

Pam Samuelson Session 01 Mapping Copyright

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SPEAKERS

Felix, James Boyle, Niva Elkin-Koren, Wendy Gordon, Christopher Jon Sprigman, Madhavi Sunder, Participant, Julie Cohen, Erwin Chemerinsky, Molly Shaffer Van Houweling, Kristelia Garcia, Aaron Perzanowski

E

Erwin Chemerinsky 00:10

Good morning. My name is Erwin Chemerinsky. I have the privilege of being the Dean of Berkeley Law. And it's wonderful to welcome all of you here, for a day of celebrating the work of Pam Samuelson. Pam is in the midst of a stunning career. She's a great scholar, a superb teacher, and a wonderful colleague. She's the Richard Sherman Professor of Law and Information Management. It's a joint appointment at the Information School. As you may know, she graduated from the University of Hawaii. She then went to Yale Law School, she practiced at a firm, she made professor at the University of Pittsburgh Law School. And then Berkeley was tremendously fortunate to lure her here in 1996, a member of this faculty ever since. As I'm sure you know, she won a MacArthur Genius Award. She has won so many other awards. And I could go on at great length talking about her scholarship, and what a huge difference it's made. But that will really be the focus of today, as people look at her work, and the impact that it's had on so many fields. I want to say a moment of how much Pam has meant to this law school and to this university. She's very much been integral to making this one of the top law schools in the country and the world, with regard to intellectual property and technology. She was key in creating our Berkeley Center for Law and Technology. Her generosity created the Samuelson Center on Information and Technology and Public Policy. She has been a key person in the law school and every issue that's arisen since 1996. And often when there are people of her eminence in a law school, they're too busy to do the work that's needed to make it run on a daily basis. But Pam has been a leader. She served on key university committees. For so many years she chaired our Merit Review Advisory Committee, which is integral to faculty governance in the law school and on the campus. It's hard to even begin to find the words to thank Pam for all that she has done for Berkeley Law and the University of California Berkeley campus. I would be remiss if I didn't also take a moment to thank her husband, Rob Glushko, for all that he's done to support the law school. He and Pam, after our beloved Dean Herma Hill Kay passed away, created a lecture series in her honor, it was inaugurated by Justice Ruth Bader Ginsburg. Rob has created throughout Glushko Chair in the Samuelson Clinic, which allows us to retain and recruit great faculty members to direct the signature effort. I want very much to thank my colleague, Molly Van Houweling who I'm going to turn the program over to, she was instrumental in putting this together. I want to thank all of those who worked so hard to plan

this conference. I want to thank Jenny Boyden from our event staff who did the hard work in making sure that the logistics, including the food arrived. I want to conclude my remarks with something I started with in saying that Pam is in the midst of a stellar career. And Pam, I so look forward to being your colleague, I hope for years and years to come.

M

Molly Shaffer Van Houweling 03:33

Thank you, Erwin, for that gracious welcome. Thank you all for being here and for making this such a special day in celebration of Pam. Uh oh, I'm getting like verklempt already, we're only six minutes into the program. So Pam is also an extremely gracious hostess. As you all know from years of participating in her conferences, so she would want me to start by elaborating on the thank yous. And in particular to recognize the staff of the Berkeley Center for Law and Technology, including Richard Fisk and Abril Delgado of the event staff who have done, as you know, from the many emails and logistical details, the hard work behind the scenes. We also have Nana and her staff here at the University Club of the stadium who have put together the hospitality for the day and will be trying to keep your drink glasses full for the many toasts that we have on the schedule, which may be the biggest job that we have. We also have Berkeley AV here to capture the events, record them, we will make them available online, eventually for the benefit of folks who could not be here today. Another thing you know about Pam is that she loves to run a conference that runs on time. And we've messed that up already by enjoying each other's company so much around the snacks and the great view so I'll have lots more to say throughout the course of today. But for now I'm going to kick things off with our first panel which is entitled mapping copyright. Now this is because Pam's painstaking work has mapped the intricacies of many doctrines of copyright law from, scÅ"nes Å faire to statutory damages. She has also stepped back to look at the big picture of what's within and what's outside of copyright protection, and why. And this panel is about the map of copyright that this work has drawn for all of us and the pads that work has encouraged other scholars to explore. Our moderator is my friend, Chris Sprigman, who is the Murray and Kathleen Bring Professor of Law at NYU Law and he's going to get things started.

C

Christopher Jon Sprigman 05:34

Molly, I really appreciate this, I'm looking forward to it. This is really our second choice. My first choice for the panel was a panel mansplaining Baker v. Selden to Pam, but that didn't turn out to be too appealing. In any event, I'm not going to cry. But I am going to take a moment before I introduce everybody to read something that I wrote on the plane last night on something called a Kudoboard, which I think is actually a really great tool for all of us to express what Pam has meant to us in our careers. Here's what I wrote, and then I want to explain just very briefly, why. Pam, there's no way I could thank you enough for the difference you've made in our field. And to me personally, in all the ways you've helped to make my academic career more interesting, productive and fun. It's not only the inspiration I've taken from your work, it's all of the relationships, you've helped me form, through conferences, events, projects we've worked on together and with others. And also the way in which you've modeled academic citizenship for all of us, the leading example that I and an entire generation of IP and technical law scholars have, of a vibrant, productive, engaged and public interested scholar is you. With great love and admiration, Chris. So why did I write that? I'll just, we're all going to try to leave room today for comments and discussion. So I'll be incredibly brief, but it goes back to when I was a fellow at Stanford. I had left law practice, I had been a partner at King & Spalding, I'd

