

Panel 2: The Role of the Author and the Acquisition and Duration of Their Rights | Apr 16, 2026

Molly Van Houweling 0:15

Welcome to our second panel of the day. I'm delighted to be joined here on stage by our next four outstanding panelists. I will introduce them briefly, say a few things about what we have in mind for this panel, and then kick things off. Tyler Ochoa is professor of law at Santa Clara University, School of Law. David Nimmer is professor from practice at UCLA and of counsel to Irell & Manella LLP in Los Angeles. And, of course, author of The Nimmer on Copyright treatise. Bob Brauneis is the Michael McKeon Professor of Intellectual Property Law, and a faculty co director of the G W Barnard Center for Law and Technology at the George Washington University Law School. And finally, Peter DiCola is professor of law at Northwestern Pritzker School of Law and director of the JD PhD program there. Our topic for this panel, which really takes off on some themes that we've started to develop already today, is the role of the author and the acquisition and duration of their rights. We've heard already from Shira and from Peter and Jessica and Jane about the author centrism and its mixed results I think of the 1976 act, and we too are inspired by the Barbara Ringer quote that Jane gave us earlier about the philosophical shift in the 1976 Act. I won't re read the whole thing that Jane put on the table, I'll just remind you of the conclusion, Register Ringer said, taken as a whole, these changes mark a break with the 200 year old tradition that has identified copyright more closely with the publisher than with the author. Ringer was pro author and optimistic about these changes and their potential impact on the position of authors, she wrote all this points in a healthy direction. It can certainly be hoped that authors and their representatives will take full advantage of these provisions and business dealings, and that the provisions will provide the basis for further reforms. Our panel will offer an opportunity to examine some of the features of the 76 Act that changed how authors' rights were triggered, transferred and calculated, and to explore whether these changes, in fact, provided authors with the new advantages in their dealings with publishers and other players in the copyright system that ringer predicted. Tyler Ochoa is going to get the conversation started by describing the changes to formalities and duration implemented by the 76 Act. Tyler, thank you.

Tyler Ochoa 2:53

So as as Bill is advertised, I'm going to be talking about formalities and duration, and the first thing we can ask is, well, why do we have these formalities in the first place? And one answer is, in part, because we've always had them. Registration goes back to the practices of the stationers company well before the Statute of Anne is even enacted in England. Deposit was a feature of the Statute of Anne that in a condition of copyright protection, that you would deposit copies with certain libraries. Notice the 1790 Act in the United States required notice publication of notice in newspapers before you published the work. And then the 1802 Act Amendment says we're going to have notice on all published copies. So those formalities have always been a part of our copyright tradition. But we can ask, well, wh, what functions are they serving? And

when you conceive of copyright as a financial incentive, right? We're going to give you a copyright in order to encourage the creation and distribution of new works of authorship. Then it strikes me that formalities make a certain amount of sense. Why would we bother giving you the copyright if you didn't need the incentive in order to create and publish. If you're willing to create and publish a work without the incentive of copyright, there's not much point in giving it to you. So in order for you to gain that incentive, you have to do something in order to claim that copyright was important to you, right? If copyright was an important part of your incentive, you had to sort of affirmatively do something to claim the copyright, and that's a formalities fit in with that sort of utilitarian view of copyright. If you have a natural right view of copyright, as was prevalent in continental European thought, part of that disconnect between the US. And the rest of the world, if you have a natural view of copyright, formalities don't make any sense, because you say, well, you know, you have copyright just by virtue of being an author. You shouldn't have to jump through a bunch of hoops in order to claim it. So let's look at how the 1976 Act changed these things. So the role of formalities under the 1909 Act, you have to publish your work with proper copyright notice in order to be eligible for federal statutory copyright. We did have common law copyright from the time that a work was created, perhaps not as broad as federal statutory copyright. Certainly wasn't nearly as commonly litigated, but you have to publish, and notice is required on all copies published anywhere in the United States. And failure to affix proper notice would place the work in a public domain. So again, this is part of the notion of copyright as an incentive. If you don't need the incentive, you can just publish and your work goes into the public domain immediately. That benefits from wide distribution. If you need the incentive, you have to do something. So publish with notice. Deposit and registration were required before a lawsuit could be filed. This was a change in the 1909 Act. You had to deposit and register as a condition of copyright before. Now you don't have to do it immediately, but if you need to file a lawsuit, you're going to have to comply with those formalities. And of course, we've already already heard quite a bit about the manufacturing clause that books in English had to be manufactured from type set and printed in the United States. How did the 1976 Act change these and the answer is not as much as we think. We tend to think of January 1, 1978 the effective date, as a big change, but a lot of that comes later in the 1976 act notice is required on all copies published anywhere in the world. So that's an expansion of the formality, rather than a diminishment of the formality. Before you only needed notice on copies published in the US. Now, when you publish your work anywhere in the world you need a copyright notice. Part of that is because of the universal copyright convention that the copyright notice sort of substitutes for other formalities that we might need. But it is an expansion of the formalities. Now failure to affix proper notice still placed your work in the public domain. We do have the cure provisions added in Section 405 so under certain circumstances, you could keep your work from going into the public domain. One of those is omission on a relatively small number of copies. But that had a corresponding effect in the 1909 Act, Section 21, of the 1909 Act omission from particular of the notice from particular copier copies wasn't always fatal, so that's just carrying that exception forward. The big change is if you registered within five years and then you made an effort to add the notice to all copies distributed after that, then you could, you could keep the notice from putting your work in the public domain, but it's really relatively minor exception to what otherwise is still strong role of formalities. Deposit and registration are retained. Deposit and registration are retained. They are still a condition of when you wanted to

file a lawsuit. Because deposit now, deposit is, mandatory deposit is decoupled from registration, but you had to deposit when you registered. So if you had to register before you file a lawsuit, you still have to deposit. And that's still true today. The manufacturing clause was designed to be gotten rid of, right. So they added a sunset provision. This is going to go away in 1982 that didn't actually happen until 1986 but at least they were like, okay, we need to get rid of this formality. So the manufacturing clause was scheduled to go away. But when you look at this, the changes weren't as great as you might think. We just haven't downplayed formalities as much as might be the case. To me, the biggest change, the biggest single change that is made in the 1976 Act is the duration of copyright. So under the 1909 act, we have a fixed period of years from the date of first publication. Now, technically, you could register unpublished works, and if you registered an unpublished work, your copyright clock started ticking from that date, but from the date of first publication or the date of registration, you had a 28 year term. It could be renewed for an additional 20. The eight years, but again, only if you took the step of claiming that renewal copyright. You had to have registered your work sometime during the first term, and then you had to register your renewal term within one year of the expiration of the first term. So you had a maximum total duration of 56 years. But most works didn't use that 56 years term. The vast majority of works expired after 28 years for failure to renew, right and now the only good data we have on this is the 1959 study on this and the register in the copyright revision study. They did some statistics. And you know, it turns out only about 15% of works were renewed, which means 85% of works went into the public domain after a period of only 28 years. Now, it turns out that there were quite differential statistics among types of works, the two types of works that were very heavily renewed, musical works and motion pictures about, you know, two thirds to three quarters of musical works and motion pictures were renewed, and so got the 56 year term. Books, it's about 7% right, only about 7% of books are renewed. So most works, most books, went into the public domain after 28 years, the 56 year provision was really most important for music and movies, and then some works would benefit from 56 years. So how do we change that, in the 1976 Act, we go to the term minimum of life plus 50 for most works, that's a huge change. It's a huge change in mindset, and it's a huge change in practice, right? You know, not only is everything automatically protected from the time, it's fixed again, we did have common law copyright before then, so maybe not a huge shift, but everything gets protected for a really long term. And the whole point of the two term structure was, after 28 years, you'd get your copyright back, and if it turned out it was unexpectedly valuable, you'd have a chance to renegotiate. That was defeated by the Fred Fisher Music case in 1943 which necessitated termination at some point during that really long term, maybe you can grab your copyright back, but it's a really long term, and we have not felt the full impact of that term. No works that received a life plus 50 term in 1978 have yet expired. Because we're at the 50th anniversary of the Copyright Act. It didn't come into effect until 1978. The only works that have expired that got a copyright for the first time under the 76 Act are the transitional works, the works that were created before 1976 but had not yet been published or registered. They get their automatic copyright on January 1, 78 and if they were considerably older, and if they were not then published before the end of 2002 they've they've expired. So you have some works that have expired, but as far as new works, new works created in 1978 or later, none of those copyrights have yet expired, and they won't expire for another 20 years as a result of Copyright Term Extension. You also have the change to work made for hire that's still measured from

