

Pam Samuelson Session 02 Copyright Reform

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SPEAKERS

Jerry Reisman, Mark Gergen, R. Anthony Reese, Bernt Hugenholtz, Molly Shaffer Van Houweling, Ruth Okediji, David Hayes, Jennifer Urban, Jessica Litman, Participant

R Ruth Okediji 00:11

So as we've already started to recognize, and remember, Pam has not been satisfied to merely map copyright, which was the topic of our last panel. And she is maybe sometimes, as Kristelia reminded us, but not always found copyright to be fine. And so Pam has worked tirelessly to reform copyright for the better and maybe even more often to fend off changes that would change copyright for the worse. And her efforts at copyright reform are the topic of our next panel. Our moderator is my Berkeley Law colleague, Jennifer Urban, Clinical Professor of Law and Director of Policy Initiatives at the Samuelson Law, Technology & Public Policy Clinic, and she'll be introducing our next panel. Thanks, Jennifer.

J Jennifer Urban 01:06

You have to turn it on. All right. Thanks, everyone, for coming to honor Pam today. And for everyone who's put so much heart and soul into organizing this wonderful event. My instructions were very strict, which was to introduce my panel by titles and keep the trains running on time. We have however, already been a little bit unruly. So I hope that Molly and Pam will forgive and the room will indulge a little bit of personal celebration of Pam following on others. This wasn't my plan. But in listening to others, I did not think that I could possibly avoid it. As with so many others you've already heard from today, Pam is not just an influence on my career, and myself as a person, but she is part of the construction of my being and my career. As many have said she provided an encouraging voice at times when it wasn't, academia wasn't something that I saw myself as fitting into. I was amazed to hear that Aaron is from Appalachia, I'm from the Ozarks, that already makes this community unusual for having two people from backgrounds like that within it. And that says something about the community. And it says a lot about Pam, and the work she's done to build this community. After I went to law school, I needed to make money. And I was assuming that I would practice in Silicon Valley for a while and eventually I hoped to make my way to public interest work inspired by Pam and others who had seen that as a great need in a time when this area wasn't seen to even have that aspect. I had the great fortune to become a fellow, the first fellow in the Samuelson Law, Technology & Public Policy Clinic, thinking I was going to do public interest work from there.

Never having seen myself as someone who could possibly be a law professor and Pam's example, and her support are absolutely a main reason why my career trajectory changed so dramatically. I'll tell one small story about Pam's support when I was a fellow, so let's say I was 26, 27 years old, had no idea what I was doing. Worked on my very first amicus brief in the Supreme Court in the *Eldred v. Ashcroft* case. For those of you who might remember that, boo, yeah. And I was invited to debate an extremely experienced copyright industry lawyer on a public radio television program. And I met with Pam first, I was terrified. I mean, I was completely petrified. And Pam listened to me be petrified at her for a little while. And then she said, Jennifer, you are an expert. Now let's be clear, I absolutely was not in any way, shape or form. But Pam doesn't say things she doesn't mean, we all know that. And I understood that what she was telling me was that for this particular topic right now, I had immersed myself in it. And I was completely expert enough to do this. I have kept that with me through so many situations in which I was petrified that the answer is to make yourself an expert, and then to own that expertise. And I think that there are many people in this room, many women in this room, people from non traditional backgrounds who have had that gift from Pam. So thank you so much. And although *Eldred* didn't go the way some of us had hoped. Other things have and today, our next panel, we're going to be talking about Pam's, profound influence on copyright reform. And I'm honored and delighted to introduce our panel, Professor Jessica Litman, who is the John F. Nickoll Professor of Law at Michigan Law, and she's going to talk about success stories. To her right is Tony Reese, the Chancellor's Professor of Law at UC Irvine, who's going to talk about the Copyright Principles Project, it's been teased a little bit today. Professor Bernt Hugenholtz, who is Professor Emeritus at the Institution for excuse me, Institute for Information Law at the University of Amsterdam, and I see other eager friends here in the room. And Ruth Okedij, the Jeremiah Smith, Jr, Professor of Law at Harvard Law School, who will be talking about international fora and we will again save some time for audience comments. So with that, I would like to turn it over to Professor Litman.

J

Jessica Litman 06:23

Okay. You've heard and we'll hear more about her important influential articles. The amicus briefs, she drafted the project, she pioneered the organization, she created the clinics, she and Bob funded, all of those achievements have her name associated with them. I want to talk about one approach she took to copyright reform projects that generated some success, but that don't have her name attached to them. And I suspect when I describe the pattern, you'll recognize it in your own interactions with Pam. So as you know, and we'll hear more about this afternoon, when Pam started writing about copyright and patent law, she noticed that lawyers and scholars who thought about and practiced IP law, and the scientists and technologists who practiced innovation didn't really talk to one another. The two tribes spoke in different languages, they operated on the basis of different and often inconsistent premises, assumptions, and norms. And so as you'll hear more about this afternoon, Pam became an ambassador between the legal community and the technology community. And on many occasions over the past several decades, it seemed likely that either a very good change in copyright law was not going to happen, or a very bad change in copyright law was almost certain to happen. And Pam looked at the situation and concluded that if only the people who had the biggest stakes in this situation could sit down in a room with each other and share their impressions of what was going on, that conversation might end up changing what happened next. And so she decided, how do I make this conversation happen? And then she did. And a bunch of times, it had the effect she'd hoped for. And I think of this as Pam's distinctive approach to saving the world without leaving too many fingerprints. So I only have 15 minutes, Molly has let me know she would really prefer if I kept it to 10. So I'm going to tell two stories

