment between or the perceived or real, pick your poison, alignment between major AI developers and tech companies and the Trump administration, that that had sort of poisoned the well and talking about fair use. And so that when we talked about it, we needed to find a new way to talk about it that didn't make us sound like we were coming in with red baseball caps.

[01:03:19.14] And it is hard. And I think part of it is whenever you have those kinds of monumental decisions that come down and may or may not fundamentally change the dynamic of how we have these conversations, it takes a while for the dust to settle. When GPT came out in summer of 2023, everything exploded. And all anybody could talk about was all sci-fi references because that was the only vocabulary we had at the time.

[01:03:47.48] We were worried about Skynet. We were worried about WOPR. We were worried about The Terminator. I say this as someone who reads too much science fiction, people need to read less science

fiction when they're legislating, maybe. But yeah, I think it's going to take time for the dust to settle. If I had the answer to that, I would be in private practice and a lot wealthier than I am.

[01:04:09.95] ARAM SINNREICH: If remix is any indication of how this is going to go down, it'll take an entire generation for the dust to settle. So when I was first doing research on the ethics of sampling 20 years ago, at that point, all of the case law, with the one exception of Campbell, which was the Supreme Court case that you're all probably familiar with that said that 2 Live Crew was making a parody when they did Pretty Woman, other than that, all of the case law on music sampling was against.

[01:04:41.91] And you had these rulings like Grand Upright and-- God, what was the one with-- Bridgeport v. Dimension where basically, judges were saying, yeah, fair use doesn't exist when it comes to sampling. And the law is based on the Ten Commandments, thou shalt not steal, these kinds of absolutist perspectives like this is categorically not even conceivably something that could be fair use.

[01:05:08.61] And when I was interviewing people at the time, they were saying, well, just wait until all the kids that grew up listening to hip hop are sitting on the bench and sitting in the jury boxes, and then things are going to start to change. And lo and behold, flash forward to the late teens, you get all these cases.

[01:05:22.97] You get Jay-Z's Run This Town, which is considered to be de minimis, first de minimis in sampling outcome. You get Madonna prevailing with a fair use argument. You get Drake prevailing with a fair use argument, all in the case of three or four years.

[01:05:42.09] And this is all because they're being judged by people who had integrated the cultural meanings and ethics of sampling from a young enough age to be able to make a nuanced decision that wasn't based on the Ten Commandments or some kind of absolutist like I'm scared of what these young Black men are doing. It's got to be illegal kind of standpoint.

[01:06:03.11] And so I think we're going to see probably the same thing. Fair use is a fundamentally cultural argument. We have this wonky four-factor test that has no bright lines in it. It has no predictive power whatsoever. And as numerous legal scholars have complained, it forces judges and juries to be art critics. And yet it somehow works with mature forms of creative expression because we're all able to be critics to a certain degree.

[01:06:35.53] So I would guess that 10, 15 years from now, when people who grew up using Gen AI are sitting on the bench and in jury boxes, then we'll have some kind of credible and lasting fair use jurisprudence. But until then, I'm not waiting up.

[01:06:53.16] XIYIN TANG: Yeah, I mean, I guess I wonder about the relevance of fair use in the overall landscape. And your discussion of the cases made me think of that because it's true that there were all these fair use victories following Bridgeport.

[01:07:08.72] But really, what you have now in the music industry is private ordering that falls way outside of the scope of that and interpolation credits being issued left and right anytime an artist is viewed by the public as having plagiarized. Olivia Rodrigo allegedly plagiarized five different artists when she released a 10 song album. And then she ended up issuing credits to everyone.

[01:07:26.96] These disputes are fundamentally settled outside of the strictures of law. And I think that even is true for all the community norms that Aram and Casey have brought up. And I did a similar study with fine artists after the Warhol decision. And it's the same. Artists adhere to their own community norms. They don't really look at what the law is.

[01:07:46.94] Bob Ellickson has a great canonical paper on this and the real property space as well. And so I guess I wonder about moving forward in the AI space, I think, Meredith, what you said about what's going to be the most valuable types of data for AI companies moving forward? We don't know yet.