publication, 75 years from first publication, or 100 years from creation, whichever is shorter. For the pre 78 copyrights, we extended the renewal term so that the renewal term is now 47 years, 28 plus 47 a maximum of 75 years of duration. But again, you still had to have the formality of renewal for those pre 78 works, and then the transitional works, works that have been created before 78 but not published or registered until after 78 they get, they get the same term as the new works, subject to a statutory minimum. And then, of course, much later, we have the Copyright Term Extension Act, which extends all of these by 20 years. Compare that to everything that's happened since the 1976 Act was enacted. And I think within 20 years of the 1976 act, we have a whole lot of changes that really do make significant changes in downplaying formalities. So of course, section 305, everything runs to the end of the calendar year. That's administratively very convenient. So changes made since then. The manufacturing clause finally allowed to expire in 1986 the Berne Convention Implementation Act is a big change. Mandatory notice is eliminated March 1 19. 1989 so we retained notice in the 76 act. It's finally gone when we joined the Berne Convention. Registration is no longer required for foreign works. However, for all works, the remedies of statutory damages and attorneys fees are still conditioned in Section 512 so that's still a formality. It certainly violates the spirit of the Berne Convention, even though, because they are remedies that aren't required by Berne. It might not technically violate the Berne Convention, but it certainly violates the spirit to retain that registration as a formality for those remedies. The Visual Artists Rights Act gives us something that's couched in the language of moral rights for the first time, but it retains a formality because it only applies to the single original or to a limited edition of 200 copies or fewer that are signed and consecutively numbered. Signed and consecutively numbered, a formality for the Visual Artists Rights Act automatic renewal for works first published in 64 or later. So instead of most works go into the public domain after 28 years now, 64 to 1977, all of those works are going to have a 95 year term without the necessity of renewal. You have copyright restoration, beginning with NAFTA, then the TRIPS Agreement, and then finally, the the Uruguay Round Amendments Act, copyright restoration for the first time, taking works that had been on the public domain out of the public domain and putting them back under copyright. It only applies to works of foreign origin. We haven't done it for works of domestic origin. But copyright restoration is a huge change. Then the Copyright Term Extension Act of 1998 so you put all of those together, we've had a massive change, only some of which starts with the 1976 act right the change in duration to a life based term starts in 1976 and I think it's the single biggest change the 76 Act makes formalities. We sort of set the table for a reduction of formalities that then gets accomplished over the next 20 years. And I will leave it there

Molly Van Houweling 17:24

While, David walks up, I have a segue, which is that while making duration based on the life of the author and longer seems like a pro author move, it eliminated renewal, which was envisioned as Tyler explained as a chance for authors to get a second fight at the apple after transferring a copyright. But David's going to tell us how it actually worked in practice and how that was changed, changed by the 76 act and beyond. Thanks, David.

David Nimmer 17:52

Thank you, Molly. Let me ask you to focus on the year 2054. I'm not going to ask you the tough question as to what our constitutional order will be or the status of political parties. I won't even ask you the hard copyright question, what will be the status of works of authorship in a world of artificial intelligence. I simply want to ask the straightforward question, extrapolating from today, which of today's music will be popular in 2054. In terms of the movies that just won the Academy Awards or that lost, which of them are going to retain interest, and of all the books you read over the past 10 years, which of them will continue to be remunerative? Well, the simple answer is, we have no idea. And this is not a modern phenomenon twas ever thus. Going back to 1926 no one knew which movies and books and music would retain popularity in 1954, and because it's impossible for an author and a publisher to contract knowing whether this will be the hit or not. There is an imbalance there which Congress wanted to redress by saying that authors can make a grant of their work and then they will come back into the kingdom. How did that work? Tyler explicated the 28 year initial term followed by a 28 year renewal term. 28 years results from the fact that 300 years ago, the Statute of Anne had a 14 year term plus a 14 year renewal by 1909 it was a 28 year term. So the theory was that the author would be able to renew the work 28 years hence and hence benefit from it. Well, that was the theory in practice, publishers said, you want to publish your work good make an assignment of the copyright. The author said, of course. Oh, and one more thing, we also want you to assign today, the contingent interest that you will have 28 years from now. Not having any bargaining position, the author agreed. Well, the matter went to the US Supreme Court in the case that's already been mentioned several times, Fisher versus Witmark. In 1943 The question is, should we honor Congress's intent and authors should be able to reclaim the copyright? No, said the court, freedom of contract applies. You already signed an initial grant of that renewal term along with the initial term, and so you have nothing. Well, that was the practical effect, and as a result, the smart move for authors was to die. An author who made a grant in 1926 who had the foresight to die in 1945 would mean that the work in question in 1954 could be renewed by the author's surviving spouse and children, and the expectancy that was granted never came to pass. Well, of course, that led to a further arms race where publishers would get a contingent grant from the spouse and the children, and so the situation made very little sense. As a result, Congress retooled and said, We have to get rid of that unworkable scheme of recapture of renewal rights, and let's implement something inalienable, termination of transfer, It's going to be automatic. For new works, it came into effect 35 years after the grant, so work created in 1980 could be terminated in 2015. For the old works that already had a 56 year term, as we saw, 19 years additionally was granted, and it's only fair that the author be able to terminate and reclaim those rights. Here's the language of the statute. Quote, termination may be effected notwithstanding any agreement to the contrary. Clearly, the purpose was to eliminate the Fred Fisher decision. Now mind you, this goes against the baseline that we all have so ingrained of us of freedom of contract, but freedom of contract is not unlimited. I don't even need to cite the case of a hit man and a contract to murder someone. There's not going to be any specific performance that the court will order in that context. But even when something is not illegal, a contract may still be invalid. Two consenting adults can have sexual relations. A contract for sex is called prostitution, and that's a crime. It's fine for a constituent to grant to contribute to a politician, and it's fine for a politician to make a vote, but a contract in exchange for a million dollars you'll vote yes on my bridge is called a bribe, and that is illegal. Now, Congress did not go so far as to say that a