about these sorts of conversations. One big conversation and one small one. I know about these two, because I got to be in the room where they happened. But my guess is that all of you will recall similar conversations that Pam created or facilitated over the course of her career. So the first one involves Article 2B of the Uniform Commercial Code. Article 2B was a project to add a new article to the UCC, to set the substantive and procedural terms for contracts and licenses involving both software and information. It was a joint project of the National Conference of Commissioners on State Laws, and the American Law Institute, who share custody of the Uniform Commercial Code. The reporter Ray Nimmer, had been working on the draft since the mid 1980s. And different versions had been considered both by NCCUSL and by the ALI umpteen times. The draft embodied a vision of the good that holds that the most efficient way to distribute anything of value is to establish strong clear, durable property like rights and the things of value and empower the holders of those property like rights to make enforceable bargains on whatever terms and conditions they chose to set. Many people had many objections to the resulting draft. Although I'm told some software publishers thought it was terrific. But Ray held firm to his vision. Successive versions ran roughshod over many of the exceptions and limitations we know and love from copyright law, but included a bunch of reporters notes about how the critics of the draft were simply wrong. In any event, the draft had been considered both by NCCUSL and ALI multiple times and seemed to be making inexorable progress toward adoption. Many people seem to take the view that it was important to get ahead of the coming ecommerce boom, by adopting something now. And even if the draft of Article 2B wasn't perfect, it might be good enough. And Pam concluded that view was only tenable because the copyright lawyers and the patent lawyers and the commercial lawyers and the consumer lawyers hadn't actually sat down and talked with each other about what this draft was going to do. And were making rash assumptions about how all this looked to people from the other tribes. So with Mark Lemley's help, she organized a three day conference and invited people from all sorts of different tribes to present papers, people who supported Article 2B, people who opposed Article 2B at least in its current incarnation, and people who hadn't actually been paying any attention at all to Article 2B, but might have some interesting thoughts to contribute if they did. I got to come because Pam invited Jane Ginsburg to present a paper on how the extant draft would affect authors rights. And Pam thought I might be a good person to comment on Jane's paper. So there was a full day explaining what Article 2B said, a keynote speech by reporter Ray Nimmer, telling us why it was terrific. There was a panel on what Article 2B looked like from the view of copyright lawyers and scholars, another panel looking at it from the point of view of patents and trade secrecy experts. A third panel looking at the article through the eyes of antitrust and competition experts. And on and on. It was a three day conference, it was huge. It generated the two Law Review symposia, one in the California Law Review, one in the Berkeley Technology Law Journal. So the short essay I contributed to the Berkeley Technology Law Journal Symposium, is one of my very favorite publications. No one cites it, no one has read it in the 25 years since I published it. Why would they? It's all about Article 2B of the UCC and Article 2B is not a thing. And that Berkeley conference was a really large reason why it is not. So if you were there, you could feel the sense of the room. At the beginning, any people I think, felt that the extant draft was either almost good enough, or capable of being made almost good enough with few changes. But over the course of the three days that confidence curdled. By the time the conference ended, most of the attendees seemed to feel that Article 2B needed major surgery. So a month later, the text of Article 2B came up for review with the ALI annual meeting. I was not in that room, but I've read the transcript of that discussion. And the short version is the membership of the ALI was deeply divided on a variety of the provisions in the draft. The ALI leadership convened a meeting the following month of an ad hoc committee to figure out what to do and consider next steps. And ultimately, the ALI announced it was withdrawing its support of the project. So NCCUSL, in fact continued to work. It changed the name of the code from Article 2B of the UCC

to UCITA. It approved a final draft, it sent it out to state legislatures. Maryland and Virginia enacted it swiftly. No other state did or has. So that's the first story. Second story involves a smaller conversation or two about what was at the time called the Google Library Project. Google announced that project at the Frankfurt Book Fair in December of 2004. Authors and publishers filed copyright infringement suits in October of 2005. And a few weeks after the lawsuit was filed, Pam invited a group of 18 or 20 people to get together for an informal conversation about the Google Library Project. We met in early February, the group included 10 or 12 copyright scholars. I don't have great records, because this is when we arrange things by telephone and mail rather than emails so they're not in an archive. But my recollection is there were 10 or 12 copyright scholars from widely dispersed points on the copyright political spectrum, ranging from scholars who supported a broad construction of fair use in most instances, to scholars inclined to agree that the Google Library Project was Napster for books. It also included four or five Google employees, we had a few lawyers and a few engineers. So for the first hour or so the people from Google explained to us, non people from Google, the copyright scholars in the room, what they were doing, how they were doing it, why they were doing it that way. And like several of the other copyright scholars, I had unthinkingly sort of assimilated scanning and indexing to what I thought of as the closest analogy, which was probably photocopying, maybe with a little CD ripping mixed in. So the description of what was really going on, helped me at least get my mind out of the familiar grooves and think of questions that diverged from questions that might have been relevant to a fair use analysis of a project that involves photocopying. In any event, we all asked a bunch of questions, and then the folks from Google went away. And we had an hour or 90 minute discussion of how to think about whether and under what conditions the project came within the fair use privilege. We certainly didn't agree with each other. But I was surprised at how many of my colleagues were inclined, at least provisionally, to see the project as within the scope of the fair use privilege. And after we talked, we got back together with the Google lawyers, asked some more questions, shared some thoughts, and then we went home. So what did that conversation accomplish? Well, one thing it did is it seeded the world with some scholars, who would be thinking and teaching and writing about whether the Google Library Project ought to be considered fair use. And thanks to the conversation, we had the benefit of more nearly real rather than imagined or analogized facts to analyze. A court wouldn't get a chance to decide the fair use question for several years, but by the time it did, the community of copyright scholars had had a chance to think through the questions and write about some of them and think about them again, without being diverted by analogies to different but more familiar technologies. Before courts got that chance, of course, Google reached a grand settlement with authors and publishers, and that settlement had nothing to do with fair use. I think that was probably the worst thing about it. But there was lots to dislike, it was a privacy nightmare. It paid no attention to the fact that the interest of most of the authors of most of the books was that people should have lots of access to their books. In the long run, it would have worked a massive wealth transfer from publishers to authors. Pam disliked it intensely. She published multiple articles about why it was bad. She filed an objection to the settlement, she held another major conference this time at the I-school. I wasn't at that conference so I can't tell that story. But I think we're going to hear this afternoon from someone who can. But I think most of you in the room can probably recognize the pattern I'm describing, and identify one or more conversations that Pam organized that ended up making a meaningful difference in what happened next. So why would one want to save the world without leaving too many fingerprints? I think one reason here is that as Pam's achievements and influence have grown. She became a controversial figure in some quarters of our field. People who haven't read and don't know her work have attributed views and purposes to her efforts, based on a made up caricature of who she might be, what she believes, what she's trying to do. So some of her

projects are, I think, more likely to work if they aren't widely considered to be efforts by Pam Samuelson. At the same time, we should all appreciate that if they weren't efforts by Pam Samuelson, they would be unlikely to work as well.

J

Jennifer Urban 20:15

Thank you so much, Jessica. Professor Reese, Tony.

R

R. Anthony Reese 20:19

Thank you. So the UCC2B conference was my very first entrance into academic conferences, as still, I think a practicing lawyer at the time about become a fellow. So I have fond memories that Jessica has revived. I want to thank Molly for inviting me and all of the organizers for this event. I'm going to talk about the Copyright Principles Project, which you've heard a little bit about already. The CPP was a group of 20 people working in copyright law, at least half of whom I've spotted in this room, I'm not sure I've seen everybody, so there may be more. But they included 13 academics, four in-house lawyers and three law firm practitioners. We were convened by Pam in 2007. And we met three times a year for the next three years, sometimes bringing in folks from outside to consult with including Marybeth Peters the Register of Copyrights, and judge Margaret McCune from the Ninth Circuit. And the goal was to explore whether it was possible to reach some consensus about how to improve current copyright law and mitigate current copyright laws' problems. Think in that nugget there, you can already see many of the themes that we've been hearing so far about Pam. It produced a 65 page report, which I commend to your reading. And the report proceeded in three parts. So first, the group articulated seven guiding principles that were said should inform how copyright law should balance the interests of the public and the interests of copyright owners. Several sub principles, so seven principles but something like 19 if you really get into detail. Next, the project evaluated how consistent current copyright law was with those principles in nine different areas, that will sound familiar to you, the subject matter, ownership, formalities, duration, rights, limitations, remedies, and perhaps less expectedly from the glyphs I've just given you technology, which again, I think you can see Pam's influence and having that as one of the distinct areas to think about. And having decided that some parts of copyright law, current copyright law were consistent with those principles, and others were not very consistent. The third part of the project was to put forth 25 specific proposals for reform as recommendations. Some of these called for very substantial changes, reinvigorating the copyright registration system, really reinventing, I think, would have been a better phrase, but reinvigorating was what it was called. Refining the exclusive rights of the copyright owner and protecting a right of attribution for authors were some of the more significant proposals. Some of them were much more targeted, including, for example, allowing software to be a commissioned work made for hire when produced by an independent contractor, and substantially simplifying the termination of transfer provisions. So you get a sense of the kind of broad scope and very specific scope of the recommendations. So nearly 15 years later, I think the principles hold up very well. And I also think the mismatch between the principles and the current copyright law also holds up pretty well, which is a reason why, again, I commend you to take a look at it if you're interested. The recommendations were broad ranging in the sense that some of them would require legislative action in order to accomplish. One of those has been enacted. One of the recommendations was that there should be a small claims procedure for copyright owners to vindicate their rights without the expense of federal court litigation. And of course, starting a

year and a half ago, the copyright claims board created by Congress has started hearing those disputes. Some of the recommendations could be accomplished by administrative action without legislation. And here, one half of one of those recommendations has come to pass. There was a recommendation that the Copyright Office should have a Chief Economist and a Chief Technologist. And as of last year, the Copyright Office has hired its first Chief Economist, who I will note is a UCI econ PhD, just as a side note. As far as I can tell, there is not yet a Chief Technologist, so I count that as a half success on that administrative reform. And some of the recommendations could be accomplished through judicial decision. And here, for example, this may surprise you, but the project recommended developing a more coherent and predictable analytical framework for determining copyright infringement, hard to imagine that we need such a thing. The report noted that if the judiciary couldn't reach consensus about this, we could get this immediately if the Supreme Court would take a case and announce a uniform framework. Predicting that in the absence of that happening, the report noted that other institutions such as the American Law Institute might work on refining the tests for infringement. And here I will report that as of May of this year, the ALI membership has approved most of Chapter 7 of the restatement of copyright first, which includes a single uniform articulation of the framework for infringement analysis. Maybe that will lead to judicial decision. But it is, I think, entirely in keeping with the report's view that if the judiciary didn't do this, there would be, might be other ways that it could be done. So two and a half out of 25 may not sound like a huge success, I will note that it is exactly 10% in little over a decade. And I suspect that is probably a larger percentage than most people would have expected at the time, with how many of the recommendations would be adopted. But I want to highlight a few features of this project, aside from the substance that I've just described, that seemed to me characteristic of so much of Pam's work. So, identifying and starting from first principles, obviously, the very kind of core of the project seems to me also at the core of much of what Pam does in her scholarship. The focus on improving the law. And if you look at the principles, there are numerous references to the clarity and sensibility of the rules, right, clear and sensible is the drinking phrase if you're reading Copyright Principles Project. Right, and I think that, again, is a kind of consistent theme with Pam's other words, in terms of the process. I've described Pam putting together a group with an enormous diversity of experience and perspectives. So there were people who were very senior academics and practitioners, we had a Copyright Office general counsel from the 1970s, down to relatively new academics. I was only in my eighth year of law teaching when I got asked to join the project. And I was only the third newest academic out of the 13. So Pam was valuing both people with lots of experience and people starting to make their way and bringing their own perspectives. The diversity included, as I've described, academics and practitioners and in house counsel, some of whom had Copyright Office experience, some of whom had congressional experience. So right, the kind of breadth of not only perspectives, but knowledge and understanding of how various mechanisms worked, and of representatives of a variety of industries and sectors. So there were software lawyers, as you might expect, but there were also entertainment lawyers and the academics included someone who was not just a law professor, but a law librarian who had the interests of libraries in mind. So all of that I think is typical of Pam's work of bringing together people with different experiences and different perspectives. The