[01:08:06.06] Some have prognosticated that it is going to be UGC, all the content that everyday users who aren't necessarily authors as copyright law would view them are generating. But those types of content, we are already willingly giving platforms the ability to use as training data through the terms of service.

[01:08:24.52] And so for anyone who hasn't done so yet, if you don't want the stuff you post on LinkedIn to be used for training, you have to go into the settings and opt out. And it's done in coercive language like, do you want to help make this product better? Please opt out if you hate the world and don't want to make the product better. And so this is the landscape we live in. And so I guess I wonder about the continued relevance of either copyright in this discussion and most definitely about fair use.

[01:08:52.44] GABRIELLE DALEY: So we're starting to get to wrap up. And I want to make sure that we have time for questions, particularly a question from a student. So to close us out, just very briefly, in a couple of words, we've heard about how bitter the first round of the copyright wars were. What are the vibes of this part of the copyright wars?

[01:09:18.28] MEREDITH ROSE: The vibes, rancid? No, it is interesting. I will say that when-- so, again, speaking as somebody who spends a lot of time talking to Congress, trying to tell them why I have all the best ideas, one of the things that was a truism prior to 2023 was that creative industries were very good at showing up in lockstep for one

another on copyright debates, even in situations where they had no dogs in the fight.

[01:09:52.94] In our attempt to get a right to repair exemption for 1201 recently, we filed-- and we were talking about Taylor ice cream machines. And Taylor did not send a representative to that. McDonald's did not send a representative to that. The RIAA sent a representative to that, for some reason. MPA was there by then.

[01:10:18.66] And you get used to seeing this in copyright land where they will always show up for one another. There's a lot of industry level solidarity on copyright. And then 2023 happened, and everything kind of blew up. And some of the usual suspects like the big sort of meta alliances of trade alliances on copyright went suspiciously quiet for a very long time because everybody was fighting from different angles on this.

[01:10:43.07] And so I think we are-- I don't even think like I can-- I don't feel that I can say that we are going to see new battle lines being drawn. I think it really is kind of every interest group for themselves on this. A lot of the traditional alliances have fallen apart. Some new and surprising ones have started popping up.

[01:11:02.17] I have seen that there's been a lot more sometimes begrudging dialogue, certainly between the public interest community and the user representative community and groups that we normally find ourselves yelling at quite a bit. There's been a lot of work on journalism specifically.

[01:11:22.89] I spent years and years yelling about link taxes and the JCPA and well, we need to give an intellectual property right to linking. And now, we're having very long and involved conversations with these folks because yeah, that framework was garbage, and we're not ever going to be a fan of it. But there's a new sort of threat model, and we can acknowledge that yeah, there is potentially a very real threat to local journalism on a systemic level.

[01:11:49.29] We need to be able to talk about what those problems look like and maybe how we can solve it without inadvertently or intentionally nuking fair use in the process. So it is a really interesting time. Groups are approaching each other in new ways. And so I wouldn't bet any money on how this is going to come out. It's all still very much up in the air.

[01:12:12.99] CASEY FIESLER: I think that one of the reasons that the vibes feel off is something that we've gotten out a lot here, which is that we have this Goliath versus Goliath kind of situation. And I think there's a lot of people who are like, well, who am I rooting for, Meta or Universal Music or whatever?

[01:12:33.71] And so my hope is just that no matter which way this goes, that it goes in a way that ends up not stomping on David while

they're fighting, right? So if we get a decision that this is not fair use, that it's decided on grounds of commerciality or market harm or something, if we get a decision that it is fair use, that that spurs some conversations around some of these more normative and ethical things and how we can handle those instead.

[01:13:16.01] ARAM SINNREICH: The two ways I can gauge vibes are from how my students treat the subject and how my colleagues and collaborators treat the subject. I'm old enough to remember how Lawrence Lessig sparked a whole free culture movement among undergrads in 2008, 2009, 2010. Back then, I was teaching at NYU. And I had students come and ask me to be the faculty advisor to the NYU Free Culture Committee or whatever it was called.