done other things, I was at the Justice Department. I was pretty elderly, for someone just getting into academic work. I went to Stanford to write, and I really went there with a purpose. I spent, I said to Larry Lessig, who was there at the time, I said, I'll come in August, and by January, I'll have a draft and you tell me if it's okay, or if it's not. And if it's not, I'll go back to the law firm. And if it's okay, I'll quit. I met Pam, just after I had written a draft of my job talk paper, which was on formalities. And at the moment, when I started writing another draft, it was absolutely embryonic on this paper about intellectual property in the fashion industry. And you know, I was absolutely a newbie, I had no idea what I was doing, and pretty much every way that you could be ignorant, I was. And Pam took a hold of this work and critiqued it, but in a way that I found incredibly helpful. She invited me to her place in St. Alena for a conference with a bunch of people who I'd only read their work, I'd never met them. And they dug into this paper that I was working on it, I had maybe 20 pages at this point. And they showed me all the things that were wrong about it. But more importantly, they showed me that the central insight had some power. I remember thinking at the time, okay, this is an enormous boost. This is a real chance to do something better with this work. I've been told how to do it, you know. I haven't been given directions, but I've been given the framing. I went back and wrote that paper with Kal Raustiala. You know, I felt at the time and I felt ever since that this entire community, into which I was introduced by Pam, really made me as a scholar, and in a sense makes all of us as lawyers, as scholars, as people who work in this field. Pam also, and I will just say this was incredibly important. She was a model for how to behave as an academic, which, you know, I didn't come from academics, I really didn't understand the culture. In terms of patience, and, you know, attention to detail and engaging with other people's work and, you know, forming relationships that lead to partnerships and writing and getting involved in projects that aim to improve policy. All the many things that I watched Pam do, I in my much smaller way tried to emulate and this was the guide to me. The path that I took was really set by her in so many ways. I just want to end by saying, you know, Pam, you and I see others here who, the women of your generation, Rochelle Dreyfuss is here, Wendy Gordon is here, Rebecca's here. I see Jessica, there she is. You guys are irreplaceable. There's a way in which this field kind of took its cues from you that I felt really made the field better. It made the field closer and more sociable and more productive and more engaged, both in our work as academics and in the policy that we care about. So I'm going to start this panel by just introducing the folks that are on it. And then we're going to talk about the ways in which Pam has kind of mapped out the world in which we live. So Niva Elkin-Koren, who unfortunately couldn't be here, is a Professor of Law at Tel Aviv University. I'm going to play a video that she prepared first. And then Julie Cohen is going to pick up from there, the Mark Claster Mamolen Professor of Law & Technology at Georgetown Law. We'll be talking a bit about the public domain. Aaron Perzanowski will follow, the Thomas Lacchia Professor of Law at Michigan, who will be talking a bit about the idea expression and copyright personal property intersection. And then Kristelia Garcia, the Professor of Law at Georgetown will be talking about copyright overclaiming. So thank you all very much for coming. I'm thrilled to be here, and let me get Niva going.

N

Niva Elkin-Koren 11:22

Good morning. I'm really sorry, I couldn't join you in person this time. If there was a single event in my entire academic career that I didn't want to miss, it is this gathering, and the opportunity to honor and celebrate the enormous contribution of Pam to our field. I met Pam shortly after graduating from Stanford and just before I joined the law faculty at the University of Haifa in Israel. Ever since she's been my mentor, a role model, a lively source of wisdom and knowledge, and a true friend. But the reason this event is so meaningful to me, and I guess, for

many of us, is that Pam has been a cornerstone of our community. She managed to bring together lawyers with computer scientists, academics with practitioners, American scholars with those of us abroad, and to turn us all into a thriving field of scholarship. I guess one example which demonstrates her academic leadership, among many is the context of studying copyright contract law interface, one of the most challenging areas of copyright in the digital era. Pam was a pioneer in identifying the mismatch between copyright law and the digital transformation. And actually back in the 80s, while the mainstream scholarship and policymakers called for strengthening copyright protection due to the ease of copying, she argued that copyright protection might actually be inappropriate in the context, for instance of software that is a utilitarian work. In the 90s, she was also among the first to identify and articulate the true significance of the digital transformation that is a fundamental shift from copyright public ordering into contracts as the main mechanism for governing rights and access to copyrighted materials. Drawing on the history of the Stationers' copyright system, she warned that leaving the exploitation of informational works at the sole discretion of right holders may undermine public policy. The digital transformation facilitated new methods for governing the use of copyrighted materials. One is digital locks supplemented by the anti circumvention legislation that protects it against breaking and also contracts and licenses which allow right holders to contractually restrict some of the uses of copyrighted materials, often in contradiction to copyright norms. In a series of articles, Pam warned against the potential chilling effect of such restrictive terms for free speech for instance, when contracts aimed to restrict criticism, research or learning for innovation, interoperability and competition when contracts, seek to limit tinkering, reverse engineering, and testing, or for the public domain when contracts aim to expand protection and beyond what is granted under copyright law to ideas, functionalities, or data. Already in the mid 90s, Porosity sought to protect uncopyrightable digitized listings, telephone listings by using End User License Agreement, Preemption Doctrine Sections 301A to the Copyright Act, intended to prevent this type of restriction as it applies to copyrightable subject matter and original data. And it seeks to provide a right that is equivalent to copyright, that is to restrict reproduction. In court, however, Judge Easterbrook held that contracts only affect their pledges and do not create right in rem. Therefore, his conclusion was that contracts are incapable of establishing rights equivalent to copyright and consequently, contracts could never be preempt. I was a junior faculty at the time when I wrote a paper criticizing Procdia decision for the annual conference of the European Association of Law and Economics, claiming that restrictions in boilerplate licenses which lack privity therefore create de facto rights against the world. Indeed, that is a byproduct of any digital distribution, a contract could become part of the content itself. And nowadays also smart contracts, could even automatically enforce such restrictions. Pam encouraged me to agree to a public debate with Judge Easterbrook, who happened also to be a keynote at that conference. This was not a dialog, Judge Easterbrook said I was wrong. And he is right, since he says what the law is. But Pam didn't forget to also follow up with me and check that I'm okay after this event, which was aversive for junior faculty. But more importantly, in a handful of papers, she proposed to set general principles that would set limits on copyright contractual restrictions. She even convened coalition, the copyright principle project that gathered top copyright experts, which drafted some basic principles to refine copyright preemption doctrine. Put simply this principle proposed that mass market licenses that include restrictions that undermine core objectives of copyright policy should be overridden. These principles for contract preemption are ever more relevant nowadays for addressing some of the current challenges that we are facing, especially in the context of digital platforms, and AI. So one example is the attempt of digital platforms to restrict in their terms of use, the scraping of data for research purposes. Data in digital platforms is essential for researching social science and language and medicine. It also is important for the purpose of studying the implications of digital platforms on society, for creating some basis for oversight. Restrictions on access to