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R. Anthony Reese 29:29

prologue to the report describes the deliberations being conducted in the spirit of open discussion and dialogue, and with a desire to avoid the rhetorical excesses and unwillingness to engage in rational discourse with those offering different perspectives, which I can testify is an accurate statement of the way the meetings of the project operated. But which I think again, is

a hallmark of Pam's work that is not necessarily always true of all kinds of work in our field. And as Julie said this morning, all of this was generative of much scholarship by the academics, at least two were members of the project in the same way I think that Jessica has described the Google Books meeting as informing the teaching and scholarship of people who were there. So finally, let me say a couple of personal things about this experience. And what I think for me was characteristic of my interactions with Pam, I was obviously grateful to have the opportunity to work with Pam and all the CPP members, and appreciated her generosity, including young academics such as myself, young at the time. It was also my first opportunity to work on an extended project that was seeking to accommodate multiple perspectives on copyright law from academics and practitioners. And my first chance to do that with, among others, three people who would eventually be my co-reporters on the Restatement of Copyright. So from a personal perspective, this was obviously enormously good preparation for the work I'm doing now as one of the reporters on the Restatement of Copyright. But I offer that merely as a reflection, that my experience I think, is just one of many examples of the way Pam's work has built capacity in the copyright field. Human capital, if you like that phrase, infrastructure, if you like that phrase, but capacity in terms of the people working and knowing one another and having experience in the field. I know that I've been a beneficiary of that in many ways and I'm immensely grateful to Pam for that. I know that so many others in the room have been beneficiaries of that. And I think we all obviously have Pam as individuals to thank for developing that capacity. But even more importantly, we have Pam to thank, as a field and the scholarly community for having developed that capacity, those relationships, those differing perspectives. So thank you, Pam, for all.

J Jennifer Urban 32:38

Thank you so much, Professor Reese. Professor Hugenholtz.

B Bernt Hugenholtz 32:43

Thanks for having a European speak at Pam's Festschrift. Dear Pam. Hello, America. Europe is way ahead of you. And Pam knows this very well. Europe has the GDPR, the DSM, the ODD, the DGA, the DSA, the DMA, and very soon the Data Act and the AI Act as well. The U.S. have, let me think, the DMCA and that's from the last millennium. We have 25 copyright exceptions, including two for texts and data mining. You guys have? Well, fair use. We have kings and queens, princes and popes, presidents, prime ministers, innumerable regulatory authorities, many in the field of the internet. The EU itself has two presidents. And what have you got? Well, two presidents. By the way, Pam actually met our Dutch queen as she visited UC Berkeley last year. And despite her Dutch looks, maxi ma as she's called is actually from Argentina. She's American. Pam knows this too. "Your queen," wrote Pam to me enthusiastically, "is very impressive. Exudes warmth, so definitely not Dutch." Pam's directness could be Dutch. Yes, yes we Europeans love to govern and make new laws and we're happy to regulate anything under the sun. Even things, particularly the things we don't understand, such as AI. And this makes for a very efficient division of labor between us and the U.S. While you develop all the tech and operate the services, we set the rules. And Pam understands this mechanism. She knows that it's in Brussels, not in DC where the rules in our field are being made. And that's why U.S. companies and platforms are spending fortunes on lobbying the European legislature. Pam knows that if you really want to make a difference, as a public interest academic, Europe is the place to be. And she's been to Brussels more often than I have. And I live in the Benelux and is

better connected at the European Commission than most if not all, European academics. Pam's transatlantic interventions are usually aimed at containment, limiting the damage of yet another crazy European initiative, or aimed at preventing European solutions from spreading across the Atlantic or the globe, usually by simply explaining how the digital economy works, how technology works, how U.S. law works in practice. Let me just give you three examples of Pam's role as a transatlantic influencer. In a famous 1997 article that Pam co-authored with Jerry Reisman, who's not here unfortunately, Pam argued that the newly adopted sui generis database, right, and the U.S. bill that was inspired by it posed serious threats to science. The U.S. Bill eventually came to nothing. And the database right was contained to Europe. We still have it, we'll have it forever. We can't get rid of it. But you don't have it. And neither does the rest of the world. And that's very good. A second example, and a publication in EIPR, the European IP review, co-authored with Tom Vinje, who's here and Bill Cornish who's no longer with us, argued that the idea expression dichotomy, one of Pam's perennial favorites, and we heard that before, rules out functional features from software protection. And this article undoubtedly influenced the outcome of the CJEU's landmark SAS Institute decision of 2012. Third example, in many of Pam's writings and blogs and other publications Pam has defended, vigorously defended the doctrine of safe harbors for online intermediaries, and warned against emerging divergent approaches in Europe. While recent EU law does introduce various obligations and responsibilities, and stricter liability for large platforms, the safe harbor remains the core liability norm of the DSA, even in Europe, and that's another important contribution. In Pam's tireless efforts to contain or educate the EU legislature, Pam has formed long standing relationships with like minded scholars and institutes in Europe and taught her European colleagues, including me, and I'm very thankful for that, a thing or two about copyright, public interest scholarship. In Pam's vision, the metaphors abound in this conference, copyright is like good wine. It is to be enjoyed, but in moderation. And that's a very important insight, particularly for Europeans. Occasionally, Pam does find in Europe something of value worth importing into the U.S. One example here, and that ties into directly what Tony was talking about is the European Copyright Code Project, the Wittem Project that was drafted by a group of European scholars earlier this century and that demonstrated that despite a high degree of politicization of copyright also in Europe, it is actually possible to agree on a basic set of principles and rules on copyright. And this must have inspired the Copyright Principles Project that Tony just spoke on. And perhaps also the ALI Restatement Project that is still ongoing, both of which were initiated by Pam. By the way, Wittem also demonstrates another important thing, it is possible, hello Americans, to have a copyright act that is concise. At the eighth year, the Institute for Information Law in Amsterdam we are proud and grateful, eternally grateful for our long standing relationship with Pam and through her with Berkeley. Pam has been on the faculty of our annual international summer course international copyright summer course, since it started in 2000. And in doing so, has educated literally hundreds of government officials from all over the world, including many from the European Commission, policy advocates and academics. The BCLT and IViR are also jointly organized regular so called transatlantic dialogues to discuss topics of common interest, such as the one on platform liability last year here in Berkeley, and another very successful one on copyright formalities exactly 10 years ago. At IViR, we're especially grateful for Pam's and Bob's inspiration and very generous contribution to establishing the first classical Samuelson clinic in Europe, the Information Law and Policy Lab that was set up in Amsterdam four years ago. My personal relationship with Pam goes back further to 1995, to the Future of Copyright in the Digital Environment conference, that IViR organized at the Royal Academy in Amsterdam. And these were the very early days of the web, as you, as the older crowd here will remember were scared out of their wits about what the information superhighway was about to bring. Disaster. This is where I first met Pam. And interestingly, this was also the first time Pam met Bruce Lehman of the USPTO the the fearful tsar of IP lawmaking in the U.S., and at the WTO, the world. There's a weird picture on