contract against termination is a crime. It simply said it's invalid. Termination may be effected notwithstanding any contract, any agreement to the contrary. This was part of a unified law to replace the 1909 Act. And I have to talk a little bit more about renewal rights under the 1909 Act, which we already heard about from Tyler. As to a solitary work the it was intended that the author would be able to renew it 28 years hence. But sometimes there were composite works. Let's take an encyclopedia that has 100 authors. In that context, as of 1909 Congress said the proprietor, the encyclopedist, should be able to renew it. Now, in 1909 there was not even protection from motion pictures, but later on, those fell into the same category. So how do we replicate that? Well, when the 1965 bill that we heard about so extensively and intensively this morning was formulated, it had the termination provision, and it also had to have an exception, something analogous to the composite works of the 1909 Act, and this came in the form of the work for hire doctrine. Works for hire are not subject to termination. They can be renewed, they can be continued in the possession of their proprietor. And there are two types of works for hire. One was works by employees, so if you imagine the old studio system where everyone came to work nine to five and they wrote screenplays, okay, the motion picture studio would still own it that could not be terminated. And another example was specially commissioned works, which we also heard about. Basically, this applies to works of multiple authorship. So if you have the following, Congress called it a specially commissioned work for hire which would not be subject to termination, encyclopedia, an atlas, an instructional text, test answers, book illustration, maps, bibliographies, movies and other audio visual works, because those were works of collective authorship, not sound recordings, as we heard about, because of the anomaly that this was put together in 1965 and sound recordings were not protected until 1971, but basically, works of solitary authorship would be subject to termination. Let's see how it worked out. Classic work of solitary authorship, Winnie the Pooh. So A. A. Milne made a grant, made the grant to Steven Schlesinger, a Broadway impresario. Schlesinger married, of course, a girl in the chorus line who had a daughter. And so the daughter ended up owning the copyright to Winnie the Pooh, which became the most lucrative property, even more so than Mickey Mouse. But, the young Schlesinger faced the possibility of termination of transfer, because that's what Congress had anticipated. Not wanting to suffer the defeasement of her rights, she brought her lawyers together, and an interesting state of affairs unfolded. A A Milne was dead by this time, so his termination right belonged to his only son, Christopher Robin Milne. The Schlesinger's and Christopher Robin gathered in a room and said, you know what, we had an old grant. We're going to get rid of that grant and we're going to have a new grant so it will not be subject to termination. And the vehicle we will use to do that is called a rescission and regrant. You're going to get rid of the old grant and you're going to make a new grant all in one instrument, and because of that, it will not be subject to termination. Well, it fell to myself to be Counsel of record for the Milne's and to argue this case before the Ninth Circuit. My proposition was very simple, before they got into that room and did a rescission and regrant, this was subject to termination. And you know what Congress said, termination may be effected notwithstanding any grant, any agreement to the contrary. That's what this rescission and regrant is. It's an agreement to the contrary. Well, judges have in their mind freedom of contract. And as we heard from Peter, there are few judges who know this area of law very well. Sadly, none of them gathered on the panel on that day. And so the first question to me was from Judge Wallace, well, Christopher Robin Milne entered into a new agreement quote, didn't he do very

well by signing the contract? And my answer was, Congress could have made a statute that said termination may be affected notwithstanding any agreement to the contrary, except when people do well or very well. But that's not the statute. It is absolutely categorical. And so it so happens he did not do well. He actually did not make money from this. He took the position, gentlemen, do not terminate their father's contracts, and I'm not going to take money for this, but that's beside the point. Even he had made money, termination may be affected. Okay, that seemed to work, and it elicited the second question. Oh, said Judge Wells to me, so you quote, so you are saying that he had no authority to sign the contract. I wasn't saying anything about authority. He certainly did have authority. He had authority to come in under state law and sign a contract. But you know what? There's such a thing as the federal, the Supremacy Clause, which says that federal law is binding, and Federal law says termination may be affected, notwithstanding any agreement to the contrary, even when someone had authority to sign. That elicited the third question, quote, you are suggesting that he would have been better represented by counsel. He was represented by counsel. I was not suggesting anything of the sort. I was simply trying to vindicate the proposition that termination may be affected notwithstanding any agreement to the contrary? Well, we lost that appeal. Freedom of contract prevailed. Fred Fisher was resurrected, and that was the result. Now I heard the question from the audience, what should we do about termination? And so I will give a very concise answer now. All we need is two fundamental changes. First of all, the voluntary nature of termination and the fact you have to jump through so many hoops to get it done, is an impediment that makes it practically impossible, unless you have counsel who takes a great many steps, which we did take in the Milne case. So termination should become automatic, not something that is subject to the formality of a notification. And the second is that Congress should pass a new law that says termination may be affected notwithstanding any agreement to the contrary, and this time we really mean it. Happily, I have word that Congress is set to pass exactly that law in 2054. The courts will enforce it, and so the kingdom is at hand.

Molly Van Houweling 30:37

So the work for higher doctrine that David discussed a bit and that we've heard about earlier today, is one way in which the 1976 Act determines not just the rights of authors, but who qualifies as an author. And Bob is going to share insights about other aspects of this question of who counts as an author and what impacts the 76 Act had on them.

Robert Brauneis 30:57

Well, thanks, Molly, and let me first express my gratitude to all the conference organizers here at UC Berkeley and at Columbia, including both the faculty involved and the student editors of the great Berkeley Technology Law Journal. It's a great privilege to be able to speak here, and even a greater privilege, I think, to gain the insights of the other wonderful participants in this conference. Yeah, so as Molly said, I'd like to talk about those occasions on which people arguably do the kind of creative work that we expect of authors and yet are not recognized as authors. And I have to say that even that way of framing the issue owes something to Barbara Ringer's quote and the shift in perspective that she documented and also helped effectuate so here I want to touch on a few doctrines I think have a particular impact on whether creative work gets recognized as authorship, and consider whether and how the 1976 Act had an impact in

those areas. Obviously, maybe the most obvious doctrine under which creators are excluded from authorship is the work made for hire doctrine. But Jessica and to some extent, David have already touched on that, so I'll just say that in that respect, as Jessica explained, the direction of the 76 Act is really complicated, right? In some way, we could say that the 76 Act could be read as somewhat author friendly, but only in relationship to the instant expense and effort test that was developed after the work made for hire Grand Bargain was, you know, penned in 1965 so a very strange kind of sequence of events. So here I want to focus on three other doctrines that I think may be somewhat less obviously tied to recognition of creative work as authorship, although some people in the room will recognize them as central and they are fixation, derivative work authorship and joint or CO authorship. So let me start with fixation. Of course, the 1909 Act doesn't directly mention fixation, because under that act, it is publication and registration that are important boundary markers. However, both publication and registration imply fixation. So under the 1909 act, publication requires a distribution of physical copies, so a work definitely needs to be fixed in the 1976 Act sense, in order to be published and obtain federal copyright protection. Even more importantly, only certain types of embodiment in a copy count under the 1909 Act so under the Supreme Court's 1908 decision in *White-Smith versus Apollo*, musical works have to be embodied in visible notation. A phonorecord doesn't count as a fixation of musical work. By extension, a literary work could not be fixed in a phonorecord either, nor could it be fixed in the soundtrack of an audio visual work, and going even further afield, a choreographic work, right, couldn't be fixed in an audio visual work, either. I think that's then taken as a given in the 1909 Act, and the copyright office then adopts this framework for the deposit requirement for registration. So registration of a musical work or choreographic work following the historical model of books has to be by means of visible notation, and the visible notation forms the boundaries of the registered work. If you only deposit a lead sheet with melody and lyrics, that's all that counts as the Registered work. As one result, many composers who do not notate, and who are, in that sense, musically illiterate, although they're great composers, right, end up never being recognized as authors of the musical works that they composed. That's certainly true in the blues and folk genres, right? Many blues and folk musicians came up with melodies and harmonies and lyrics, and we have phonographic evidence that they did, but they never notated those compositions and as a result, they were not recognized under the 1909 Act as authors. Of course, if those musicians had understood copyright law and they had had the resources to find someone to notate their compositions they could have done that, but the legal barriers to obtaining copyright are often interwoven with exploitation, and sometimes fraudulent exploitation. So many songs end up not being protected by copyright, and others are claimed by people who didn't actually compose them. So along comes the 76 Act and Section 102 famously provides that works of authorship can be fixed in any tangible medium of expression now known or later developed. So under a narrow interpretation of that provision, that could just mean that musical and literary and choreographic work still need to be notated, but they just need to be in written paper. It could be stored in magnetic tape or an optical disc or solid state drive, whatever. But instead, that provision has been given a much broader interpretation, and I think an interpretation in some ways aligns with legislative history, although I don't think people fully contemplated its impact. So under the 1976 Act language, you no longer need notation to fix a literary, musical or choreographic work. If I sing a song that I compose into a microphone connected to an audio recorder, I have copyright