data for research purposes obviously contradicts the purpose of copyright. The contractual terms de facto apply to any users of the platforms by virtue of simply using it. The terms of use take to prevent the reproduction of data which is intentionally kept outside the scope of copyright, in order to ensure that data is free for all to use as an ingredient and further creation. These provisions in terms of use further undermine the right to research, which is reserved under fair use for the purpose of advancing learning, promoting the creation of new knowledge and securing freedom of speech. Another example, for a timely application of preemption principle is a legal dispute concerning the use of copyrighted works to train, machine learning and AI systems. One example is of course the Copilot GitHub example where the class action against DITA claims not only the unlicensed copying of protected software in the course of developing Copilot but also a breach of contract by failing to give attribution to the open source developers. Here too, providing copyright like protection beyond the exclusive rights granted under copyright law, is likely to create a contractual thicket with some contradictory norms that would result in unnecessary barriers to accessing copyrighted materials that would undermine the balance struck by copyright law between incentives to create and access to work. A balance, which is essential for promoting progress. Over the past decades, the majority of courts have rejected the preemption doctrine. But recently, the Second Circuit reaffirmed a preemption claim in the context of a scraping lawsuit of *Genius v. Google*. And the recent decline of the Supreme Court to hear the case might be a sign that preemption claiming mass market licenses might be more successful in the future. Pam is a true academic leader, her innovative approach, her diligent research, and especially her courage to speak out and stand up, not for the views which are popular, but to the things she believed was right all make her a leader. This leadership remains a source of inspiration for paving new paths and offering useful tools for addressing contemporary policy challenges of our times. Thank you Pam, and congratulations.

C

Christopher Jon Sprigman 22:43

We're very sorry that Niva wasn't able to be here. I know she really wanted to be, but I want to move on to Julie Cohen, who will talk a bit about the public domain. You're right. Okay, Julie, please.

J

Julie Cohen 22:59

So it's a privilege, more than I can describe, to participate in this event and I will get to the personal at the end in order not to tear up now. So I'm here to talk about Pam's work on public domains and copyright law and beyond. And the story really begins in 2001. So as I'm sure you all know, the late 1990s had been a very turbulent time for copyright law and scholarship. The digital era had dawned and rightholders had begun a seemingly unstoppable rampage to expand the scope of their legal entitlements, and copyright scholars were casting around for a compelling framework with which to mobilize public opposition. In 2001, a group of leading thinkers on these issues convened a now legendary symposium on the public domain at Duke Law, and the paper presenters came armed with legal scholars' biggest and most formidable weapons, legal history, property theory, law and economics, constitutional argumentation, and they trained those weapons squarely on questions about how to defend the idea of an intellectual space for the public. The audience was engaged in the q&a crackled with vitality. Pam's paper for the symposium, published in 2003 in *Law & Contemporary Problems* was a special kind of revelation. Deceptively simple, it attempted merely to perform two linked

feats of description. The first was just to describe what the public domain contained. Pam approached that project, not by high theory, or clever doctrinal parsing, but rather by focusing on the practical accessibility and use of many different kinds of information in ways bounded but not fully controlled by multiple legal regimes. She constructed a map of the public domain, identifying multiple core areas and contiguous territories. She included territories.

F

Felix 24:53

I made the map.

J

Julie Cohen 24:53

You made the map. And she had help, she had help with that graphic which was awesome, right. Thank you, Bob. She included territories that a doctrinal purist would not have thought to include because their terms were not defined and controlled entirely by law. And she pointed toward practices of public access that were complex, long standing, and culturally and organizationally embedded. In doing this, she posed an urgent question. Although Pam was too polite to say so, no single one of the other fancy theoretical frameworks being brandished around by other contributors could account for all of these examples of messy, creative, and intellectual reality. And the paper thus suggested an absence at the core of intellectual property thinking, the need for a different toolkit through which to make sense of what her map depicted. The second feat of description and Pam's paper concerned emergent constraints on the practical accessibility of the information lying within the public domains, various regions and contiguous territories. This was not just a story about what intellectual property law purported to permit or forbid, it was also a story about a growing cluster of ancillary doctrines and initiatives. These included new legal protections for technological measures, what Peter Jaszi called paracopyright, they included proposed bills to mandate and standardize technological protections, which luckily never passed. And a proposed licensing law called UCITA, who remembers UCITA, right. That would have enabled seamless and easy contractual foreclosure of public access to many of those same territories and contiguous domains. And here again, Pam's paper was revelatory, both for what it did and what it did not do. Recognizing perhaps that you don't bring legal theory to a knife fight, she did not attempt to superimpose any pre existing theoretical framework. She simply mapped. She simply described novel practices of appropriation that seemed to be jumping their traditional bounds and cohering into constellations of unprecedented practical power. So any philosopher of language will tell you that the map and the territory are not the same right maps serve particular purposes, a map can be as it was for Pam, a device for uncovering the rich, diverse set of practices that users of information employ. But a map also can be a tool for exploration, extraction and exploitation. But Pam's map and the ambivalent character of mapping as an intellectual project directly inspired my own work on the public domain in 2006, which noted U.S. specific linkages between the term public domain and historical practices of appropriating and claiming land for private use. Land that was occupied by preexisting people. And in place of that framing, I offered a different frame, the public's domain to describe a more enduring and generative set of entitlements that are linked to creative practice that arise wherever the public is, and that emerge as members of the public stake their claims to a common culture. Pam is unquestionably the inspiration for that work. A different and profoundly impactful paper also inspired by the Duke symposium, and by the ideas of mapping was written by my now colleagues, Anupam Chander and Madhavi Sunder published in 2004 in the California Law