the web, which you can find if you Google well, of a young Pam together with Bruce Lehmann, and several glasses of wine. And John Perry Barlow, to make it even weirder, is in the picture as well. He's no longer with us either. He died five years ago, separating the happy couple on the picture. That picture was taken there and then. By the way, talking to Bruce Lehman in the 1990s was probably the best way to get motivated as a public interest IP scholar. I can tell you that from my own experience. In 2002, the University of Amsterdam celebrated Pam's academic achievements by making her honorary professor at our university which she still is until this day, and that's a very rare honor. Ahead of you again, Americans. Pam and I also share a liking for sumptuous dinners of which we had many in Amsterdam, and hopefully we'll have many more. We also share Norwegian connection, and, of course, a fondness of wine and cheese. Many years ago, Pam took me for a wine tour around Napa Valley directly after a Berkeley conference. And her research assistant who did not become a famous professor, I believe, was instructed to pack lunches but somehow forgot. And so all we had to live on for a very long afternoon was lots of wine and the cheese I had brought from Amsterdam. Here's another piece of cheese in anticipation of more wine tasting and to symbolize the admiration and friendship I have for you. In Europe receiving a Festschrift means you're on your way out. Or you should get out. I trust that's not what this Festschrift is about today. Pam? Europe needs many more years of you.

J Jennifer Urban 45:32

Thank you so much. Professor Okediji.

R Ruth Okediji 45:39

Thank you so much. I just saw Pam on Monday. And it was such a treat to be with her after so long. And I'm so happy to be here. This is my third time at Berkeley. And each time I have come because of Pam. And I'm really grateful. After my first time here, I said only Pam would bring me to Berkeley. I went to the post office down the street, to mail something, this was the Article 2B conference. It was my first time and there was someone in the post office with a mouse running up and down them. And I freaked out. And I said, oh my God, there's like a mouse on you. I thought it was, you know, they were completely unaware of this, because it was sort of running around their back. And they said, yeah, that's my friend. I am never coming back here. Never had seen it. So many of you have already spoken to the fact that Pam is really a global citizen. And her impact has really transformed much of the world of copyright. When I was 16, I ran across a bunch of papers that I now realize or later realized were WIPO conference documents. And for some reason, I had nothing better to do than to read them. And so I read them and my life drastically changed. I decided that I was going to be an IP person, and specifically a copyright person. And that decision ultimately took me to Harvard Law School, where there were no copyright classes on the curriculum. And I remember wandering around wondering, well, what am I going to do now. And then I was told that there was a professor there who had been on the CONTU Commission and that I might want to talk to him about my interesting copyright. And so these were dark days at Harvard Law School, you did not go see a professor in his office, and certainly not Arthur Miller. And I finally decided that since this is what I wanted to do, and if he was the only one that knew anything about copyright at Harvard, I was going to go see him. And so I declared a day of fasting, I had no sackcloth or ashes, but I did fast. And the next day, I went to see Professor Miller. And it was, as you might imagine, a very frightening encounter. He looked at me, stared me down, and I refused to budge and said,

I do need you to supervise this paper because you know something about copyright. He later told me well, actually, I don't know anything about copyright. And we became very good friends. And we became friends because in his mentorship, he actually directed me to Pam Samuelson's work, and I know that that is a surprise and I wanted to tell you that. As he defended his position on.