not just in a sound recording, but in a musical work. If I dance a dance that I've conceived of in front of a camera connected to a video recorder, I have copyright not just in an audio visual work, but in a work of choreography. So I'm continuing with the example of music that ends up allowing more people to be authors of musical works as the musical work no longer needs to be notated and published. Moreover, if it turns out that it's easier to pass sound recordings back and forth between collaborators and do multi tracks and all that sort of stuff, then I think it also makes co authorship easier. Obviously, as Peter will say a lot more about after me, legal protections alone can't create an optimal market for creators. It's still possible for composers to be exploited and not get their due. However, I find one trend that some of you know about to be interesting. Emma Perot, Peter to some extent, Glyn Lunney, and others have written about the fact that the average number of songwriters credited on top songs and the billboard hit 100 list is a popular source for data sets has grown over the past decades. Glyn Lunney calculates that the average number of composers on a billboard hit 100 song has more than doubled from 1.86 in 1963 to 4.65 in 2018, and then Emma Perot tracks the timing more precisely. She notes for decades, the average fluctuates between one and a half and two and a half, and then it starts taking off in the 1980s and really accelerates in the 1990s and 2000s. So there are a lot of potential reasons for this increase. Emma Perot considers the possibilities that star performers are demanding credit for songs they didn't write, a practice that dates back at least as far as Al Jolson in the 1920s that song writers are being added to mitigate legal risks after prominent litigation like the Blurred Lines case may have been perceived to broaden infringement liability, and that the practice sampling and rap and hip hop music necessitated broader crediting, something Peter has investigated in some depth as well. Glyn Lunney suggests somewhat pessimistically that the growth of number of songwriters shows that each songwriter is becoming less productive, and you need more of them to write one song. So I want to suggest another more optimistic possibility. When I investigated pretty closely the development of one song and sound recording in particular, back in 1949 a song called A Little Bird Told Me, it was clear that although a gentleman by the name of Harvey O. Brooks composed the very basic melody and lyrics of the song, a lot of collaboration went into the song, as was ultimately first recorded. The singer, Paula Watson and three or four other musicians actually went over to Brooks' house, and together they worked out new lyrics for a call and response between Watson and backup singers, wasn't in the original Brooks song, a new bass line, an arrangement for a backup band, a hummed introduction. In other words, the musical work as it appeared on the sound recording was far more collaborative. At that time, however, back in 1949 Brooks alone was credited as the author of the musical work, and copyright in the sound recording went to the record company, leaving nothing but session payments for the other collaborators. If that initial recording of A Little Bird Told Me had been produced today, I would like to think that there's a possibility that the others who contributed new lyrics, bass line arrangement, hummed introduction and so on, would have gotten some songwriting credit. I mean, of course, to the extent that back in 1949 significant revenue was still being produced by sheet music sales. Maybe we could say, well, Brooks wrote what was necessary for the publication of sheet music. So only he should be credited as author of the sheet music. But today, a vanishingly small percentage of music revenues comes from the sale of sheet music. And so the musical work as embodied in the sound recording is the work that's most often relevant when considering musical work authorship. That's much more collaborative and at least, as I read anecdotally

about the production of sound recordings in lots of genres of popular music today, that's how many of the sound recordings and the musical works embody them are being produced. So the rise in number of authors being credited for musical works may it be a matter of less productive songwriters having to combine their forces to produce anything, or the overreaching of famous performers or sampling or whatever. Instead, it may be at least partly that more of the people who are actually making creative contributions to the musical work that's embodied in the sound recording are being recognized as authors, right? And at the same time that the musical work that's recognized is thicker in the sense that it includes more of the elements that make the recorded version a hit. Obviously, it would take a lot of empirical work to tease all these elements out, but I think the timing of the increase in number of writers, it was at least promising. So recall that Emma Perot documents that the numbers are stable until the 1980s and start to take off. It's of course, in 1978 that the legal change takes effect, and shortly thereafter, a change in registration process starts to gather steam. Right, at first, even in 1978 most people, when they're registering musical works, are depositing notation. But for another article, I documented the change in form of deposit, and by the 1980s 80% of musical work registration applications are being accompanied by phonorecord deposits, and only 20% by notated music, right? So you know, maybe something that some optimistic story can be told. So all this talk of collaboration leads me to the other two topics I want to touch on, and those are the rules about copyright in unauthorized derivative works and rules about contributions of expression to works by what one might call non dominant creators. So in both cases, there's no doubt that the creators of those works, or parts of those works, are doing exactly the sort of things that authors do. However, those creators are sometimes not recognized as authors. So let's start with derivative works, right. Section 103, a of the 76 act and famously, infamously, provides that protection for work employing pre existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully. And then we've got 115B2 which provides that a musical arrangement made under a compulsory mechanical license shall not be subject to protection as a derivative work under this title except with the express consent of the copyright owner. So in both cases, those statutory provisions seem to be denying copyright protection for creative work that were it done by somebody else, namely someone who owned copyright in the underlying work, or had their permission, would be exactly the kind of work in which copyright would in here. You know whether that refusal to recognize copyright and otherwise original work was a new fixture of the 1976 Act depends upon what we think the 1909 Act is, and there's some controversy about that. David's father, Melville, in the first edition of Nimmer on Copyright, says that there's a section six, which later became section seven of the 1909 Act that it provided for the same kind of forfeiture without that little without that little nuance of just the part of the work. And so, you know, there we'd say, well, maybe the 76 Act is liberalizing that a little bit. The current edition of Nimmer on Copyright in Section 306 takes the position that the 1909 act statute text was ambiguous and the decision is contradictory in the language of section 306 and then Pam Samuelson and Jessica Silbey, in an article published last year in Boston College Law Review, argue that the pertinent text in the 1909 Act did not provide for forfeiture of Copyright in the new expression, right? So if the Samuelson and Silbey position on 1909 is correct, then the 76 Act newly refused to recognize the creators of unauthorized derivative works as the as the authors, I should say the creators, right, as the authors of those parts of the works that use the underlying work unlawfully. And

even if the 1909 Act is ambiguous, the 76 Act still resolve the ambiguity in favor of not recognizing as authorship, otherwise qualifying creative work in the context of unauthorized use of another work. So you know as Pam and Jessica Silbey have argued that the 103A forfeiture provision should be read extremely narrowly. I don't know what that 103A can bear the full weight of that narrow reading, but I have a lot of sympathy for the policy arguments in favor of that position. So let me just talk a little bit right about collaboration and joint works. The most relevant 76 Act text here is definition of joint work in Section 101, and as with works made for hire, right? All of the work is being done in the definitions. And it says the joint work is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or independent parts of unitary whole. So it's pretty clear that that language was intended to legislatively overrule the cases interpreting the 1909 Act as allowing a music publisher who had bought the rights to a melody from a composer to combine it with lyrics written by someone else and make it into a joint work. That's the 12th Street Rag case. And so under the section 101, definition, okay, the intent needs to be the intent of authors of parts of the work, not the intent of a third party, like a publisher. However, in the copyright revision study on joint ownership of copyright, George Cary, the author of that study, then Deputy Register of Copyrights, makes a much more broader, much broader comment. He says, quote, in considering the question of whether and how the present copyright law may be modified to resolve the types of problems that I have referred to above, one might start with a premise that is desirable to reduce as far as possible the frequency of the occurrence of situations in which a given work can be said to be a joint work. So wow, ouch. That's a sort of big policy judgment. Courts seem to have taken that comment to heart, right with the zenith probably reached either by the Ninth Circuit's 2000 decision in *Aalmuhammed versus Lee*, which I think is good law right here in the International House, or the second circuit's 2015 decision in *16 Casa Duse LLC versus Merkin*. I would give the edge to the Casa Duse case. A number of scholars have done great writing about the resulting problem of granting a dominant or controlling co creator sole authorship and ownership of a work that other creators were quite consciously and intentionally involved in creating. Denying any authorship of that co-created work on the part of the other creators involved. That, again, is denying authorship status to creative work that is the same work that authors do. And I feel like I'm going to leave someone out, maybe even someone in this room, but my initial list of those scholars would include Mary LaFrance's 2001 article *Authorship Dominance and the Captive Collaborator: Preserving the Rights of Joint Authors*. Shyam Balganesh has his 2014 piece on unplanned co authorship, the amicus briefs of Shyam, Justin Hughes, Peter Menell, and David Nimmer in *Garcia versus Google*, and then, most recently, the not quite published article by Jessica Litman called *Authorship Nonsense*. So as Jessica puts it, courts have adopted rules that minimize, reallocate or erase the creative contributions of inconvenient collaborators. Oh, such a lovely, lovely phrase there. So you know, given this symposium about the 1976 Act and not about judicially developed rules about co-authorship, the question is, is the 1976 Act to blame for what's happened there, or should we put the blame on the courts that are resisting something that is outlined in the 76 Act? And I, you know, I think probably more of the blame is on judges than on that language in the 76 Act about joint authorship, but we can have further discussion about that in the in the discussion period. Thank you.