Review, they contrasted romantic accounts of the public domain as a wellspring of common culture with a different kind of map, which superimposed practices of cultural appropriation on the global north south divide. And as Chander and Sunder explained, the construct of a public domain can be powerfully disempowering for those whose cultural and traditional practices become raw material for others extractive efforts and again, without question, Pam's work, I think was the inspiration for that paper. Pam, meanwhile, returned to the idea of the public domain in a later lecture at Duke Law, which was published in 2006, in the Duke Law Journal. And this time, her project involved developing a taxonomy of all the conceptions of the public domain that recent events had inspired. Including her work, right, which inspired so many of them. And she called this work a departure from her earlier piece, because it described multiple public domains rather than a single one. But there was a consistent through line, as before her overriding concern was with constructing a workable framework for understanding, defending and preserving the practical accessibility of information, especially as against those novel practices of appropriation, that we were still all collectively learning how to contest and to counter. So without question, I would have to say that Pam is and remains a public domain romantic, yet the picture that some painted of colonialist rapaciousness enabled by the construct of the public domain and the picture Pam painted of emergence slowly cohering information economy rapaciousness were not entirely desperate. The map is not the territory but maps bring new territories and new conceptions of territoriality into being, unequal distributions of power over culture, knowledge and information matter enormously for the shape of those ongoing projects. Pam's work on public domains reminds us to honor the complexity of the terrain over which that contest occurs and the complexity of the everyday practice through which that contest occurs. It's without question, the foundational and transformative contribution to all of those projects of theory. If defending the public domain involves playing 12 dimensional chess, Pam is the undisputed grand master. Now, no description of Pam's work on this subject would be complete without discussion of her work as an activist and advocate for public domains. But that's on our agenda for later today. So I wanted to close my remarks with a few more personal observations. So I first met Pam when I was on the academic job market in the fall of 1994. And I was invited to give a job talk at Pitt Law where Pam was on the faculty. I had a paper that cited and relied on her work, but also had some criticisms of it. And I was petrified. I needn't have worried, Pam treated my engagement with her work as entirely legitimate and she embraced me, a very, very junior and very inexperienced scholar with the germ of a good idea, with open arms as a future colleague and potential contributor to a shared intellectual project. Unbeknownst to me, she was about to depart, right on a year of visiting away that would end with her appointment to the Berkeley Law Faculty. She backed me for the visiting appointment at Pitt that began my career for the permanent appointment when she made her departure formal. Later for the hire at Georgetown where I am to this day, she read and commented on my drafts, she recommended me for invitations to symposia, she invited me to working groups, including the copyright principles project group that was so generative. And in every respect through years and years of this modeled, the engaged and collegial academic citizenship, and wise and generous and engaged mentorship, that we should all strive to embody, in every conceivable way. I quite literally would not be sitting here today without her. It's impossible in my 12 minutes, or whatever, to do justice, to the way that has been transformative for me. And it's obvious that I'm not far from the only one in this room who can say that. So I just wanted to close by saying thank you to Pam, for the extraordinary gift of your mentorship and the extraordinary privilege that continues to be your friendship. Thank you so much.



Julie, thank you so much. We're going to move to Aaron Perzanowski, who'll be talking about idea expression of the copyright personal property intersection.

A

Aaron Perzanowski 33:19

So I want to start by acknowledging what an honor it is to be here today celebrating Pam's career so far, in her long invaluable contributions to the IP community. Her scholarship, her teaching, her mentorship, and I think most of all her example have made such a lasting impression on me and so many of us here today. When I started considering Pam's work as it relates to this theme of mapping copyright law, my thoughts turn to boundaries, right. You know, maps help us think about the arrangement and configuration of territory, but they also require us to identify and demarcate its outer limits. And over the past five decades, Pam has diligently staked out the boundaries of copyrights, subject matter and scope as they relate to systems, methods, and processes generally and to software specifically. She argued persuasively and early that copyright was an inappropriate fit for software and calling for more tailored forms of protection. And then within the copyright framework, she has consistently argued for limitations on the scope of protection that would limit the utilitarian aspects of software and other works. Once I zeroed in on this theme, I faced the sort of daunting task of preparing for today. So I went back and I reread more than a dozen of Pam's articles, all of which I'd read before. And, you know, the first of those articles was published in 1984, and the most recent was published just a couple of years ago. Obviously, I'm not going to try to detail each of those pieces but I want to touch on some of the recurring themes, and then I want to turn to how Pam's writing really built a foundation for so much of my own work. When Pam critiqued the country report's recommendation to extend copyright to machine readable code in 1984, she argued that protecting the utilitarian aspects of a work or a device was a major departure right from long standing copyright policy. From type faces to wheel covers, copyright had denied protection for works, or aspects of works that serve some useful purpose beyond communicating information. And even in this really early work, Baker V. Selden featured prominently, right as we all know, Baker's the landmark 1880 Supreme Court decision that held that a bookkeeping system was beyond the scope of copyright in the book that explained that system and Baker became really a key text in Pam's work, one that she mined new insights from and applied to new contexts, and one that she defended from fundamentally mistaken interpretations by courts and commentators over the years. And Pam's work did a lot to really sharpen our understanding of both Baker and section 102 B. There are a handful of takeaways that I think I want to note here specifically, but as I said, this is a really big body of work, and I can't do it all justice. But Pam demonstrated that counter to the kind of commonly accepted narrative, Baker did not create the idea expression distinction, right, that predated Baker. This is a move that Jason and I kind of stole when we wrote about *Bobbs-Merrill v. Straus*. I don't think we were quite as successful in correcting the narrative, but we tried. But you know, Baker offered these other key distinction between invention and authorship, and between systems in their explanations. Second, Pam made the case that Baker and its progeny really laid the foundations for the system method and process exclusions in 102 B. And she showed that when Congress included 102 B in the 1976 Act, it was in large part because of concerns about the degree to which copyright might expand to cover the utilitarian aspects of computer programs. Then in subsequent work, Pam used Baker in 102 B to assess the limits of copyright scope in a whole bunch of different contexts, right, from numbering systems and technical standards to board games and yoga poses. But her writing on software interfaces, of course, has been particularly important, right. And that work began in the early 1990s, when she argued that the Lotus spreadsheet interface was a system and therefore unprotectable by copyright law, much like the bookkeeping system in Baker. And there was a sense, I think, after *Lotus v. Borland*