P

Participant 49:05

[Inaudible]

R

Ruth Okediji 49:08

There are couple more surprises. As he defended his position on CONTU, he mentioned that there was a professor whose name was Pam Samuelson, who was a vociferous critic of their decision. And in his view, he thought she had it wrong, but some of the points that she had to make were interesting, and he thought it was worthwhile that I read some of her pieces. And this is my introduction to Pam Samuelson. And it was a very bizarre world. Bernt talks about lots of oddities. But imagine being stuck between Arthur Miller on one hand and Pam Samuelson on the other. It's a miracle that I survived. That encounter with Pam's work began to open my eyes to some of the deficits in the international copyright system. I realized that much of what I had learned and much of my writing about copyright, even then, as a student, really lacked both a political economy perspective, but also a sense of what copyright was for. And this is the thing that I had the most intense debates with Professor Miller about, well, what is the point of copyright if the public won't benefit? How do we maintain a sustained body of work in the public domain? What kind of limits should copyright have? And over the year that I work closely with Professor Miller, I must have cited Pam or said something about Pam 100 times. And at some point, he said, I should not have had you read her work. Fast forward a couple of years. Professor Miller thought, despite all of my arguments with him, that it was important for me to get a taste of what the World Intellectual Property Organization was like. And so he decided that I should think about an internship there. This is about the time that negotiations were beginning for the WIPO Copyright Treaty. And I recall, wondering how it was that this treaty was unfolding in WIPO, and I kept hearing Pam Samuelson's name. I had no idea how I was going to meet Pam. I had very few mentors in the field. I knew and had heard that Pam was involved in this effort to really push back at WIPO on the draft that Bruce Lehman, Bernt and I did not rehearse this, that Bruce Lehman was advocating and some of the work that he was trying to do. Many of you will remember that in a Wired article, Pam talked about this experience at WIPO. She taught her, that title of that article was Big Media Beaten Back, her and John Browning. He wrote Africa 1 Hollywood 0. And I can't overestimate the impact of the work at WIPO with respect to the WIPO Copyright Treaty. There were two things that I think are crucial about the work that Pam did at WIPO. First, she led the team. It was her pragmatism, her collaborativeness, her ability to have these weird pictures with people that she did not agree with. But for the goal and the outcome that she was so focused on accomplishing, she pulled everyone together. And I remember sitting by the sidelines, sometimes, of course, this is really early in the early ages of the internet and thinking, one of these days I want to be there. One of these days, I want to be Pam at WIPO. And so I kept notes, of all of the moves and of all of the ways in which Pam strategized and argued and persuaded and cajoled and argued again, that the world would be a better place with a balanced international copyright treaty. It was also the first time that I realized that Pam and Jessica, were effectively doing the world a favor

where Pam's work at WIPO, in many ways, was a living demonstration of the work that Jessica had written about in terms of the creation of copyright law in the United States. And I thought, how can the entire world rest on the shoulders of these two petite women? I remember being overwhelmed by the vision of that. And then I met Wendy and Rochelle, I thought, well, it's four petite women. But she blazed the trail for people like me, for whom access to both the academia, the world of academia and access to these international fora was almost infeasible and also improbable. And in her work on how big media was beaten back at WIPO, Pam taught me that there are always ways to bring people around to your point of view, even if they are unwilling, particularly when you stay the course and have clear principles in mind. And so the work that Pam and Jerry and several others did with respect to the WIPO Copyright Treaty, became a model and has stayed a model till this day. Working with the Africa group to think about the needs of the public in designing a copyright system has become the thing that I do almost every day, and almost every day at WIPO, I am still channeling Pam Samuelson. In something that I call wiring the world if you look at the WIPO Copyright Treaty, Pam wrote in her article, thinking and forcing us to recall what had happened at the WCT negotiations, she emphasized the abiding value and I quote "of a balanced public policy approach to copyright in the digital environment." She talked about the defeat of the high protectionist digital agenda at WIPO, which was a close enough call, she said, that its story deserves to be told in detail. And I remember reading that and realizing that part of the message that Pam was sending to all of us, and certainly to me, was that vigilance in watching and putting guardrails around copyright would always be the task of every generation of copyright scholars, that taking our eyes off that balance was never going to be a luxury that we could rest on. And we see that of course, even today, as we battle, the consequences of AI and copyright law. I want to mention a third area in which Pam has influenced the world and that has been in this global movement with limitations and exceptions. Really, it began with the WIPO Copyright Treaty, and the work on the agreed statements with respect to Article 10 of the Copyright Treaty, which is the article on limitations and exceptions. And in Article 10, and in the agreed statements, the real coup was to be clear that Article 10, which of course incorporated the three step test, would allow contracting parties to carry forward and appropriately extend into the digital environment, limitations and exceptions in their national laws. Pam, I think a few others have mentioned it this morning, her foresight in seeing exactly how particular provisions and proposals were going to impact this balanced view of copyright has been remarkable in making sure that existing language continues to preserve the robustness of the U.S. fair use doctrine. Ultimately, my work in delving and extending Pam's work to the global south has remained unabated. In at least three national copyright laws, I have taken Pam's work and ensured that presidents and national legislatures recognize the importance of that balance. And just earlier this year, the Nigerian president signed into law, what the International Library Association has described as the most robust set of principles in any copyright legislation in the world for libraries. I think it's important to note that when you think about Pam Samuelsson in the global south, it's not Pam, the person, but it's Pam, the person and the integrity and the compassion and the conviction with which she does all that she does with copyright reform. It has the capacity to say that there's a scholar with over 25, 35, 40 years of literature that has consistently borne fruit, about the importance not only of principled copyright, but of a public policy oriented copyright. Justin Hughes earlier this week, referred to Pam as a copyright purist. Someone else this morning referred to her as a copyright loyalist. There will be many adjectives for Pam, but I think one important one is the realization that for Pam, the copyright world is a world about making the lives that we live and the technologies that serve us, serve us better, and serve us well. So thank you, Pam.




 Jeniffer Urban 59:51

Thank you so much. That's so impressive. We have a few minutes for audience comments. We have someone calling in.

 Jerry Reisman 59:47


Hello?

 Ruth Okediji 59:48

Jerry. You are on.

 Jerry Reisman 59:53

Hi, Pam.

 Ruth Okediji 59:58

Everyone saying hi Jerry.

 Jerry Reisman 1:00:00

Hi everybody. Sorry, I couldn't be there. Is Pam on the line?

 Ruth Okediji 1:00:05

Pam is right here.

 Jerry Reisman 1:00:07

Pam, you have done wonderful work. I just hope your retirement will give you even more time to write.