[01:13:51.62] And those people went on to be-- they're names that you know, who were students back then, who went on to be copyright advocates and reform activists. And that all died out with the rise of contemporary social media and streaming. The perceived harms of commercial monopolization disappeared once access to commercial content was ubiquitous and more or less free and legal.

[01:14:19.72] And my students just stopped giving a shit whatsoever. I'm teaching right now an unmixed undergrad class on copyright and culture. And the students get it intellectually when I explain to them what the copy fight was about and where Lessig stands and where fair use comes in and all that stuff, but they're not morally invested in it the way that they used to be. You know who is morally invested is my agent.

[01:14:47.62] In addition to writing nonfiction, I'm also a sci-fi author. And so I have a literary agent because sci-fi pays marginally better than nonfiction. I was being approached recently by some attorneys for AI companies about maybe serving as an expert witness in some of these cases.

[01:15:10.64] And I told my agent, because she was pushing us to file for the Anthropic settlement money, and I was like, by the way, I think I'm going to be on this side of this. And she got really, really, really pissed at me. And we spent like an hour on the phone arguing. And she's a PhD who knows publishing industries way better than I do. It's her bread and butter.

[01:15:32.56] But ultimately, her arguments were not evidence-based. They were vibes-based. And she was pissed because exactly what Casey was saying before, these tech bastards are taking my work and using it to replace me. And I was like come on, Jenny, nobody's like, I've read your work. It's really great and unique. And you've got a voice. And it's copyrightable.

[01:15:53.76] Nobody is going to vibe code their way into replacing you on the romantic shelves or whatever. That's not going to happen. So what do you think the harm is? And all she could say was that the

harm had something to do with the moral turpitude of tech companies just doing this to artists without their permission.

[01:16:16.62] And so I actually think that a lot of the momentum that came out of the artists rights movements from the remix era poured into the anti-big tech antiAI movement, but this time, it's not in any way based on evidence-based policy making. It's all based on vibes.

[01:16:36.91] GABRIELLE DALEY: Xiyin, I'll give you the last word to wrap us up shortly here on the vibes.

[01:16:40.71] XIYIN TANG: Yeah, I mean, I second that. This has been a pet project of mine, wondering about how basically, the legalization of streaming content has obscured, I think, the role of copyright in everyday people's lives formerly viewed as a barrier. Obviously, P2P, college students were getting lawsuits or cease and desist letters at least that kind of turned copyright holders into this big villain.

[01:17:05.49] But with the legalization of streaming, that big bad rightsholder image went away. And instead, it seemed like we're living in this world of plentitude. But in turn, it's also empowered everyday individuals to think of themselves as rightsholders. Everyone's a creator now. Everyone has something that they're hoping to sell and monetize on the internet. And I really have also noticed that shift amongst my students as well in how they relate to copyright as a system.

[01:17:32.93] And because they now view themselves-- I mean, I think the cultural reporter, John Seabrook, at The New Yorker described this best as sort of everyday users are now collaborators with legacy rightsholders like record labels in the Chancey enterprise of virality, that they have a very different relationship to property rights in a way that maybe is more pro-property. Whether you want to talk about it in strictly IP terms or labor terms, I spent time doing this, and now I'm owed compensation. Either way, we're living in a very different world from the free culture days of the early 2000s.

[01:18:06.97] GABRIELLE DALEY: Thank you. OK, let's go ahead and open it up to a student for the first question. Could we get a volunteer, students? You know I don't like to cold call on you. Yeah, so we've got a student right here.

[01:18:22.33] AUDIENCE: Thanks, Adam. Curious about the nationalism politics element of this where lots of the framing from not just rightsholders but the AI companies themselves is that we are in this mortal race with China. The bureaucrats in Europe are doing it differently.

[01:18:41.65] Given that the US has been so influential for IP policy and the structure we have now, do you think that framing that we have Jensen, we have Zuck, and you guys have bureaucrats, do you think that's impactful for how policy is being made now and maybe if the US is still leading those conversations?