that that central question about copyrights scope was settled when it came to software. And then, of course, that question reemerged decades later in the wake of Oracle's lawsuit against Google, over the command structure of the Java API. And the core question in both of those cases, as Pam, rightly maintained, was the same right, whether a command structure designed to be implemented in a computer program is unprotectable under 102 B. Now the Federal Circuit unfortunately failed to embrace the lessons of Pam's work right, the lessons that she tried to teach them. But I think, you know, to my mind her sort of thorough dismantling of the Federal Circuit's logic there was decisive even if the Supreme Court ultimately decided to duck that particular issue. So I think Pam has consistently and effectively centered 102 B, and Baker as really crucial components of the overall design of the copyright system. Those are certainly lessons that I've internalized. They are lessons that I stress to my students, when we talk about this material. There's one more important boundary that Pam's work has really helped to clarify and that's the line separating copyrights and patent rights. One of the key functions of 102 B is defining and policing that particular boundary, right the reason we exclude systems and methods and processes from copyright right to use the language from Baker is that they are the province of letters patent not of copyright. But Pam's work has really recognized the difficulty of drawing that line clearly when it comes to software since function allottee is so pervasive in that space right? So policing that boundary requires some greater degree of subtlety. And in some of her more recent work, she's distilled a number of strategies kind of scattered throughout the case law for disentangling copyright and patent subject matter. Those pieces like so much of Pam's work and it really showcased her precision and clarity as a writer, no matter how complex the question, Pam's writing never leaves the reader uncertain about her arguments, or how a particular line of thought builds on what has come before. That's something I try to emulate but largely fail to emulate in my own writing. But Pam's work has been really crucial to my own writing, in lots of ways, like a lot of my work, including the articles and books that I wrote with Chris and with Jason. It focuses on the ways in which copyright law enables firms to assert post sale control over the media, and the devices that they personally purport to sell to consumers. Right, and those concerns range from remote deletion of your ebook copy of 1984, to bricking your home printer, to restrictions on repair of John Deere tractors. And in an important sense, right copyright protection is sort of the original sin here that gives rise to this entire complex of concerns when it comes to software. The worry in all of those cases, right is not that copyright holders are exerting control over their expression. It's that they are using the functional utilitarian power of software to control end user behavior in ways that should not under any reasonable interpretation of the law implicate copyright interests at all. The magnitude of those problems really flows from the fact that copyright is everywhere. And copyright is everywhere, because software is everywhere. Computer programs now operate traffic light systems, update inventories, regulate pacemakers, pump gas, and control car engines. That sentence is certainly true today. Pam wrote that sentence 40 years ago, right. Because of the ubiquity of, because of the ubiquity of software, right? Copyright serves a really different set of functions in the world today, ones that I think we ought to regard with really deep skepticism. And as Pam and her co authors wrote in their 1994 manifesto, programs behave right and they regulate and limit how we behave. Programs, control machines, programs are machine is right. You know, as mechanical components get replaced with software that achieves the same functionality in our home appliances, in our vehicles, in our industrial equipment. We open the door to copyright interfering with competition with repair, with innovation, and ultimately with the personal property interests of consumer. So I see a really direct line connecting the work I've done over the last 15 years with the questions that Pam has been tackling throughout her career. If there's one important lesson Pam has taught me about being a panelist, it is to never run long. And so I want to close on a more personal note, I first met Pam as a first year law student here at Berkeley 20 years ago, this year. I had a fascination if not a particularly informed one with

copyright law and I came to Berkeley because I figured it was going to be the best place to engage with a community of people who would help me develop that interest and Pam's reputation and the center and the program that she helped to build here. The clinic she was so instrumental in creating, were all driving forces in that decision. But aside from wanting to be part of that sort of community, I had no real professional goals. I wasn't sure I wanted to be a lawyer. I had never given thought to being a law professor. At the time, I was a kid from rural Appalachia with no professional experience to speak of. For those of you who remember I had a ridiculous haircut and a bunch of tattoos that would have been regrettable to a person capable of regret. I have less hair now but many more regrettable tattoos in the 20 years since. Despite all of that Pam took me seriously. As a student in her courses, as we work together on briefs, as I did my own sort of initial academic writing, she treated me like a person who might have something interesting or useful to contribute. And that was instrumental in seeing myself as a person who might have something to contribute something valuable to say. And I really needed that encouragement, that endorsement from somebody that I respected and admired before. Honestly, before I could even like recognize my own ambition, let alone say it out loud. So beyond you know, all the things that Pam has taught me in the classroom, through her writing, through her mentorship, I'm most grateful to Pam for recognizing and encouraging me and validating me as a person whose ideas might matter. And so to Pam I just, I want to say thank you, I will always be grateful for the role that you've played in my life.

C

Christopher Jon Sprigman 46:27

Aaron, thank you. We'll finish with Kristelia talking a bit about copyright overclaiming.