 Ruth Okediji 1:00:15

She's not retiring, but we're celebrating her work.

 Jerry Reisman 1:00:19

Sorry, I couldn't be there today. But I'm always an ardent admirer of you and your work. All the best. Welcome to retirement and the possibilities it creates. Are you okay?

R Ruth Okediji 1:00:36
Yes, she's fine. Yep, we're all here.

J Jerry Reisman 1:00:39
Okay.

R Ruth Okediji 1:00:41
And she's smiling and saying thanks.

J Jerry Reisman 1:00:43
Okay. Give her a big hug. I'm sorry I couldn't be. If I'd known you were going, I might have been able to arrange.

R Ruth Okediji 1:00:52
I will give her a big hug for you. All right.

J Jerry Reisman 1:00:54
Thank you. Thanks for calling.

J Jennifer Urban 1:01:02
That was great.

R Ruth Okediji 1:01:03
He insisted on that, so.

J Jennifer Urban 1:01:04
He was delightful. We have time for maybe one more comment before we do our official toast. Yes. Oh, look, we're on, please.

D

David Hayes 1:01:18

Hello, I'm David Hayes. And I confess first, I'm not an academic. And I accept my status in this room as a second class citizen. I want to give you, Pam has had a profound effect on my life as a practitioner. And I want to give you a little context of why that's so and when I first encountered her. So I'm trained as an electrical engineer, I have two degrees, worked in Silicon Valley as an engineer before I went to law school. And in 1980, thereabouts, there were cases beginning to go through the courts, asking the question whether computer programs and object code form, executable form are copyrightable. Everybody knew source code was, it's human readable, it's a work of authorship. But object code is ones and zeros turns on transistors. And people were saying, well, you know, that seems functional. That seems outside the subject matter of copyright. Well, I thought this was kind of bizarre, because as an engineer, I realized two things. Number one, from a technological point of view, there's no difference between source code and object code. They're the same work of authorship. They're just in different forms. And second, it was apparent to me that the lawyers who were arguing these cases didn't understand the technology. And the engineers who were going to be profoundly affected by them were not in the courtroom, arguing the cases. So I said, gee, we need, we need some engineers to go to law school, and begin to get immersed in these issues. So I took a leave of absence from a PhD program I was in, went out worked as an engineer to see what that was like before making a shift like this. And at the end of it decided I really was going to do this. So I went on to law school. And in 1983, I was on the Harvard Law Review, and I published a student note, I was writing a student note, the title of which was Copyright Protection of Computer Program Object Code. And it went all the way through editing and if you know how law reviews work, and all of you do, we had this procedure where it would go through several rounds, pre-edit, and then a main edit, and then a final edit. And then what we called p-read by the president of the Law Review who had to approve it. I was in final edit for this note. And we had a process called preemption. That if an article came in to the review, on the same subject matter, and it was better than what the student was writing, it would preempt the student's note. So I'm in final edit with my article. And a manuscript comes in on computer software protection. And it had the name of Pamela Samuelson on it. And so the chair of the articles committee came to me and said, I just want to let you know we're holding your note until we review this manuscript, and there's a possibility it might preempt your note. And I said, oh shit. That's literally what I said. Well, what happened was the articles committee went through a detailed review of this article. And Pam, I believe it was one of the first major ones that you wrote on, the uneasy fit of copyright was software and we may need a sui generis form of protection. And you were at the, Pittsburgh then right? University of Pittsburgh. So this article comes in. Well, the articles committee decided no preemption because I was arguing for copyright protection. And she was arguing it doesn't fit very well, we should have something else. And so they said that's not preempted. And she went ahead and published hers in the University of Pittsburgh Law Review right? No? I'm sorry, Duke Law Journal. And my note came out, and a few months later, the Third Circuit and Apple v. Franklin cited my note in the first appellate decision to rule that copyright protected computer programs and object code form. A small victory against Pam Samuelson. So in 1984, I graduated and this is the last context I'll give you. There was a generation of us that emerged from law school, and we called ourselves computer lawyers. And that was the first year, 1984, that the publication called the Computer Lawyer began publishing. And I was soon invited to be on the board of editors of that and have been ever since. It's now called the Computer and Internet Lawyer. Pretty soon I'm sure it will be renamed to the Computer Internet and Artificial Intelligence Lawyer. And so this generation of us came out, and we didn't focus on an area of law exclusively, we focused on an industry, which was computers at the time, software, hardware, later evolved to the internet, artificial intelligence, but we've been focused on these issues as practitioners. Well, Pam and I met very

early on in Silicon Valley when she gave a seminar that I attended. And we talked afterwards and realized we had passions in common. And I just want to tell you that as a practitioner, what a profound effect, my interactions with Pam have had over these decades. We have two passions, we have many passions in common, but two of the most important are, we both love computer law, and the importance of the way the law applies to computer programs and software technologies. And number two, we both believe deeply that all of these issues in the digitization of technology that come up, were decided by Baker v. Selden, 150 years ago. And Pam has sent me many drafts of her articles. And I've commented on a bunch of them, and we've had phone calls about them. And every time at the end, there's some issue in that article that we agree, Baker v. Selden decided this 150 years ago, why are we still talking about this? But from a practitioner's point of view, I've had lots of clients who've come to me and said, can I protect X? Can I protect my API's? Can I protect, you know, structure of commands, all sorts of things that we've struggled with, is that properly within the scope of copyright? And one of the things that my dialogues and reading Pam's paper and so on, have taught me to do, is to tell the client yes, possibly. But you need to think about are you, if you protect your API's, are you ever going to need to connect up to somebody else's software through their API's? And if they say, yeah, maybe, then maybe you don't want to take the position that yours are protected. And if they say no, I say, well, what about if the industry evolves this way, and somebody extends your thing? Are you going to feel the same way? And it at least gets them to think about the kinds of issues that Pam has wrestled with for decades and taught us this uneasy fit of copyright and the grubby little hands that are always trying to extend it out of its lane. So that we practitioners will do what the client ultimately wants, of course, but they have to make an informed decision understanding what the implications of it are, both for their own business, for the industry, and the good of it as a whole, and what this might mean down the road. There are clients who think deeply about that. And for that, Pam, I thank you and for your friendship.

M

Molly Shaffer Van Houweling 1:10:48

Thank you, David. Next, I'm going to welcome my colleague Mark Gergen, the Robert and Joann Burch D.P. Professor of Tax Law and Policy at Berkeley Law to give us yet another perspective on Pam's work and influence. I also want to recognize our friend Jim Block, a professional photographer loyal to Berkeley Law, who is here to capture all of this today. He asks us to please toast with more gusto, and more picturesquely. So when Mark finishes, please do that. And after Mark we'll give you some instructions for what's happening next.

M

Mark Gergen 1:11:29

Good afternoon. Good morning. So this toast concerns an aspect of Pam's career that gets a very brief mention at page 26 of a 27 page resume. An important part of what I'm going to talk about doesn't get mentioned at all. Most of this conference and Pam's scholarship addresses the ownership, production, preservation, dissemination and use of information and knowledge. And of course, it's about how too much of the first or the wrong type of the first hurts the other four. My subject is an aspect of Pam's contributions to the operations of the universe in the law school. And all the academics I hear, damn, committee work, service. Well, one thing I'm hoping to persuade you or at least assert to you if I can't persuade you is Pam's contributions in this area have been instrumentally valuable. Her time, and it involved a great deal of time, was well spent. It also reveals aspects of her personality that we should celebrate with a toast and emulate in our own lives. A University of course, is an institution, a factory, if you will, for the

production, preservation, insemination and use of knowledge. That's what we're here for. And faculty play a very important part in that factory. Some of us think we play the most important part. Think about it. So people in this room on the Berkeley faculty or one of our sister UC schools, know that faculty serve both as labor and management in this factory. In most schools faculty are involved in appointments and tenure decisions. Basically, they decide who, who we to hire to work alongside them. At Berkeley and the UC system more generally, faculty play a larger role through something it's called step system, the merit system, the scale system. What that means is every few years, every faculty member is subjected to a merit review, in which other faculty members, a committee, evaluate their scholarship, their teaching and their service, to determine if they merit promotion up the steps, up the ladder. In the law school, the Dean delegates this task to the Merit Review Advisory Committee. At the campus level, there's something called the Budget Committee that's shorthand for a longer name, they actually have nothing to do with budget. That's just the way we do things at Berkeley and UC, right. That evaluates literally every member of the faculty on this campus every few years, not just when we hire them, not just when we give them tenure, but every few years. Pam has served on the Budget Committee, including serving as Chair of the Budget Committee. She doesn't put this on her resume. It'd be on my resume. It's no small task, just the number of hours that are involved the amount of judgment and effort that's involved. It's a nine person committee, again they're responsible for reviewing every member of this faculty on this campus every few years, and people serve on the committee for three years. Pam has also served on and chaired the [unknown] committee. So this work is instrumentally valuable. I'm going to assert that. I'm going to claim that, I really believe it is. It encourages faculty to excel in scholarship, teaching and service. As Pam repeatedly says, when she talks to her colleagues, as you move up the ladder, the rungs get further apart. The message is keep stretching yourself throughout your career, the rungs, get further apart, keep stretching yourself. I believe this system is one of the reasons the University of California Berkeley, is the greatest public university in the world. Of course, the system only works if faculty buy in, if they accept this culture. Pam bought in. She is rightfully proud of her service on the Budget Committee. If you go to her house in the country, there'll be a picture of her and the other Budget Committee members, I think at the house. Of course, they're having food and wine. But sometimes committee work doesn't have to be painful. By the example, she said she encourages other people to buy in. This involves an aspect of her personality that is in plain view, Pam, I should say to Bob too, does not do things by half measure. If she is going to do something, she is all in. Working with Pam, I've seen other aspects of her personalities, some of which are not so plainly in view. Now one of these aspects has been much commented upon. And I'd say more generally, and just to use these terms that Pam is both an elitist and an egalitarian. She is both an elitist and an egalitarian. And one aspect of being both an elitist and like egalitarian and that other people have commented on is she welcomes new people into our community, she embraces the entry of new people into our community. Now I'll tell you a story about Pam, that perhaps you're aware of, she went to University of Hawaii because her parents didn't think a woman should go to college. And she got a scholarship so she could go to Hawaii. And so she's walked that path. And she encourages other people who are walking that path. There's some other aspects of her personality, though that haven't been commented on. One is she thinks people who excel shouldn't put on airs, they shouldn't get too big for their shoes, they shouldn't get too big for their britches, they shouldn't have a chip on their shoulders. It's odd that the best way of saying this are all old ways of saying. People who excel are doing what is expected of them. That's all. But Pam is also compassionate. So we've had, there's the the hard cases where people aren't excelling. And Pam understands that sometimes people hit a rough patch in life. And that when they do, and this may happen in your life, they grab on to the one thing they can continue to do well,

while letting other things slide just to get through. Sometimes you just got to get through. That's actually directly from Pam's mouth. And she thinks people in that position should be commended as well. So Pam, I toast you, I salute you, and thank you.



Molly Shaffer Van Houweling 1:18:47

Thanks Mark, and good job, everyone. I saw Jim smiling over there as he caught that on film. Okay, next up is another good job. We have 20 minutes until 12:25 to go downstairs where you will find a buffet lunch, get your lunch, take it into the big room where you'll see circular tables and find a seat. Because at 12:25 we will have another toast which will then transition us into our keynote address by Judge Pierre Laval. I know you're looking forward to that, so be in your seat by 12:25 with your food.