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[01:19:07.55] MEREDITH ROSE: So it's interesting because America leads the world in dah, dah, dah, dah industry is very-- partly, that's a side effect of just the overall rhetoric of the current administration. It's also kind of a fundamental because so much of IP happens through trade policy that it is also emphasizing the Americanness of the entertainment industry or the tech industry has always been like one of the default go-to rhetorical framings.

[01:19:35.46] I do think that cuts both ways. I also think that it's an upshot of the fact that really, since the late '90s, we did enjoy sort of uber power status when it came to setting technical policy around the world. We have Section 230. We were able to get things fundamentally like some DMCA equivalence into major trade agreements.

[01:20:03.06] We have done-- and this is a separate soapbox I will not get on. We launder a lot of our copyright policy through international trade agreements historically. We do that all the time. And so we have managed to export our perspective on these things to the rest of the world.

[01:20:16.18] Europe has-- and you can say whatever you like about the merits of the way they've decided to approach it. They took a look at AI and went, we got to do something. And they moved comparatively pretty fast on a lot of these things in a way that is, frankly, very un-European compared to a lot of other policy areas in terms of just speed.

[01:20:35.08] And so I think it's both the current administration and also a deeper anxiety about the fact that we're not the ones who get to export our policy globally anymore. And that goes all the way back to privacy policies and GDPR, but it's becoming more and more prevalent where we're not the person calling all the shots. And I think that's causing a lot of Sturm und Drang in the policy sphere.

[01:21:01.48] GABRIELLE DALEY: Thank you. Do you have another question? There in the middle. Oh, go ahead.

[01:21:11.70] AUDIENCE: Yeah, isn't the discussion here really kind of fundamentally almost a discussion about neurology? And aren't we essentially talking about a kind of rewiring of human consciousness?

[01:21:29.90] And I wonder whether essentially, the technology is straining the relationship of the individual to the society and how perhaps essentially through technology, we're developing another sort of lobe of the brain that's external. And we need the input of an evolutionary biologist to talk about how adding an additional lobe of the brain like going from a reptile to a mammal might help predict the impact on society.

[01:22:09.02] GABRIELLE DALEY: So if I could put kind of a gloss on this, could we talk a little bit about how tech policy requires

interdisciplinary solutions and how maybe AI is putting a little bit of pressure on that?

[01:22:22.73] MEREDITH ROSE: The only thing I have to say to this is that I'm a believer in the old saw that politics is downstream from culture. And the reality is that we have had to deal with-- the problems of humanity scaled up so quickly in a way that we never had these problems of humanity at scale.

[01:22:44.75] A lot of the problems with social media are just humans being humans at a scale that we are not intellectually equipped to deal with. Our brains are simply not wired to deal with feedback from thousands of people at once, and the law is also downstream from that adaptation. So we are kind of moving several steps at a disadvantage behind the pace of technological change on this stuff.

[01:23:08.13] ARAM SINNREICH: I actually-- and this might be a first ever disagree with Meredith. I actually I think it's amazing how quickly humans adapt to these new information architectures and social architectures that the internet has provided. And I've actually been working on a paper for way too long with a sociologist friend of mine named Nick John about this.

[01:23:32.55] It's evidence that our innate capacity for cultural processing and for social organization is much broader than what the affordances of our pre-industrial cultures look like. We knew what to do with the internet when it arrived. It wasn't all good stuff.

[01:23:50.93] We do a lot of horrible stuff with it, but we knew what to do with it because I think we have these immanent capacities. So no, I don't think that technology is rewiring our brains. I think it's just allowing us to use aspects of our brains and of our cultural organizations and social structures that were not tapped in the same ways in the past.

[01:24:14.53] GABRIELLE DALEY: I think we've got time for one more question. I think I saw a hand here in the middle.

[01:24:23.05] AUDIENCE: Thank you. And thank you very much for all the presentations and panels today. I'm from the college of music. And I'm in the performing arts sphere. I'm a creator myself. I have a podcast. And I probably have 400 some odd hours of podcast up on the web somewhere, right?

[01:24:42.17] I am heavily dependent on fair use because my podcast is a literary analysis podcast. So I'm talking about other people's work as the core of what we do. I make money off of this podcast, not enough that I don't have a day job at the University of Colorado, but it's not insignificant enough that I don't have to report it on my taxes.

[01:25:04.45] I also am a copyright holder. I have done what I am supposed to do to say this is my work, I have rights over it, and you're needing to contact me if you want to use it in any way beyond the

standard uses of fair use. And I just wanted to reflect back, having listened to all of this, that as a person who theoretically has followed all of the rules to do this, I'm totally left out of any of this conversation with AI.

[01:25:32.63] And I think that when we talk about the vibes that you were saying, the vibe-based argument, that's certainly where people are coming from in the creator space is I have no doubt that my 400 some odd hours of me and my friend talking have been scraped untold numbers of times by untold numbers of data analysis.

[01:25:56.07] And that that data analysis is to the point where I've walked on to ChatGPT and said, can you write me a script for my podcast? And it knows my name. And it knows the tagline we use at the beginning of our podcast. And it knows the structure with which we tell some of our jokes. It sucks at actually being us, but it knows enough about us to imitate us on a level that I can recognize myself in the language learning model.

[01:26:21.02] And my question comes around to what you were talking about with alternative frameworks for looking at this, that fair use is not a good solution for this because frankly, that is fair use in a lot of ways. I may not like the way that I'm being portrayed, but there's some level that you could argue that this is a parody of me that's happening.

[01:26:48.66] And there was never really any permission to take what I said for 400 hours and train it to be this specific at being able to target me, but also, it's a very general thing that it's doing. So my question is, how do we create a new fundamental policy or advocate for a new test in a way that's going to be coherent and actually gains any sort of legal traction? Good luck.

[01:27:19.74] MEREDITH ROSE: I wish I knew.

[01:27:20.64] CASEY FIESLER: Yeah, I mean, I struggle with what we could actually get to, especially beyond copyright. I mean, I'll just say that I was mentioning earlier other ways that people conceptualize what's happening here as opposed to it being property. So another way to think about it would be labor, which would suggest being compensated for your work, which is some kind of compulsory license even outside of the context of copyright. You're going to everyone.

[01:27:48.04] Another way to think about it would be privacy or research data, which would probably suggest some kind of consent or opt out regime. I mean, I actually love the idea of some kind of opt out for training data, but it's too late. I have no idea what that would look like at this point. But I do think that there are other ways to conceptualize what this is beyond just property, or rather, there would be if we had privacy laws instead of just copyright to deal with stuff, for example.

[01:28:22.12] MEREDITH ROSE: Yeah, I was going to say, one of the things that we ran into pretty early on when-- again, summer 2013 was kind of like a BC-AD changeover in a lot of the policy world because all of a sudden, we all had to know about AI. One of the things that we ran into is that a lot of the threat models that people have, what are you actually worried about having? What's the worst case scenario in terms of what actually could happen that would make you lose sleep at night?

[01:28:45.96] Because I think a lot of folks are like up losing sleep without necessarily having a clear threat model. A lot of the threat models that people can conceive of right now-- and we will think of new ones. We will be unpleasantly surprised. But a lot of the ones that people think of there are legal frameworks in place to deal with right now. So like making a deepfake of someone ticks every single box of defamation standards.

[01:29:09.49] Now, whether you have access to a court in order to enforce it, and whether that is obviously not equalized because it's a state by state thing, those kinds of things do exist. But I will say from policy, the vast majority of what we do is just black hatting solutions like, well, what if we do this? Well, what if we do that? And what are the unintended consequences if we do this over here? And what is going to be the fallout if we do it over there?

[01:29:32.45] Unfortunately, this makes us professional killjoys, and it's what I get paid to do. And right now, I think what everyone is struggling with on almost all sides of this equation is it is really a trade off of what collateral damage you're comfortable with and who it falls on.

[01:29:47.29] GABRIELLE DALEY: And on that thought-provoking question, I think that's all we have time for. Please join me in thanking our panelists.

[01:29:53.95] [APPLAUSE]

[01:29:58.85] I'm going to go ahead and turn it over to Professor Reid to close us out.