K

Kristelia Garcia 46:34

Great. Thank you, Chris. Hello, it's very exciting to be here. I want to start by thanking Molly for giving me this wonderful opportunity to celebrate Pam, and all that she means to us and to this community, and to Abril and the rest of the Berkeley Center for Law and Technology staff who I know worked incredibly hard to put this event together. And of course, to Pam for giving us an excuse to all get together and eat cake later. I will plan as the last person on this panel to just spend a few final minutes before we open up discussion to the room to talk about two distinct but interrelated topics. First, the influence of Pam's work on my own when it comes to the proper metes and bounds of copyright protection. And second, the impact of Pam's example and support, and helping me navigate the truly bizarre and foreign world of legal academia. So I'll start with Pam's influence on my work, which is the most obvious in a field I think, in which academics are constantly under pressure to declare copyright to be something good or something bad. I think that Pam's body of work proves that copyright is fine. It's useful even perhaps, so long as it stays in its lane, right. And as with so many things that humans come into contact with, copyright has a tendency to take what's given and then ask for more. And I think that no one's done more than Pam, to slap back that grubby little hand. In what's typical of Pam's scholarship, she doesn't limit herself to any one doctrine or practice, and instead flushes out copyright overreach indiscriminately, calling it out like she sees it wherever she finds it. And boy, does she find it as as I saw when I was going through my literature review prepping for this. So you know truly no sui generis intellectual property right is safe, and that's her term, not mine. Importantly, too, I noticed that Pam is rarely satisfied with writing things just for those of us in this room to read, right, but regularly converts your ideas into plain language for the public to ingest, which I think is incredibly important. And I lost count, I started

to try to go through and see how many of these were written up like for computer science folks, for example, but I stopped in the hundreds of them. So it's safe to say there's a lot. In the world of data and databases, she has carefully circumscribed, protecting socially beneficial information goods from proposals that would, under the guise of market failure, afford overly broad rights for a virtually infinite duration. In the world of standards she has, particularly those standards that are mandated by the government. She's cast doubt on the ability of copyright to really play a meaningful role in incentivizing their production. And so questioning, it's place there. When it comes to conflicts between copyright owners' rights and users' rights. Much of Pam's work has come to the qualified defense of the user, where the argument goes that once the right holder gets their due, they should get no more. Right and here I'm referring specifically to her work on the freedom to tinker and the freedom to repair, both of which rely heavily on these concepts of autonomy and dignity that I'm working, that I'm tinkering with, I should say pun intended, and an enforcement related project that I'm currently working on. And perhaps no one has done more to dispel the misunderstandings, and there have been many, around software and copyright. Folks on this panel have already mentioned so that by the time the decision finally came down in Google v. Oracle, the public was simply brought into a debate that Pam had been spearheading, for decades, maybe maybe longer, for at least a decade. And her commentary following that case, is essential reading for my copyright students who just grappled with Oracle v. Google last week. Her proposals for mitigating overreach are likewise broad and far reaching. It was Pam, for example, who showed us that the merger doctrine is essential in maintaining the free flow of ideas, while keeping copyright out of the realm of patent, a common theme in her work. Her work on limitations and exceptions simultaneously argues in favor of the predictability and reliability that statutory exceptions afford to users, while also applauding the flexibility of other limitations, like fair use, to enable uses that lawmakers could not have foreseen. And I could go on and on here, of course, but the point has been made, right there's, there's a lot. So when I began in my own work to observe what I would call unexpected behaviors in the copyright industry, and I've written about this topic in the context of you know, terrestrial performance rights, content ID shenanigans, interpolation credits, alleged resale royalties and so on. I had in Pam's extensive body of work, a blueprint for how to address copyright over claiming which questions to ask and where and how to draw the lines for that. And that's to say nothing of Pam's broader blueprint for me, namely, how to be as a legal academic. So, you know, to put it mildly, I do not come from a family of academics or lawyers, or much less legal academics. So when I, a decade into practice, I had the incredible fortune to secure a fellowship at GW. I quite literally had no idea what I was doing. And I don't mean that in like the faux humble sense, but the actual literal sense of like, I don't know what I'm doing. But with equal parts, you know, determination and naivete, I had gathered that in order to get a job, I had to write something and publish it, preferably well placed, and then I had to present it preferably convincingly. And the real struggle was just finding out what those things possibly meant. And as everyone in this room is well aware, those things are easier said than done. But I decided early on that the best way to figure out how to write legal scholarship was to read legal scholarship and Pam's work figured prominently in these early cram sessions for me. From her prolific body of work, I really learned that I didn't need to limit myself to any one overly narrow question or problem, but I could go wherever my interests and research led me. And when I did finally manage to scratch out my first draft, Pam was one of the first people I sent it to. And I should note here that there are a couple other people here today Lemley, Jessica, who also received that first terribly terrible draft, and responded with grace and enthusiasm. And for that I'm eternally grateful. Well, Pam also responded and has continued to respond literally to every single draft that I've ever sent to her. And I think unfortunately for her, I've sent her a draft of all of the things I've written. And you know, she's responded and not just with buzz off, which would be completely understandable, but with detailed, substantive comments that have really made my work much stronger. Importantly, as others have

mentioned, here, Pam is really the master of giving honest feedback without malice, right. And this means that it doesn't mean she won't tell you when your ideas are bad or wrong, as some of you like me know. But it does mean that when she says something is good, or has promised that she means it and this is invaluable I think for when you reach that point in a draft, where you look at it with disdain and self doubt. I think those are good times to remember that Pam said you had something worth worth looking at here. And in the last few years, as I've begun to receive the odd email asking me to take a look at a draft, I always aim to respond in a timely fashion, with the same honesty and thoughtfulness that Pam has always shown to me. Then a couple years ago, when I decided to go on the lateral market, I once again found myself faced with a situation for which I had no basis and no insight and no sense of how to navigate it. And it's safe to say I still don't but at least I'm on the other side of it. And once again, I reached out to Pam and I found unwavering willingness to answer many, many questions and to offer sound levelheaded advice and support. Right I don't know how many times she's been wrangled into writing a recommendation letter for me, but I imagine it's many. And I'm hardly the only bewildered colleague in this room, which she has selflessly extended herself for. So finally, I'd like to say I don't think it would be overclaiming to cert that Pam is one of the primary reasons, I think IP is unequivocally the best field for an aspiring female scholar who wants to do good work and be taken seriously, which is, you know, really what all of us want. We know that we can do thorough, meaningful research, and we can be recognized for doing so. And that we can pay it forward in this space because Pam has not only opened the door, but has also enthusiastically invited us to join her. So I want to say thank you to Pam.

C Christopher Jon Sprigman 55:37

So we've achieved what I aim to achieve, which is to leave some space open for all of you. And we'd love to have your comments or questions.