Molly Van Houweling 48:31

We're going to continue to understand how the 76 Act had an impact on creators with even more focus on music, and how the Act did or didn't anticipate the current economic landscape for music creation and distribution. Thanks to Peter.

Peter DiCola 48:47

Thanks Molly. Thanks so much to Berkeley, to Molly, Pam, Peter, Richard Fisk and all the volunteers and conference organizers. It's really an honor to be here, and especially an honor to have an opportunity to speak on this panel with Tyler, Bob, and David. So in my remarks, I'm going to ask a question Molly posed to us, you know, inspired by Barbara Ringer's remarks, whether the changes of the 76 Act, in fact, provided authors with new advantages in their dealings with publishers and other players in the copyright system. And I want to address that in terms of market power, although first I'll say it's so interesting, it was so interesting to me that Barbara Ringer said that, because my first thought, I have to say, was, wait, that was the goal. Oh, okay, so... But of course, Register Perlmutter and Peter in their talks have explained, well, yeah, relative to the 1909 Act, lots of things were different, and we're pro author and of course, and it makes perfect sense now, so I'm really grateful to them for highlighting that history for us and setting this up. So as Molly said, like Bob, I'm going to focus on music as an example, and my main argument is going to be that the copyright reforms of 1976 did not but, perhaps more importantly, could not provide authors with meaningful economic leverage in the face of what was about to happen economically. And here, Jessica has set me up by talking mentioning the word the profound consolidation that's happened in these industries. And you know, I'll talk, I'm going to emphasize that and talk about what changes, what those changes look like in the music industry. Okay, so first though, I want to talk about, we're being invited here to evaluate a policy. So policy evaluation, very broadly speaking, requires two inputs, so an understanding of the goals of the policy, and then data to measure the results. So I want to talk about both of those things. So the way Molly framed this panel is really useful, because we can focus on the copyright Act's goals with respect to authors. People differ, of course, about whether one thinks the acts benefits for authors are an end in and of themselves, in and of itself. Is that an end in itself, or is it a means to an end to serve just the broader public, or is it some of both? And I don't think we have to address that debate, where I think we're all interested in what it did for authors, whether as a means or an end. But I would like to highlight another normative dimension on which the disagreement is often implicit. So the degree to which the Copyright Act serves authors is often framed in terms of whether it serves the superstar artists. And I can just tell you from having worked on music industry issues for, oh God, now, 25 years, most conversations I have people think I'm talking about Taylor Swift. They don't have a bell, in my head what I'm thinking of, which maybe is a weird economist trait, is that I'm thinking of a bell curve, right? There's a whole distribution of musicians, you know, we can talk about Taylor. There's a lot of interesting stuff to say about her and her business career, you know. But she's not representative, you know, and, and many of the things you know, as I'll talk about, I think I will mention later, you know, there are things that there are things that she's been able to do in her career, that the industry has literally made sure no one else will ever be able to do, so not a helpful working example, exactly. Maybe helpful in terms of, normatively, what you'd like to see some artists be able to get, but not helpful. So what I'm saying here is, normally what I am going

to be talking about, and some people in the room may reasonably disagree, like, I don't care about that artist who can't make money. I guess I'm is it unfair to imagine our friend Chris Buccafusco sitting here and saying, if they didn't get the market response, like, I don't care. You know, Chris doesn't think poetry should exist either. Those are interesting views to try to defend. He's not here to do it. But what I'm thinking of is that people are like, well, if you can't make it in the market, you can't. And I'll talk about how that is, of course, part of our system, but I think we need more than like for artists. So that's that's good. So if you can go with me there, okay. So that's the normative part is that normatively, I'm going to care about the distribution and then data wise, oh, it's so frustrating. So we used to have a bureau at the National Endowment for the Arts that measured musicians and other artists labor outcomes. There were PhD economists who worked in that department, thinking of Neil Alpert and Greg Wassal. They wrote a great report that I read because I was I wrote my thesis in college about multiple job holding, and they studied multiple job holding among artists and musicians, and then, and then that department gradually was shut down in the wake of the budget cuts from the from the Newt Gingrich Congress of the of the mid 1990s. So that's not to say there haven't been great efforts by the copyright office, including having a chief economist and great papers by Bob and others about the data that we have about the registration system and other aspects of the system. But what I'm talking about is, like labor market data, like, how are artists making a living? How are musicians making a living? And it would be so useful to have longitudinal data over the course of the Internet era, and we just don't have that. It's, you know, I can talk, if you're curious about why it's hard to do that. I can talk more about that. But one thing I want to say about the data we have. You know, I recently saw a presentation, just two weeks ago at this great the music law summit at Vanderbilt, where my friend Will Page, former chief economist from Spotify, presented all this really exciting, optimistic data about recorded revenue from recorded music going up. Right? Bob, you remember, you were there with me. The curves are all going up. It's very exciting. There's more money being made. We've recovered from the file sharing dip as an industry. None of that data broke down how much of it was going to the creators. None of it, it was just that's just completely elided from that dispute. Now I'm not saying Will doesn't care about creators, I think he does, but he doesn't have the data, right? We don't have the data. If Will, doesn't have the data, we definitely don't have it. And so that that makes this hard to do policy wise. So what we're even doing policy wise. Just one thing I should say is that we're going on well, as Jessica said, we're hearing from artists, and we have to decide whether to believe them and evaluate the anecdotes. And if you say, oh, well, that's a weak argument to rely on anecdote, well, that is, to some extent, the best we have because of structural decisions we've made about whether we're going to collect this data and make it available. So that would be one thing I'll say, which is maybe a little off topic on the Copyright Act of 1976 except maybe you could imagine a system that said that in setting up the copyright office and having provisions that there, you know, that you could think as part of legislative design to try to think about data and policy evaluation. Okay, now to get to my point about consolidation, so let me start, my view on the economics of copyright is that, in a nutshell, copyright is meant to allow some amount of market power for a differentiated product. It's not a full on monopoly. Of course, writing one book doesn't make you a monopolist in the economic sense, you're working in a differentiated market, but the intention is for copyrighted works to be sold at some markup above marginal cost, if the market demand is there. And as I said, we've always understood,

and everyone seems to like the idea that your rewards under the copyright system, as opposed to say, a Grants system, are based on the proportionality between market demand, your reward, and market demand that we like the system that you make more money from your copyright if there, if there's that market demand, but if you accept that thought, that market demand has always shaped exactly how big quantitatively the copyright reward will be, then I think you should go with me and look At this other implication, which is that market demand the shape and the position of the demand curve, If you want to use the econo speak, those depend on the market structure. The market demand is going to be shaped by what's going on, both in the structure of the market for copyright aggregation, record label, in my music example, record labels and music publishers, but it's now also shaped by the concentration among the people who actually deliver the companies that deliver the content to music. And here we're talking about the music streamers. And in the US, there are four that have 97% market share. So that's a concentrated market, and that is what is new. So this is what I mean by structure, this degree of concentration, and as Jessica said, they both changed significantly since 1976 we're down to three major publishers and three major record labels. I've been doing this long enough that I remember when there were seven labels. The independence, now I hear a lot, especially from Spotify, about the independent sectors numbers, and I think those numbers about the independent sector being big and that they're giving more and more royalties the independent sector, those numbers are often misleading, because there are major distributed Indies. There's this hybrid category in music, and so if some you know, for instance, if some artist has a vanity label that you know they could be that could be described as an indie when really it's distributed through the major system. And then I'd also add here, by concentration, I don't just mean their market share within music, I mean that the publishers in the major record labels are just parts of larger conglomerates. So some of you remember when Universal Music was owned by a French water company, called Vivendi, composers and songwriters on the one hand and recording artists on the other, they're facing these large entities when they're negotiating contracts, and that's the bargaining power that that David alluded to, or the lack thereof. It's really interesting now, if we evaluate, okay, what's going on with those contracts? It's pretty interesting that the music publishing contracts, we don't hear as much about how they have become more structurally exploitative, but on the recording contract side, over this period, post 1976 we do see more and more acquisitive behavior. So I'm thinking of the shift about 20 to 25 years ago, to what are called 360 deals, where the record labels, their verb of choice is participate in the revenue of the of the artists when they're engaged in other endeavors, such as, you know, selling a perfume or going on tour or selling T shirts or things like that. So that's a new, you know, that was a new innovation, and there are other loopholes. So I mentioned Taylor Swift. You know, Taylor Swift famously re recorded her albums and owned, you know, in order to own her sound recording copyrights, all the record labels have moved to have a clause that where artists contractually agree not to do that anymore, right? She will be the last. She was the first to really successfully do it. She will be the last, probably, unless we change the system, unless we make that kind of contract, the kind of contract that you can't make. So there's consolidation on the side of the copyright aggregators. We're familiar with that story. I think the biggest story, though, right now is the consolidation what I like to call technological intermediaries, the entities that actually retail or deliver music. So in 1976 music retail had national chains, but it was not particularly consolidated. There were lots of mom and pop stores, and those chains were not

part of the biggest companies in the world. I don't think Sam Goody was part of the biggest company in the world. Was Coconuts part of the, I don't think so. I don't think that they, it was like the Coconuts was brought to you by the equivalent of Google or whatever, what they I don't think the oil companies own them or anything like that. They weren't big players, like what we see now, the copyright owner set the prices for music, and, you know, there was a, you know, there was a markup for the retailers. But they weren't big players, and that starts to change with consolidation, not just because of the internet, but also brick and mortar stores like Walmart becomes the biggest retailer of music in the mid 1990s and many of you have heard me talk about that before, and they you know, Walmart used that market power to weigh in on both pricing and content. They pushed for more family friendly content. And so economically, just to go back to my model of the markup, like the copyright owners aren't able to set the price just through the copy. The copyright owning record labels and music publishers don't set the price now they're negotiating with a technological intermediary, and that continues through with the iTunes Store. And so if you have in your head like an economic model of a copyright owner setting price, choosing the markup, I think that is obsolete, at least right now. Like that isn't what's happening. It's instead one oligopoly selling through another oligopoly. That's what we have in music. And so I think that is why Spotify YouTube, Apple Music and Amazon music are under what I perceive to be increasing scrutiny and more discontent among musicians. So I think what I would say then, to bring that back to copyright, is that copyright can only deliver economic benefits based on the structure and institutional design of the markets that the authors have to sell into. The value of rights has always, of course, been mediated by the market. If there's no demand for your creative work, copyright isn't going to deliver you revenue. But I would argue that the structure of today's market is categorically different than the market of 1976 and Peter alluded to this earlier, as well as did Jessica, that in the music industry, there are now twin oligopolies for individual creators to contend with, the technological intermediaries the deliverers of music are not music companies. I think it's really important to understand they may well be happy to sell music at a loss in order to retain users on their platforms and to harvest their data. And that's just a that's a dimension of economic value that music publishers and record labels have never had. And I just, I don't think the 76 Act was designed at all with that kind of business model in mind, as someone that would use music as a loss leader or as a way, you know, to convince people to give them their data. Of course, none of this means it's not worthwhile to have copyright or that these you know that the shift to individual rights wasn't worth doing to have the limited, you know, economic benefits that it does provide. That's not my argument at all. It's just my argument is that the twin consolidation I've described changes the numbers in terms of how much income copyrights can provide. It limits the extent to which legal rights can deliver quote advantages in business dealings from from what Barbara Ringer said. So I think it's interesting that Barbara Ringer also suggested, and here I'm quoting again, the provisions will provide the basis for further reforms, the kinds of reforms necessary to deal with the copyright owners and the technological intermediaries market power, of course, go beyond copyright, and as Peter Menell said earlier, into antitrust law and regulation. I've been writing about other reforms that can conceivably, could conceivably be part of copyright, although they might be unfamiliar, they could also just be considered as reforms in separate areas. So I'm thinking about regulating the terms of contracts in line with what David talked to us about with termination of transfers, you could have more provisions that are mandatory rather than default.

And that also pertains to the songwriting complexities that Bob just talked to us about, which that was really a fascinating set of examples of where musicians are sometimes disadvantaged. There is draft legislation, draft legislation in the previous Congress about allowing for sectoral bargaining for musicians against the music streaming companies. That is one thing to think about. You could think about creating authors rights for access to the data pertaining to how their works have been exploited. You could think always might be helpful to think about mandating transparent accounting practices, given that now the sources of revenue for the ultimate deliverers of music may not have anything to do with music. This could get increasingly complicated. So I just want to end with what I think is the biggest new hole in author's rights. If I haven't convinced you that this is a problem, Spotify has a new policy as of December 2023 you may not know about you may not know about you may know about it. It's a policy change. They no longer pay royalties on tracks that achieve less than 1000 streams in the preceding 12 months. So Register Perlmutter mentioned like this, was a huge success to bring streaming into the copyright system. It was a big shift away from the file sharing era, where musicians aren't getting any revenue from that, it looks like a, you know, market compromise, It seems like an improvement over those over the litigation based, you know, ought the 2000s the 2010s the streaming era seems good, but now we see what happens. Spotify is copyright compliant, but having your music on Spotify means agreeing that less successful tracks don't receive any royalties at all. Your choice as an artist is to forgo roughly 30% of the US streaming market or be subject to this new policy. And then to bring it back to the data point, how are we supposed to figure out how many tracks are not getting paid out? How do we know what has happened to the copyright system because of Spotify policy, until, you know, I'm hoping to find out myself. I'm working on a project about that, but I don't expect it to be easy. The data are not readily, you know, they're not readily publicly available, so that you would need to understand what the consequences of this policy are. How many artists are affected to what extent? We just don't know. So I will say, though I'm not going to take Spotify as word for it. I think this shows the huge importance of concentration as we think about evaluating the Copyright Act success and reforming copyright and then maybe looking to other related areas of law going forward. Thanks so much.

Molly Van Houweling 1:06:26

We're going to talk amongst ourselves for a little bit. We have questions for each other, and we also have time reserved for questions from the audience. So gather your thoughts, because I'll be turning to you in just a minute, I'll start with one question, and then I know folks have some questions for each other. We've heard some sector specific analysis, especially from Peter, about the music industry, and I'm curious whether people want to say or speculate anything about whether these observations are generalizable. I'm thinking about book publishing, about movie making, there's lots in the news about that particular market and its consolidation these days. So I'm curious whether these are other areas where maybe the promise of a pro author Copyright Act have not come, or have come to pass in light of different market structures?

Robert Brauneis 1:07:26

Is this on? So I don't know that I have a lot to say about market structures in all of the copyright industries. I do think that there's another aspect of generalizability, and that is one, creative

practices. So my comments about fixation, right? It makes a great deal of difference, I think, in music that now we've got the fixation musical works, in sound recordings, because there are a lot of musicians who are commercially successful, who are not using notation, right? So it makes a great deal of difference when you move into that regime. Less difference in areas where the creative practices still typically involve notation, as they always did, like literary works. It is true that Garrison Keillor registered his monologs on A Prairie Home Companion. He deposited photo records of those monologs, not notated records, and he probably didn't notate them, although, you know, with his resources, he probably could have and then commercialized those, those recordings. So there's, you know, there's a tiny example of notation, or the difference in fixation, sort of affecting one commercial one stream of registration and commercial exploitation. But it's not going to happen for most literary works, I don't think. And then in areas, in areas of derivative work rules and co-authorship rules, you know, I think those are generally more broadly applicable. Except that as Jessica says in the article that I'm going to continue to commend to you, Authorship Nonsense, that's very dependent on traditions and on customs and practices in particular areas of creative endeavor. So she incredibly documents how in areas of sculpture and painting, theater, screenplays, comic book characters, that there are different embedded practices that have already kind of been independent of the rules on the books, and may continue to be so. Other areas I think are affected more directly by or would be by changes and rules about both derivative work copyright protection and the status of co authors.

David Nimmer 1:10:09

I'd like to ask Peter a question taking off on a through line of what I was talking about earlier, in terms of contracts not being able to defease copyright policy, and a conference that Pam and Peter organized here in Berkeley 30 years ago about our UCC article to be in which I published an article in the California Law Review saying that ProCD versus Zeidenberg was wrong. In other words, a company should not be able to defeat the US Supreme Court's Feist ruling that telephone listings are in the public domain by putting them in a shrink wrap and saying the whole world is now bound by my shrink wrap. The Taylor Swift example of record companies saying you may not engage in sound imitation is another defeasement of one of the rights that Congress has given because Congress has said, when you're when there's a sound recording, you, the owner, have the right to prevent sound recapture. You do not have the right to prevent sound imitation. It seems to me that these record companies are systematically trying to defuse that right of the copyright owner, and I'd like to bring the same considerations to bear to defeat that effort.

Peter DiCola 1:11:19

Well, wow. Just like, yes and yes. I mean, I hate ProCD versus Zeidenberg. I have since I was in law school. I think it's wrong. And I agree with you that, I mean, it's interesting. You have to, you have to, sort of, you would have to, you know, kind of elevate the negative space of 114B into like, a right of the public. But I don't think that, I think that's, you know, for scholars, that's, you know, I think that's the right way to think about it, and you just have to convince the judges. But, yeah, I mean, I think that's that's really interesting, that maybe we already have the tools to deal with that one. Of course, part of what's going on, part of the reason we're not seeing like

challenge after challenge, or why there wouldn't be a lot of opportunities to challenge that is that the market conditions for Taylor Swift were such that she could, you know, she has a relationship with her fan such that she could direct them to which version they should be streaming on Spotify, and successfully do that. But, you know, I think it's, yeah, I think that's very interesting. And Bob, what

David Nimmer 1:12:16

And Bob, what do you want to do with the negative space in terms of the unauthorized derivative works?

Robert Brauneis 1:12:18

I want to shrink it. Well, no, I mean, I mean, I mean, I think so.

David Nimmer 1:12:25

think who owns it at the end of the day?

Robert Brauneis 1:12:27

Well, well, I think that the owners of copyright in the underlying works still have a tremendous bargaining advantage over the authors of the derivative works, because any exploitation of the derivative work is going to include, you know, a publication or a display of the underlying work. And so they can say, no, like, unless you agree to my terms, nothing is going to happen with your derivative work,

David Nimmer 1:12:58

Okay, but if it's an old work, then, then that old work could expire in the next 10 years, and this, and the question is, if the person who created the unauthorized derivative work has rights in it that could last for another 60 years in those derivative elements.

Robert Brauneis 1:13:14

I mean, I'm not as worried about that as some people in this room might be in the derivative elements. I'm, you know, that was a new that was new creativity that happened much later. It's kind of like saying, you know, is, should we still have copyright in a modern work that's based on an old-

Tyler Ochoa 1:13:41

West Side Story?

Robert Brauneis 1:13:43

Yeah, should we still have copyright in its West Side Story, because Romeo and Juliet is no longer under copyright. Yes, of course we should. I mean, obviously there's going to be debates around the edges of when a tiny bit of creativity was added. Are we, you know, we're worried about that, and that's that's like L. Batlin & Son versus Snyder. Are we worried when somebody just changes a little bit on those Uncle Sam banks, and we could adjust the originality threshold sort of accordingly to say, look, if you just change a little bit, no, but if you invested a lot in in

your derivative work, creativity, then absolutely, I'm not worried that that Romeo and Juliet's no longer in the pot. It's no longer the copyright.

Tyler Ochoa 1:14:29

So in terms of the relationship between contract and copyright, this is an eternal theme. You know, is, is should copyright preempt you know, state law rights in contract, or are we going, is it simply a default provision that can be changed by private ordering? And you know, to me, the most prominent examples are, you know, the use of so called end user license agreements to defeat section 117 rights of owners of computer programs. And to defeat the For Sale Doctrine. You know it, you know it's the same problem as we have with ProCD and and other things.

Molly Van Houweling 1:15:12

Peter, I know you had a question you wanted to put to the group.

Peter DiCola 1:15:14

I do have a question. So I've been looking at these recent proposed bills in the music space. So there's one called the Protect Working Musicians Act that would provide an anti trust exemption that would allow sectoral bargaining with the music streamers. And then there's the more controversial and more expansive Living Wage for Musicians Act, which, in a nutshell, puts a 50% tax on music streaming subscriptions and then creates a fund to pay out. But I don't want to talk about the substance of those bills and whether they're, I don't know that either of them are, you know, on the cusp of passing or anything like that. But the one thing I noticed about the structure and reading the text of just the proposed bills is that they do this interesting thing. They define, they're like, they know, they have these long definition sections where they define the terms in the regulated entities, in terms of their how much revenue they have and they have, you know, they're all very specific to they all, they all sort of scream out, we live in a world with a consolidated market structure. This only applies to the Big Four streamers. It doesn't apply to, you know, to any independent entrance. I just wonder a little bit to me that that raised a question about how we're designing the code, you know, the 76 Act, is this com, this combination of common law type provisions, like 102,103,106, like the 107 the core of it, and then all these regulatory, you know, provisions, as Peter talked about, as we know. So which mode is better for authors like which one, or is there a difference in how they end up being protective? Or, you know, is there, is there something, yeah, or is it, is it neutral, you know, is it just, does it just depend always on how they're how the details work out?

David Nimmer 1:16:53

I mean, I think it just, it just depends, but, but Tyler's comment earlier about, you know, we need not just copyright, but antitrust. I think that this is trying to do antitrust through copyright. And, you know, maybe the judgment is, well, we can't actually get an antitrust thing passed, so we're going to, like, smuggle it into copyright law. Maybe, I mean, maybe, maybe that is, you know, the second best solution that we have to live with.

Tyler Ochoa 1:17:22

I don't know. I mean, it seems to me, the problem is that authors are always going to be diffuse and are going to lack bargaining power compared with a consolidated industry, right? So they're probably going to lose under either system. We've certainly seen a proliferation of regulatory copyright, all of the amend, most of the amendments passed since 1976 tend toward the here's a negotiated agreement rather than sort of a general common law approach. You know, in terms of termination rights or recapture the copyright. You know, authors are better off with a termination, right compared to the Fred Fisher Music situation, but definitely, much worse off compared to the 1909 Act as written had it been interpreted differently in Fred Fisher Music.

David Nimmer 1:18:17

So the problem you, you note Peter first drew my attention when I was writing up the digital performance right and sound recordings act of 1995 because there are various provisions that says these contracts will only be valid if 20% of the contracts provide x and 23% provide y, meaning it facially, cannot even apply to one contract, and in theory, there could be one small record company, as Jessica pointed out, and you know that that's not reality today. So I don't know empirically who's benefited from from it, but, but certainly that's the direction copyright law has gone in.

Molly Van Houweling 1:18:56

Okay, it's perfect timing to open things up to audience questions. I think we have microphones available for you.

Audience 1:19:09

Peter, so earlier you were talking about the poverty of data that we have. So the Bureau of Labor Statistics has data on occupational outlook, and they have data for artists and musicians and writers in various categories, and they have data about earnings. And so I agree with you that that is pretty bare. Although it is longitudinal, it's pretty bare. And I'd be very interested if you had a specific menu in mind of things that you actually want the government to collect, that you think would make research more effective.

Peter DiCola 1:19:43

So thank you so much for that Chris. So first, right, I should have mentioned the problem with the Bureau of Labor Statistics longitudinal data is that because they're doing a nationwide sample they only actually talk to like 20 musicians or something, and then extrapolating out. And so the data is extremely noisy. And so mostly what that data has been used to do is, if you want to measure peak to trough in the variation, you can spin a story one way or the other about employment going up or down based on random variation, about whether they happen to catch 22 or 23 musicians, basically. So it's just really noisy, and so not super useful. But the kind of data I'm talking about are things like, you know, and not to like. So 15 years ago, I did, you know, a study with Future of Music Coalition, my old organization, about, you know, which was a survey of how artists make revenue, and we were right at the beginning of the streaming era, and we really wanted to redo it. And it costs a fair amount of money to do it, though, because you have to get musicians to trust you and fill out this long survey about all the different, you know, there are 42 different sources of revenue that we identified. We're getting them to check

boxes about whether they get those and then we're asking them to roughly put their revenue into buckets, live performance versus sound recordings, versus compositions, versus teaching versus other things. And you know, that just took, takes a lot of time, and it took a lot of outreach effort. And so, you know, we tried, we applied to get funding to redo the study and have that kind of data going forward. And everyone said, yeah, but what's the policy change like? What are you measuring? And so none of the grant funding organizations in, you know, privately or in the government, were willing to fund us again. So I would say that that would have been nice to keep doing that survey every few years, that kind of data about, what are the sources of revenue? Because we're because the relationship here for the market conditions, if you're concerned about, you know, creators welfare, you have to pay attention what's going on in the live music industry that's tied to copyright and the you really need the full picture. And, you know, like, for instance, now we're going to have some remedy of some sort, hopefully in the Live Nation case, and then that will be a change in the industry. And it would be great to know what happened in the wake of that change, and it would have been great to know what was happening before in more detailed ways. So that's what I'm talking about. Just those rough buckets of like, how they're making their money, would be great. And to my knowledge, no subsequent study to ours from 2011 has done it.

Audience 1:21:59

This is a question for Bob, who deserves the blame for the exclusion of inconvenient co-contributors, and I think that it's pretty squarely on the shoulders of judges. Sorry, the statute says the merging their contributions with the intent to merge their contributions into inseparable or interdependent whole. Well, it doesn't say the intent to merge their copyrightable contributions. It doesn't say with the intent to be co-authors, which is the Second Circuit and the Ninth Circuit's statement that you're not a co-author unless you're the mastermind, is completely nonsensical. Sorry. Okay, so I think we can agree that doctrinally, this is wrong, but it does have the merit of getting rid of the inconvenient co-contributors. If you apply the statute as written, then how do you decide who is enough of a co-contributor to be considered a co-author, exclude people who are only giving ideas, but well or maybe not, because, if there's a real collaboration, as Judge Posner suggested, maybe you should be a co-author. So I'm just trying to figure out how you would ascertain who-

Robert Brauneis 1:23:40

I do understand that, you know, from the for the defense of judges, the judges are saying, wait a minute, you're you're writing an abstract rule. We actually have to apply it in real situations. And we have administrability issues, and we also have issues about deciding the share of ownership, right? And we're going to stick with the the every co-author gets an equal share rule because we just don't feel like we're competent to decide otherwise. And then, and that's that is really, that is really Aalmuhammed, right? That's that because we are if we were to grant Jefri Aalmuhammed an equal share that it seems outrageous to us. Therefore we need, we need to find some doctrine under which he will not be deemed to be any co-author of the work. So I, you know, yes, I acknowledge that with unplanned co-authorship, as as Sean put it, that we've got, we've got, we've got sort of gap filling problems. And they do include problems of, is there some threshold under, under which you wouldn't want to you know consider co-authorship at all, just

as we talked about a threshold for derivative work authorship. And then do we, do we stick our fingers into the issue of unequal shares, or do we have some sort of presumption that says, look, if you didn't plan for it, this is how we're going to do it. And you should have planned. I mean, in some ways. I mean Aalmuhammed versus Lee, you know, is all about, and frankly, 16 Casa Duse as well is all about fixing up problems caused by the entities that had good legal, should have had good legal advice, not doing things that they should have done. And another way to look at it is, wow, if Aalmuhammed came out the other way, that would be just a huge shot across the bow of of motion picture companies. You've got to make sure that you've got work made for higher agreements for these people. So, that probably is not a sufficient answer to your question, but it's, it's my attempt at the start of one.

Tyler Ochoa 1:26:06

Okay so, but with Aalmuhammed, you could have said, Okay, everybody in the credits is a co-author, everyone else signed work made for higher agreements. So you get, you know, one, you know one 10,000th share or one 5000th share in 16. Casa Duse versus Merkin to say that the director of the movie isn't a co-author makes no sense, right? You know it's inadvertent to joint authorship. But you know you can't have inadvertent or unblatant joint authorship under the Second Circuits test. That's just crazy.

Molly Van Houweling 1:26:44

We have time for one more.

Audience 1:26:52

it's mainly a question for Peter, but I think it relates to everybody. So I'm channeling Peter, which you brought in. So if we are saying that artists get less, we have several types of concerns. One concern is that it's not fair. I want to put that aside for a second. The other concern is that we might not have creativity in the long run. And the question is, do we see that? I mean, this is going back to the basic principle of the incentive simplify incentive story. So do we see that? Do we do we have the data? Don't we have the data? Is it coming around the corner? I know it takes time. So how do we think all of that affects creativity in the long run?

Peter DiCola 1:27:32

So really briefly, I'd say two things. So one is that I don't put fairness aside. So, you know, I'm like, you know. So, like, you know. So that's part of it, you know, I lost my economics card. You know what I mean, like, I'm, you know, whatever, I've been cast away from the discipline long since, so I'm not at any risk anymore for not being a utilitarian. But anyway, it's still, I still have the diploma, but I'm not sure they may come and seize it from me. As far as, the incentive, no, we don't. I mean, that's, you know, that was the power of, you know, Joel Waldfoegel's work to say, you know, in the streaming era, you know, in the internet music era, we get like, three times the number of releases and things like that. So, no, we're not seeing any shorter releases. But the, you know, the effects that we're worried about are things that might be more subtle, career effects, things like that. And, you know, and we, but no, I don't think that's, I think it's more of a fairness argument. It's more about a divide. It's a it's more you're exactly right, you're perceiving.

It's more of a dividing the pie kind of argument, and then wondering about, you know, could that have long term effects or not? I don't know. Yeah.

Molly Van Houweling 1:28:36

Please join me in thanking our panel. Let me explain what's happening next. It is time for lunch. You are going to grab your lunch over the next 30 minutes, and then at 1:35 we will have our lunchtime or dessert time or coffee time keynote and judge McKeown has gotten lots of teasers for her view from the bench, and that's what we're going to get at 1:35, so please be back and ready for that.

The 1976 Copyright Act: Formalities and Duration

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Role of Formalities

- = 1909 Act §9: Notice required on all copies published in the United States**
 - Failure to affix proper notice placed the work in the public domain
 - Deposit and registration required before lawsuit
 - Manufacturing clause
- = 1976 Act §401: Notice required on all copies published anywhere in the world**
 - Failure to affix proper notice placed the work in the public domain, subject to “cure” in §405
 - Deposit and registration required before lawsuit
 - Manufacturing clause to sunset July 1, 1982

Duration of Copyright

- = 1909 Act §23: 28 years from the date of first publication [or registration], with possible renewal for another 28 years [max 56 years]**
- = 1976 Act §§302-305:**
 - (a) Life of author + 50 years after the author's death**
 - (b) for works made for hire, 75 years from the year of first publication, or 100 years from the year of its creation, whichever expires first.**
 - Pre-1978 copyrights: 28 years + 47 years = 75 years from the date of first publication [or registration]**
 - Transitional works: same as new works, subject to a statutory minimum [end of 2002 or 2027]**
 - All terms run to the end of the calendar year**

From 1976 to 1998

- = Changes made after the 1976 Copyright Act:**
 - Manufacturing clause allowed to expire in 1986
 - Berne Convention Implementation Act: mandatory notice is eliminated; registration no longer required for foreign works (but see §412)
 - Visual Artists Rights Act
 - Automatic renewal for works published 1964-1977
 - NAFTA, TRIPS, URAA (copyright restoration)
 - Copyright Term Extension Act of 1998