P Participant 56:04

I see Google v. Oracle as being much more indebted quite directly to Pam, and Baker. So I just want to tell you why. I'm sure you know the grounds. I'm just curious, Baker itself says that the arrangement of columns, lines, and words that made up the bookkeeping forum might in fact, have a copyright under some sort of aesthetic graphics theory and be infringed if copied for use in an explanatory work, yet be noninfringing if copied for use as an accounting forum. That's largely the exact distinction, largely and exact don't go in the same sentence, Pam would be ashamed of me. That is largely the distinction I think that was crucial to Breyer. So I'd like to nominate one of the essential preconditions for the good parts of Google v. Oracle. One of the preconditions necessary was the existence of Pam scholarship. Thank you.

C Christopher Jon Sprigman 57:20

There must be others. Joy.

P Participant 57:27

Just because I forgot to bring it up. There is a little known work by Pamela Samuelson. And it's called something like "The Essentials of Good Student Writing " I give it to my students every

called something like "The Essentials of Good Student Writing." I give it to my students every year. And there's a series of tips and literally the first two are have a point and get to the point. And if you haven't read it, I commend it to you. It's genius. "Good Legal Writing: of Orwell and Window Panes." Thank you.

C Christopher Jon Sprigman 58:03

Others. Yes, Mike. Sorry.

P Participant 58:18

Check check. I'll just project, you can hear it. There we go. So there's going to be so many. I mean, Pam is so many people all in one and so many things to praise. I've also benefited extremely from her generosity. I also want to echo Chris's point about Pam being one of us, a generation of senior women who really helped define the the culture of the field, right, and culture matters and culture eats strategy for breakfast we've heard and in fact. And culture endures as long as we continue to keep it vital. And I think that is our job as this sort of next, you know, middle generation to model what we've been taught and pay it forward. And I intend to be part of that. The other piece of Pam's work, all of these big ideas have policy implications. And Pam hasn't just recognized it, she's gotten into the trenches in many of those. And so just one aspect of that work. First of all, all of these aspects of Pam's career, none of it was given, all of it was earned. Right? And that's an important part of Pam's own trajectory is that you know, nothing is given everything has to be earned and you have to work for it. And being reminded about especially Niva's point, I entered the field I went to law school in 1993. I went to a couple of copyrights society meetings, and this was just at the time when copyright was still a field where you could have reasonable disagreements with people, and then go out for a drink. And then the digital era came along, and it got nasty. And so as someone who grew up in Washington and sort of understands how policy debates go, when policy debates get personal, things get really ugly. And I watched close up as that happened, and Pam just had to bear the slings and arrows of completely, you know, libelous and defamatory statements. And so to the point about Castelia, I once wanted to write a piece for you, Pam, I never, I never got around to it. But I would declare Pam to be a copyright loyalist. For all of these people if you don't believe in copyright, you're against all of this ridiculous garbage rhetoric. In fact, Pam and a few of her I think, are loyal. They're loyal to the idea of the progress of science and useful arts and copyright is an instrumental policy tool to accomplish that. And I think that's the through line for everything I see in Pam's work, is she is loyal to the core concept of where copyright belongs in society. And Kristelia liked it. And it needs to be kept in its lane because it's the large concepts that inform copyright law can become overbroad and overclaiming so quickly. And Pam has recognized that danger early on, and has been the sort of chief cop on the beat. And kudos to you, Pam, thank you for everything you've done.

C Christopher Jon Sprigman 1:01:43

We do have more time if others have to add. Madhavi.

M Madhavi Sunder 1:01:49

Madhavi Sunder, I just want to say what an incredible opening for such a special, special member of our community. Pam, the everybody being so close to tears, everybody having this real personal story, everybody on this panel spoke for all of us in this room. And I know that we're going to get this opportunity through the kudosboard to share those stories. But I can't be more proud to be a legal scholar in this community, and the leadership from you for all the, through all these years, and the colleagues that have been mentioned too, really made all of this possible. It's what brought all of us out here today. And so I just wanted to highlight that and say, these personal stories are our personal stories as well. I have not had one encounter with you personally over the 20 some years, where I didn't walk away with like a little kick in my step of like joy and happiness, because you lifted me with your kindness, your warmth, your generosity about my work every single time, including on Monday night, a few nights ago, I got to see you in Cambridge, for dinner. And so there's the warmth and the community that you've created. But the work I also had to speak right now only because Julie, you know, mentioned me and Anupam as a bit of a foil, you know, to the you know, on the, you know, the critique of the public domain. But I am beholden to the public domain, as is Anupam, and your clarity, your courage that many have mentioned today, in and I loved Kristelia too, just killing it with her, you know, like, keep your grubby hands off. Which is more and more important today, because now everybody wants to use copyright for everything under the sun, every social justice cause under the sun, but your clarity and commitment has inspired and continued to inspire. So just wanted to say thank you for the tremendous amount of work and coupled with the warmth and the community that you have built. So thank you so much, Pam.

C

Christopher Jon Sprigman 1:04:01

Thanks a lot Madhavi. I think we have time for one more comment if someone wants to add something. Chris, oh. We could get to it. But I think Brian had his hand up as well. Is that right? Yeah.

P

Participant 1:04:23

So I just wanted to react to Mike labeling Pam a copyright loyalist. I'm not sure I would have chosen that label. But I understand what he means because I had to figure it out for myself. When I was at YouTube, I did more copyright law than anybody else there. But every fall I had to do this thing called Privacy Shield, and I hated it. Right like, and I would look at my colleagues. I'm like, how could they be interested in this body of law, this privacy? It's awful. It's so you know? And then I realized, well, they must think the same thing of me like, well, how could you be interested in copyright as we've heard heard up here. It's, it's got all these problems and you have to keep its grubby hands at bay. Right? But for myself, I answered the question by saying, well what I care about is art, and literature, and music and works of authorship. And what I care about is technological innovation. Right? And so if you care about those things, then it's really important that copyright law and policy be correct as well. And I think, so I just putting that footnote I think on Mike's comment, I think that's where Pam's dedication to this field comes from as well, that those of us who are, who love this crazy area, do it because of those things. Right. Thank you.

C

Christopher Jon Sprigman 1:05:56

Okay, I think that brings us to the end of our time, I really appreciate this. And I think we're

going have a toast.

M Molly Shaffer Van Houweling 1:06:06

we have two toasts next, and the first is going to come to us via a video from another dear friend, Jamie Boyle, the William Neal Reynolds Professor of Law at Duke Law could not be here in person today. But he also wanted to salute Pam and so I'm going to cue up Jamie.

J James Boyle 1:06:35

Hey there, everyone. I wish I could be there toasting in person. Then again, you're all probably drinking coffee, consolations. I'd like to offer three short thank you toasts to Pam. There's so much more, we could talk about Authors Alliance, work with the EFF. The work that she involved in with establishing Glushko clinics. I'm just going to pick three. So first one. It's easy as we all spend, certainly I spend a lot of time lamenting toxic platform in [unknown], lamenting the ability of monopolists and state actors to undermine the open web. It's easy to forget that there was at one point a real question whether we would ever have an open web. I still remember sitting with Pam at first meeting of the Digital Future Coalition as she described all the legislative proposals stacked up like planes over JFK, proposals that collectively would have made the global network we take for granted, inconceivable. Pam certainly wasn't the only person in those fights, she'd be the first person to tell you that. But she was a vital one. So thanks for the internet, Pam. It's a work in progress. But it certainly beats the alternative. Secondly, thanks for your passion about getting software copyright doctrine right. Something you've been doing since the very beginning. I still remember eating dinner with you at a restaurant in Chapel Hill, as you were, how could I put it, fulminating about the recently handed down CFC decision in Google vs. Oracle. A server was waiting politely behind, you couldn't see him, I think. But after a while, he seemed to get interested in discussion. Sounds like a pretty bad case, he said. Pam turned to him and fixed him with her gaze. It's the worst decision in the world, she said. He lurched backwards, but I think he was convinced. Finally, thanks for making our own niche of the professions such a rewarding and humane field to work in, for all of us. Pam, again, wouldn't claim for a moment to be the only one, the intellectual foremothers of IP are now being rightly celebrated. I hope you were toasting them even as I speak. But again, she was a vital part of that, teaching us to take our subject with deep seriousness and ourselves not so seriously at all. For those things, and for many others, cheers to you, Pam. And I am allowed to say that the guy behind me in the mittens agrees. Cheers.

M Molly Shaffer Van Houweling 1:09:17

Well, cheers to Pam and to Jamie. I'm so glad that Jamie mentioned the intellectual foremothers of intellectual property because next I'm so pleased to welcome one of those. Wendy Gordon, the William Fairfield Warren Distinguished Professor at Boston University School of Law. Wendy did you want to come up here? We could bring the mic to you. Okay, she'll be right here.

W Wendy Gordon 1:09:48

Thank you. I never heard foremothers before I like it. Michelle, Becky, Jessica, Pam. You want to adopt it? Virtually every theme in my toast has been elaborated and raised already. I ask your

adopt it: virtually every theme in my toast has been elaborated and raised already. I ask your indulgence for one more personal look at the wonder that is Pam. I thank Molly and the other organizers for inviting me today, for the IP crowd is and has become a second family to me and I think for most of us. To have been absent would have been to miss a crucial family reunion, a crucial family celebration. Thank you. Now one reason for giving a toast is to gather up the many strands of attention, admiration and affection in the room. Like an old phrase, to pluck the heartstrings. The person giving the toast, activating those strands hopes her personal recollections will serve parallel memories in those listening and help the honoree recognize how often and how deeply she has touched others' lives. My first strong memory of Pam is walking with her on a scrubby beach road on Boston's south shore. I think it was 1995. We were discussing how to choose research topics and their scope. She said two things both typical and being generous. First, she said she liked me. She said it casually but I really treasure it. Second, she said she admired the way I had chosen to avoid being distracted by the invitations to do short pieces so that I could concentrate on larger ones. She said she was going to try something similar. I felt very flattered. I also felt instructed. I admired the sheer consciousness she was bringing to bear on her research choices. I was seeing in Pam a kind of deliberateness, deliberation I wished I could increase in my own scholarly agenda. For the truth was less, less that, what I'm trying to say is I didn't choose topics, topics chose me. So I was like an artist reacting to stimuli rather than a conscious planner. And I think I should have blended the board, too. But one's life is one's life. That Pam mentioned she liked me is also part of the story of her. She likes us. She likes her colleagues. She likes her students. She likes the people that she's interacting with. She wants us to know, she likes us as part of a way of building this community. She makes it her business to encourage, to assist, to critique, to be there for us. Younger folks have seen her in action as a mentor, but her peers mentor each other too. We might call it by another name, but that's what it is. Pam's consistent willingness to page through my long drafts astounds me as to the precision of her commentary. Her most consistent suggestions to me is to anchor my observations better in the real world. I'm still trying. Another part of Pam's mentoring is truth telling. Pam has criticized me when I needed it. I hope each of you is remembering your own communications with Pam, your debates or jousts or the exchange of personal data, walking, emailing, debating, writing. Now, giving a toast has many purposes, stirring the pot of memories works to cement the group's ties to each other, to express it's appreciation for the honoree and to take a public stance about what constitutes excellence. I could say Pam should become a standard but I know copyrightability of standards is quite controversial. And there's one other thing about these toasts. The honoree herself may need aid from us to recognize that this, what she's accomplished is real. That is it's hard to appreciate the scope of your own contributions when they're quite as broad as this, and you really are that wise. You really are. Thank you.

M

Molly Shaffer Van Houweling 1:14:58

So I should have known that one of the great theorists of intellectual property would give us a theory of toasts, as well as a beautiful tribute to Pam. So next up is a break which as Pam has taught us is one of the most important and valuable parts of conferences because we have so many memories to share prompted by what we've just heard. So thank you so much, to Chris for moderating, to this first excellent panel, to Jamie and Wendy, for those inspirational toasts. So we will be back here after a generous break at 10:45 for our next panel. Enjoy: