

Pam Samuelson Session 05 Copyright and Internet Activism

Tue, Jan 16, 2024 8:31PM 1:08:33

SUMMARY KEYWORDS

pam, copyright, samuelson, law, eff, students, litigator, clinic, litigation, point, standards, case, people, internet, lawyers, berkeley, professor, issues, years, writing

SPEAKERS

Eric von Hippel, Andrew Gass, Cindy Cohn, Jason Schultz, Carl Malamud, Joseph Lorenzo Hall, Participant, Molly Shaffer Van Houweling, Corynne McSherry, Blake Reed

M Molly Shaffer Van Houweling 00:12

It's a nice transition from Brewster's kind thank you, to Pam, for the internet. Pam was in fact one of the first legal scholars to see the transformative potential of the internet and the potential for law to help or hinder its development. Our next panel entitled copyright and internet activism, will explore the many ways in which Pam's work as a scholar, a supporter of clinical education, and advocate has helped shape the digital landscape. Our moderator is Jason Schultz, Professor of Clinical Law at NYU Law and Director of NYU's Technology Law and Policy Clinic. And he will introduce our panelists. Thanks, Jason.

J Jason Schultz 00:56

Thanks, Molly. And thanks to you and all the organizers. It's been an amazing event. We just keep buzzing about it about how many great conversations and how many great moments there have been. So thank you, again, for that. Welcome to the internet and coverage activism panel. It's late in the day, so get active, take a big breath, stretch if you need to stretch, because we're in it for the home stretch, right? So there we go. But we're going to really try and keep the energy going but turn the focus in a particular way to some of the particular work that Pam has inspired and that we've connected to around these kinds of places of intervention. And the kinds of opportunities and seeing them and thinking about them strategically. And so I'm gonna start with a little personal story, which was 25 years ago, which is sort of hard to believe I was a 1L at Berkeley Law. And, you know, it was when I was told the typical, like, keep your head down, get good grades, try and get in Law Review. And that was all fine. But that really wasn't what I was here for, I was here looking for something bigger, something important, something that I really wanted to do that would make a big difference. And so I was in, I was on the Berkeley Technology Law Journal, and I was at a lunch and the editor in chief Laurel Jamtgaard came in and said, well, Professor Pam Samuelson is organizing a conference. This is a conference you've already heard about a little bit about a new proposed article for the Uniform Commercial Code Article 2B which sort of the predecessor to UCITA

which was referenced earlier. And then as a 1L, I didn't know anything about anything. And at this point, I didn't know what the UCC really was, I didn't open my book that was supposed to have it in it. But you know, but Laurel kind of made this case, which is great about how this is going to be really important. This is going to be about like the future of like software and the Internet and, and like what rights we have. And you should go to this meeting. And a number of us went, including some people in this room, Jen Urban, [unknown] and a couple other folks, because we were intrigued. We're like, okay, what is going to be so important about this thing that sounds really boring, but you know, it's part of law, we'll figure it out. And we showed up, and Pam held this meeting, and she start explaining why it was important. And not only was she explaining why it's important, she had a plan. And as we all know, and as we've all talked about, more often than not, in fact, I can't remember last time, you haven't had a plan, Pam. And the plan was simple, in a sense, right, which was to take down the proposed Article 2B and expose it as an industry power grab, that was threatened to override the public interest in a number of different areas. But most, especially copyright, at least for me from what I took away from that. And, you know, she laid out the stakes, and she laid out how we're going to do it, she was recruiting a team to fight the good fight. And needless to say, I was in. Like, that was what I was looking for. That was the thing that I was hoping to find in law school. And all the sudden I'd found it and it was career defining for me in any number of ways, including helping to start the clinic at Berkeley, and then teaching the clinic Berkeley and starting a clinic at NYU and being part of a movement to start clinics, inspired by so much of your work and investment in sort of thinking and recruiting. But it was really life changing. And of course, for Pam, it was just another day at the office. Right? Like that's what she does. I had no idea at the time, but like, now I look back and I'm like, oh, that was like day 23 of the semester or whatever it was because this is how you think and this is how you work. And this is what's beautiful about it. Right? It is a beautiful thing, the way that you figure this stuff out. And then you bring us all along for the ride. It's like the best, you know, thing you could hope for in a school and then in a career. But it wasn't just your passion for justice and your strategic savvy. It's the things that have been mentioned all day long around building community, right. You know, having now taught in law schools for 15 years. Still the number one thing that students, I think are looking for is community. Law school can be very alienating, it can be very hard, it can be very competitive. And yet people are trying to like, where do I fit in, who are my people, right? And offering like law students a chance to find their people, and to be passionate is just so fundamental to them having any kind of meaningful experience, but also surviving. Like just getting through it to a place where they can see themselves, I mean, sort of referencing some of the stuff that especially what Aaron was saying, seeing themselves for what they're truly capable of. And offering that to 1Ls who don't know anything. I didn't know anything. And you're like, here, come on board, let's do it, was just so important. And through that work, and through the many battles that we fought together, over the years, I have met so many amazing, brilliant and generous colleagues and friends. And it has been totally transformative in that sense for me and my whole life. And so I want to thank you for that very much. And I want to use that as a way to introduce the panel, because these are all friends and colleagues who I value dearly. And it's all connected to what began in that, you know, classroom that I think we met in back in the day. So let me introduce the panel. And and then we'll go through and then we'll hopefully involve you all in a wonderful conversation as it concludes. So next to me is Corynne McSherry. Corynne is Legal Director at the Electronic Frontier Foundation, who recently won a huge victory on behalf of another panelist. And his organization, the D.C. Circuit, which I think will have huge ramifications across many of the other litigation moments that we're in. Next to her is Joe Hall. And Joe's career is impossible to summarize. So I'm just going say that he understands the internet and how it works. Like the whole thing. Like I have yet to find a technical aspect of the internet, he can't tell me about in some ways. So if you want, you can ask him after the panel and see if you can find the thing he doesn't know, because I

haven't yet. Next to him is Carl Malamud. Carl hates copyright owners forcing people to pay to read the law. I think you know, that's sort of my takeaway from a lot of what Carl works on, among other things. And then we have Andy Gass, and Andy is one of the foremost copyright litigators in the country. He currently is deeply embroiled in many of the cases around generative AI, but also played and continues to play a key role in a little case you heard about at lunchtime, involving Andy Warhol and a photograph of the musician Prince. So with that, Corynne, do you want to take us?,

 Corynne McSherry 07:56

Yeah, let's go. And just since Jason mentioned the public resource case, I have to also acknowledge my co counsel Andrew Bridges, who's also here. Alright, so like everyone here, I have lots and lots of reasons to appreciate Pam, but one of them is that she basically gave me a job. She gave me the best job. So when I graduated law school in 2002, I was interested primarily in two things. I was interested in IP, and I was interested in civil liberties. But in 2002, it turns out public interest IP litigator, that was not a thing. That was only the most accidental thing you could possibly end up doing. And part of that was because people didn't, and many still don't think that copyright in particular is a civil liberties issue. Just don't think it. And but Pam, has always been an exception to that. She has understood throughout her career that the copyright clause, the intellectual property clause is as important to digital rights as the Fourth Amendment, the First Amendment, or the 14th amendment. And that is 100% true now, but it's been true for a long time. So back in the mid 1990s, a lot of people keep coming back to the mid 1990s. But it was an important moment. It was one of those moments where there was incredibly strong pressure to rewrite copyright. We see it over and over and at the time it was particularly, let's eviscerate fair use completely. We don't need fair use. There's too much of that fair use stuff and require people to license RAM copies and things like that. And Pam was right there in the thick of that conversation as we've been hearing all day and pushing back and being one of the leading voices to say, this is a terrible job, please don't do this. The thing that Pam did that I think is really important is she didn't just do that via the law review articles, which is an important thing to do. She went out and raised a public conversation. She, working with Mitch Kapor and John Perry Barlow and a whole lot of other people, she reached out to technologists, she wrote columns in Wired, she went to international convenings, she helped people who normally wouldn't be part of this conversation, understand that it was happening and that they needed to care about it. And she told a different story, a much more positive story about about copyright than people we're hearing right now, because it was one of those many times of kind of moral panic around copyright. And so she was basically suggesting that the right question about, in particular software, was not how should copyright apply to computer programs? Rather, how should computer programs be regulated at all? That was a different question. And it was a better question, we should have spent more time on that question. And the other thing she did is she took what was a radical position, which is that maybe we should wait and see what legal rules we actually need, before rushing to regulate. And crazy idea, maybe consult with civil society, see what they think, very radical idea at the time. And the trouble with that last point is there weren't a lot of civil society representatives, there weren't groups that could represent the user, the interests of users in these copyright battles, they just didn't really exist. So then Pam did something else, which is she helped to create one, the Electronic Frontier Foundation. So Pam wasn't an original official founder, but she was working with Mitch, working with Barlow, clear influence on them in their thinking, the things that they were worrying about. And then after a few years, she did join the board. And today she's Chair, in her spare time. And through that, she helped ensure that fair use would be part of EFF's DNA. And that in turn, led to an organization that would welcome copyright nerds.

And fair use zealots, some of you will get that reference. In other words, the perfect place for people like me. So I've been at EFF, I've been very fortunate to be there since 2005. Jason hired me. And then he left. And Pam and I have worked together on many, many cases and issues in various capacities. In that time, EFF has grown from a tiny but scrappy group of 20, 20 when I joined, to a still small, but still scrappy team of 100. Lawyers, technologists, activists, artists, who are now respected as experts around the world. I was in the White House earlier this week. That wouldn't happen 20 years ago, we're seen as experts we're not seen as pirates. Now, to be clear, there's nothing wrong with being a pirate, just saying, you can be a little more influential when people don't think of you only in that way. And I will say that while there's many other public interest groups who have joined the fight for digital rights and the fight for internet rights, there's very few groups still on the public interest side who do copyright litigation. But EFF was one of them. And I think Pam's a big part of that, again, it's part of our DNA. It's part of what we do. And Pam has helped guide the growth of the EFF in a bunch of ways as a member of the board, and now as chair. She's helped guide the work that we've done as a friend, as a founder, as a mentor, as a fellow traveler to me and to lots of folks on the legal team. And I want to be clear that like all of EFF's board, Pam doesn't interfere with EFF's decision making around what cases to take or how to litigate them. It's not that kind of micromanaging. But it doesn't mean that we don't seek out her wise counsel, which we do. And that counsel is more important than ever because we are once again in the moment of copyright moral panic. With gen AI. As you all know, we are once again being told that we need to rush to rewrite the rules, even if we don't really understand the potential effects on expression, innovation, technology's still evolving. Nope. Let's regulate now. But this is sort of, it's the new hotness, right, the pressure to rewrite, to reinterpret copyright rules, or whittle away at the traditional contours of copyright is relentless. At least it has been my whole career. And it's so, so very well funded. But thanks to Pam, EFF, as well as an army of lawyers, who were once Pam's students, or EFF interns, or worked in a clinic she helped create, or all three, were here, and were able to fight back in Congress, in the EU, around the world, in the courts. We're here and really, you've grown an army, and that was much needed. So thank you for creating space for copyright nerds to make trouble.

J Joseph Lorenzo Hall 16:00

Hey everybody, I am so pleased to be here with you all celebrating such an important person and such an important mentor to me, Pam, and I may tear up but I'll power through it and it's just how it is. My role here is to give voice to the many technical folks that Pam has inspired over the years. There are some in the room I know Ashkan's over there in the back. If you don't know Ashkan you should introduce yourself, ask him what he does. We can easily compose an entire volume on the subject of Pam's influence on thinkers in more technical disciplines. I myself finally got comfortable with expressing Pam's influence somewhere over the Midwest yesterday on the plane. I think I was her first PhD student, so I think that might count for something. I think it gives me some insight. And Pam as I'll describe, quite literally changed my life with a single lecture. And while that lecture was profound, something really changes inside me each time I get to see her speak or I get to read her work. I think you've seen a little bit of that from everyone here. Pam's mentorship in grad school and since, it set me on a path to create more of what I call polic, technologists, or public interest technologists that is technically and or scientifically trained experts that apply their skills and competencies in the halls of legislatures agencies in the courts. Pam has a very specific set of skills and inclinations here that struck me from the very beginning. While not a technical expert herself, she easily swam in those technical depths. She navigates the interface between law and policy and science and technology, working closely with the megafauna in those technical depths, and surfacing with

just what she needs to get purchase on important problems and bringing people together as we've heard. In time, and not that I was the only one, but I realized we need many, many more scientific technologists and scientists in law and policy. We can't count on people to be expert multidisciplinary navigators, like Pam, we have to adequately embed expertise, so it's easily available to people who need it. And when it comes down to it, none of this technical crap is magic. But we have to breed those policy technologists, scientists, public interest folks that can make the technology itself legible. And beyond this embedding of sort of usable knowledge. Pam is an advocate maybe an implicit, maybe explicit advocate for another really important dynamic, catalyzing adversarial discussions, just like at the core of the adversarial legal model. Adversarial discussions that build technical and scientific elements into debates of law and policy. So with that, as a way of introduction, I'd like to give three testaments and I'm not religious, so hopefully, I'm not making any faux pa there. But I'd like to give three testaments so to speak, to the essence of Pam's influence on a once young technical mind like mine. First the lecture that changed my life. It's a sort of a testament to Pam's speaking ability. Second, the multidisciplinary collaboration of Pam's that most influenced my own grounding in issues of intellectual property. Finally, the paper I share and cite more than any other which you may have heard me say the title of earlier today, demonstrating so clearly, and how well Pam writes and how her writing legacy is perhaps most profound, and in terms of spreading the good virus, so to speak, of communicating complicated concepts simply. So first, the lecture that changed my life. This is a testament to Pam speaking ability and her particular inspirational approach to speaking. This is a story about a talk Pam gave in 2002, or 2003, I cannot remember about something called the Digital Millennium Copyright Act, the DMCA. Public speaking, is of course about communicating through performance. And inspirational speaking is a really important part of good leadership and those of you who are leaders or growing into being leaders, you'll either know that or you'll recognize that. I was an astrophysics grad student in Berkeley in the early 2000s. And I was like, okay at it. I started to realize while I was okay at physics and astrophysics, especially modeling atmospheres and something called Fortran 77. Groans I heard that. I couldn't see myself doing that for the rest of my life. I wanted to help people. But that was when I thought about it. That's what I wanted to do. And that didn't seem to be a core part of most astrophysics careers. There's ways to do that. But it's not built into it. At one point, one of my fellow teaching assistants, this is a teaching assistant in a course of 1500 students in Berkeley for astrophysics, it's bigger now. Talk to me later about how we do that. But this TA Patrick Garvey said, a professor from his department was giving a lecture on the DMCA. And I thought, oh, snap. That's the stuff I read about on my lunch break while doing astrophysics stuff, that's going to be so cool. I don't remember much from that lecture. Other than the thesis, which was the DMCA was inhibiting cryptography research. Said differently, the United States had passed a law that made it illegal to take apart and learn from certain mathematical structures we've written into software and burned into hardware. What the hell, I said to myself. Next, a testament to Pam's glorious multidisciplinary collaborations and their potential to unlock mines and fold brains. This is a story about the law and economics of reverse engineering. A paper Pam wrote with Suzanne Scotchmer, may she rest in peace. Suzanne was really special. And this paper shows how brightly two lights can really shine. And if you've never read it, after this, you must go read it. But first, some quick background. After seeing that mind blowing talk from Pam on the DMCA. I had to have more. I took her cyber law class, I took Molly Van Houweling's introduction to IP class, I took Kathy Abram's election law seminar. And incidentally, Molly's class is where I picked up the nickname of Joe Dongle for being the only student in this like 80 person room who could describe what a dongle was, which is written into the Statute of the DMCA. And at some point, the law school registrar told me I'd actually have to enroll in law school to continue to take law classes. And somewhere in there, I got accepted to the PhD program at the UC Berkeley School of Information advised by Pam none other than herself. There was a blip there where she was on budget committee and oh my god, that

statement about budget committee, you will have no idea what that entails. Unless you've done it. Later, working with Deirdre Mulligan as my grant supervisor and Pam as my PhD advisor, we got something like \$10 million from the NSF among 60 institutions to hack voting machines and I finished my PhD. The work around that work with voting machines involved legal constraints on making black box voting machines transparent and legible, understandable. And that got me more interested in these sort of proverbial [unknown] and levers of regulation. I had a pretty decent grasp on technology and a growing grasp on the law. But the shape and texture of both norms and markets were just totally unfamiliar to me. I needed to know more about those things. And Pam's paper with Suzanne was exactly the medicine I needed. Their paper was a treatise on the importance of inquiry to the underlying process of innovation itself. That is being able to figure things out, the freedom to tinker, that tipped to Ed Felton. And at the time, I was like, whoa, Scotchmer is a professor at Berkeley, I can go take a class from this person. And a few days after reading that paper, I found myself with two other School of Information PhD students, [unknown]. In Suzanne Scotchmer and Bronwyn Hall's economics of innovation course at Berkeley. That first class blew our damn minds. And this may blow your mind. Suzanne got up and said intellectual property was the most perverse way of making things happen from an economics and innovation perspective. I was like this. You know, Ivory Tower is falling right in front of me. There's a lot of waste, a lot of deadweight loss and duplication, bitter fights about rights and freakishly complicated legal environment, from statute to regulation. But giving people rights to fight it out in the market ensures that demand can spot and reward the winners. And it turns out that these structures and intellectual property are a great way to get things to happen that you never knew you wanted. You know if you know what you want, there are grants, contracts, markets, prizes, a whole bunch of stuff. But if you aren't sure what you want, or better yet, if you want to catalyze things you could never dream of, you need something a bit weird. And you can't easily control what you get and you'll get things you don't want and you'll get things you wish didn't exist. And this was a really profound lesson from Suzanne Scotchmer's, clearly as sharp as Pam's but in a different direction. This is a different projection in the plane of brilliance, so to speak, that I was witnessing between those two in this piece of authorship. This is so relevant to the work I do today at the Internet Society defending the internet. Just like this feature, right, of intellectual property. The internet was built to be built upon. The internet was built to be built upon. And that very essence that generativity is today fundamentally under threat around the world. Talk to me later about that. Finally, a testament to Pam's writing and importantly, her writing legacy. This is a story about Pam's paper from 1984 "Of Orwell and Window Panes". Technically, the full title is "Good Legal Writing: of Orwell and Window Panes". But I tend to leave the first part off just because that short paper is perfect for anyone that writes a lot, not just legal writers. The central thesis of that paper is that good writing is transparent to the reader. Good writing results in concepts manifesting in the mind of the reader, as the author intended, without any thorns or unnecessary accoutrements that might stop the reader or impair their understanding. And an accoutrement right there may have impaired some of your understanding. Look it up. This is the most single highly cited paper by me to our staff, my mentees and co-travelers in tech policy. It's helped people write congressional and administration briefing documents over the years, seven figure grant proposals. We wrote a proposal, I told people, you've got to go read this paper, we're going to rewrite this whole thing and we got a lot of money from somebody, and many, many other things. I doubt that that more informal sharing of this paper that I've seen could ever be reflected in formal citation counts. But it really feels qualitatively profound. And you heard Julie mentioned it earlier today. Just to give you an example, I tell people that I help government get tech right and tech get governance right. That's I help people, like help government get tech right and tech get

governance right. And that's a motto of mine that has an essential truth from Pam's 1984 paper, that best communication is often the simplest, and one that leaves a lasting impression in that simple form. Thank you so much, Pam.

J

Jason Schultz 27:18

Thanks, Joe. Go ahead, Carl.

C

Carl Malamud 27:20

So I have a confession to make. I'm not a law professor. And I'm not a lawyer. But I do get a lot of practice. My practice is focused on the public domain, but very specifically works of government on things that are prepared with taxpayer dollars, anything from research to, to financial data from the Securities and Exchange Commission, but especially edicts of government. And those are separate things, right. So in the United States, works of government of the federal government have no copyright, but states can have copyright. In tourism videos, for example, edicts of government are the law and legal materials issued in the name of the state. And why is that important? Well, because in a democracy, we need to know our rights and our obligations and not only be able to read the law, but to speak to law. Right, to communicate the law to other people. Now, you may be surprised to learn that there's a dozen states in the United States that assert copyright over their state laws. And about 15 years ago, I started buying those from companies like Lexus and West and in a few instances from the states themselves. And I posted them, and I put them online for anybody to read and I marked them public domain. And I did what you're supposed to do when you're questioning authority, I sent a letter to the authority saying, "Hi, I've posted your laws. You will be pleased to know that the citizens of Georgia and Mississippi, Idaho, Tennessee, Oregon, and several others, now have easy access to the law." In the case of Georgia, we put the official code of Georgia annotated on a peanut thumb drive and sent it to the Secretary of State and the Attorney General. They were not pleased to know. They sent us takedowns, as did Mississippi's attorney general, state of Idaho, state of Oregon all sent takedowns. Georgia ended up suing us. And they accused us of the practice of terrorism, of posting their laws online. They were actually quoting a book I wrote in 1992 about standards and why they should be more broadly available. And I talked jokingly about standards terrorism, but they put that in their complaint. That was a mistake because every journalist in the United States started running stories, local man, you know, accused of terrorism for posting state laws. And they'd run a picture of me in a suit and tie testifying before Congress. So we brought that to court. They brought us to court and we lost. District court judge just wasn't hearing it. Appeal to the 11th Circuit ACLU came in on our behalf as well as my lawyers. We won in the 11th circuit and the state of Georgia filed for cert. And we did something unusual. So usually when you win in the circuit court and they're going to the Supreme Court, your job as the winner is to say, you know, there's nothing to see here, just move along, they did a great job. You don't need to look at this. But we acquiesced. For cert, we said, sure, you need to hear this. And we won. And we won on the proposition that not only the law of Georgia, but the annotations to the official code of Georgia annotated, were devoid of copyright. They were pre copyright, they were not eligible for copyright that. A state cannot get copyright in the law and legal materials issued in its name. We had a similar case, and I have two of my lawyers here, Corynne McSherry, and Andrew Bridges, in which we were sued for posting public safety codes that have the force of law. Building codes, electrical codes, toy safety codes, playground safety codes, hazardous material transport, and we were sued by

six standards development organizations that said, well, we develop these. They didn't actually develop them, those standards are developed by committees of volunteers, including government workers. Right? But the standards bodies coordinate the process with the intent of having them made the law. And they're made the law and the need to get the exclusive right to sell these things. So we started buying all standards that are incorporated by reference into law. And posting them, we got sued. We lost in the district court, just wasn't hearing. Went to the Court of Appeals, and they went, you know, that can't be right. But the district court failed to look at fair use. Look at this again. And in their opinion, they said, you know, and if for some reason it isn't fair use, we want to see this because that can't be the right results. So the district court did a fair use analysis and said fine, as long as you got the standard that was incorporated by reference exactly right. The version that was incorporated in the law, that's fair use, and it was a strong broad opinion, it said non commercial use of the standards is okay. And so we, the other side appealed, went to the Court of Appeals. Court of Appeals has recently issued a very strong, fair use decision, we are now waiting to see whether the other side is going to apply for cert to the Supreme Court. And I found Judge Leval's analysis of the fair use litigation in the Supreme Court to be extremely instructive. Because if cert is granted, we're going to be talking with the Supreme Court about those issues. Now, you may think having won those fights that we're all over and we're done. We have similar efforts going on in the European Union and in India. So in India, we sued the Bureau of Indian Standards, over 19,000 standards developed at government expense, issued in the Official Gazette. And recently, the Bureau of Indian Standards folded their cards, they made all their standards available for free download. We went to the judge and said that's what we're asking for, we'd like to drop our suit. In the European Union, we sued the European Commission after asking for four toy safety standards, which are issued as harmonized standards. And what that means is every country in Europe must turn them into a national standard within six months, much transpose them into national law. We lost at the first level. We appealed and the European Court of Justice assigned us a constitutional bench, which means we had 15 judges. We had a four hour oral argument with those 15 judges. The other side was not only the European Commission, but all 14 national standards bodies intervene and impleaded themselves as defendants in the case. The Advocate General of the EU has recently issued a very favorable opinion. And we're now waiting on the judgments. But the Advocate General is the adviser to the courts. And she said that, gosh, these are mandatory. They are the law. And they actually don't even deserve copyright because they're the law. So we're hopeful that we win. And you may think that we're done with edicts of government, we can move on to other things. That is not the case. We have litigation going on in a number of other places. And I'm going to get to Pam in just a second because it's all quite relevant to that. So in Tennessee, we asked the state for the Tennessee code, annotated. Official laws of Tennessee we asked the government for it, and their answer was we do not possess the record. And what they meant by that is that Lexus was their provider. And so we are in Tennessee court, we sued both Lexus and then the Attorney General of Tennessee and pleaded themselves, intervened as a defendant We're now waiting on that one. We asked the state of California for the California Code of Regulations, and their answer was the official Office of Administrative Law was we do not possess the record, by which they meant West, Barclays served it up on their behalf. When we asked the Building Standards Commission for an electronic version of the building codes, they said, we possess the record, which everybody agrees is a law, but you can't have it. Because it's copyright, and it belongs to these private parties. And that suit has been held in abeyance waiting the result of our federal litigation. We've had similar issues in Oregon. They've got the building standards, but they won't give them to us because they're private party. We've had similar issues on jury instructions. So the New York State jury instructions are written by a committee in which the first name of every author happens to be honorable. Right? They then turn over the copyright to that to the Unified Court System of New York, which files for copyright and gets it from the Copyright Office. And

you may say, how can that possibly be? They've actually sent us takedown notices on these jury instructions. And their answer is, well, it's not the judges who are the author, you're gonna love this, the Association of the Justices of the Supreme Court of New York, Inc is the official author. And therefore it's not the judges, the judges are doing it on their spare time. It says nonprofit that hasn't, they then voluntarily give it to the state, which files for copyright. So this is a little bit nuts. Now, Pam has been on my board of directors for over a decade, we've worked together for over 15 years on this issue of access to the law. We've got a lot of law firms working for us pro bono. At one point, there were 12 law firms representing us. My pro bono legal bills have been over a million dollars a year for the last 10 years, some years, they're \$3 million. Because we're fighting groups like Lexus, and these very well endowed standards bodies. And the lawyers are amazing. People like Corynne and Andrew, the amount of time they've put into this stuff is amazing. But you know, lawyers that are doing litigation are worried about the issue at hand, right? It's what are your defenses, we got discovery coming in, we got to get these things in. And what Pam does is she doesn't do litigation. She's actually not a member of the bar. I found that out. But she knows the strategic landscape. And so you know, when you're not being sued, and you're thinking, gee, what if I posted all the laws of Georgia? Would that be okay? I think they're the law. Someone like Pam is an amazing sounding board for those types of issues. So she's been invaluable on strategy and counseling on these issues. But here's the thing. There's an army of Pam out there, she has cloned herself. There's a number of derivative works. A huge number. So there are students like Joe who has gone out there and he's at the Internet Society. Andy here is a litigator. One student Joe Mornin, was here at Berkeley, went to EFF as an intern, and then called me up about a year later and said, you know what, I'm at a law firm. Can we do some pro bono work for you? And we've had a whole number of the students out there that doing that. You've heard about all these law professors and whose careers were inspired by Pam, there's a whole bunch of people here in the audience. For example, Leo Bailey, was a student here, he's at the Internet Archive. Brian Carver was an assistant professor here, inspired by Pam, he's at YouTube? Joe is at the Internet Society. And so this Pam way of doing things has kind of spread itself out. But the biggest multiplier effect are the clinics. Clinics are amazing. So you know, you got your lawyers and they're doing your litigation, but then you get to the point you need amicus briefs, right, or you need some preliminary research, and I believe the clinics in the United States are the crown jewel of the legal academy. It's not that way in India, there are really there's a few clinics out there but none doing this law and technology. In Europe. We've got Morrison Forrester representing us pro bono. We've got an Irish litigator, but we don't have any universities. But here when we needed an amicus brief, we called up Jason and he brought the NAACP in to do an amicus brief on our behalf. Vanderbilt, again a Samuelson clinic teed up the whole Tennessee litigation, not a clinic. Oh, well, they were inspired by you though. We give you that much. Colorado, Blake Reed was there, that's definitely a Samuelson clinic. They did an amazing accessibility analysis of the way standards are made of available by the federal government, and they showed that they're just not available to people that are blind or visually impaired. A definitive analysis of that as an amicus brief. Berkeley, has done three or four, I think and most recently, they did a beautiful law process brief on our behalf. Georgetown, again, not a Samsung clinic, but they brought the labor unions in on our behalf. Stanford has done numerous briefs. Harvard, is doing the fight on jury instructions. And we couldn't do this without this clinic system, and the clinic system is really a tribute to what Sam and Bob put together, laid the groundwork for that inspired either the clinics directly, or people like Jason who started here and then like moved on and started their own. And there has been numerous stories like that. So you've heard a lot about how, you know, Pam's like, led the creation of a body of intellectual thought, right, about how we should think about copyright. But she's done much more. She's encouraged a generation of activists. And none of us here today, Corynne, Joe, Jason, Andy could do what we're doing without walking the path that she laid for us. And so

what she did is she taught us how to poke the bear. And now that she's taught us, she was there with us, helping us poke the bear. And to do it in a successful way. Right, not throwing rocks through the window, but practicing classic civil resistance of trying to change the way government does stuff. And so that's had a tremendous impact on what I do and what many people around here do. But the thing I'm most grateful of is Pam's friendship for the last 15 years. I mean, that's the most valuable thing. So thank you.

J

Jason Schultz 41:49

Thanks Carl, Andy?

A

Andrew Gass 41:51

Well, thanks all. I was asked to speak about the relationship between Pam and the topic of litigation. So, as the token representative litigator here, I thought it would be appropriate to begin with a pugnacious rebuttal to three points that I've heard throughout the course of the day. Number one, Professor Hugenholtz suggested earlier that in the United States, the only exception that we have in copyright law is the fair use doctrine. That is false. I will point your attention to a passage that the United States Congress, in its infinite wisdom passed codified in 17 U.S. Code § 1066, which makes it lawful to engage in the performance of a nondramatic musical work by a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair. So don't come to us with your biannual, agricultural or horticultural fair, but I think we can agree that the Europeans are simply wrong. Number two, and this one, I'm going in ascending order of seriousness here, this one, I embark on a bit more trepidatiously. But I've decided that the highest way that I could honor Pam Samuelson, on this occasion of a celebration of her accomplishments, is to very diplomatically and trepidatiously disagree with Judge Leval about his comments on the Warhol Goldsmith litigation. So in 45 seconds or less, Your Honor, you took Justice Kagan to task for, in her dissent, failing to engage with a number of precedents cited by the majority. So far as I could tell, you, yourself failed to acknowledge that in the Google v. Oracle opinion, when Justice Breyer was speaking about what types of conduct would constitute transformative use, he actually used as an example, a Warhol work invoking previous copyrighted content. So to the question, which precedent is more, which of the majority and the dissent was more consistent with past precedent? I vote the dissent. Third, we heard Jerry Reichman earlier make some suggestions that Pam may be retiring. Again, as your resident litigator I object in the strongest possible terms, assumes facts not in evidence, hearsay and certainly unduly prejudicial. We cannot have that. Sorry, Bob. So, moving on to the topic I was asked to speak about. With a litigator's characteristic humility, I will suggest to you that everything we've heard today, Pam's scholarship, Pam's mentorship, the clinics, the conferences, all of it is actually really mostly about litigation. So I'm going to illustrate that point. Using this Julie Cohen admonition to say your point and get to the point. I'm going to illustrate this point using three examples which I'm going to walk through in reverse chronological order. The first one was this morning. When I got here, I rode up in the elevator with Brewster Kahle, whom I'm representing in the ongoing litigation brought by most of the world's record labels against the Internet Archive for having had the temerity to digitize old decaying 78 RPM records. He and I were chatting right there in the hallway. And Tom Rubin came and interrupted us, and Tom is at open AI, and I and Joe Gratz are representing them in the lawsuit contending that GPT is fundamentally illegal. And as I gradually extricated myself from them because I couldn't bill that time, I ran into, I ran into Catherine Stihler, the

CEO of Creative Commons, whom I've represented for many years in disputes over the interpretation of their licenses. So why is that illustrative of the fact that all of this is really actually about litigation? Well, because if you think about how this goes down mechanically, someone's at an organization and has an idea to do something really cool, maybe a little bit crazy, probably legally questionable. The question whether they go ahead and actually do it is not always influenced by a lawyer who has been trained in this school. But wow, if you just look back empirically, at the last 25 years of technological innovation, an awful lot of the huge, huge leaps forward, the ones that got litigated in cases, and the ones that made it just skirt litigation altogether, were developed by folks who were acutely aware of the scholarship and the advocacy and the mode of thinking that Professor Samuelson was a trailblazer for. And we wouldn't have companies that are doing the innovative pathbreaking things that they are doing without Pam, and the network that she has created, and the body of thought that all of the people in this room practice and teach their students with. It's all part of a system by which the folks on the ground can have the courage of their conviction to say, you know what we, someone's gonna say, we're going to get in trouble, we might have to throw a brick through the window to get out of it. But we're going to do it because I think that there's a path forward. And this this technology should not not exist. The second anecdote I want to share is about six months ago, after the the Supreme Court decided a different question than the one that I thought I was litigating in the Warhol case. I thought I was litigating the question about whether the creation of the works was fair use, they decided we were actually litigating the question of whether the 2016 licensing transaction was fair use. I wasn't feeling great. I was feeling pretty down about it. And Pam reached out and said, do you want to have a cup of coffee? And she drove from St. Helena to Healdsburg, where I live, it's like an hour's drive and sat down with me. And to Bobby's point earlier, she just walked me through how to pick yourself up off the mat when you've been knocked down. And what is amazing having sat here today is that I don't know how Pam does that for everyone. It seems impossible. Pam seems impossible. The last anecdote that I want to share, I'm not gonna make it through this one. So this is from 2006. And in the spring of 2006, when I was a 1L, I took Pam's copyright law class with Aaron Perzanowski and Brian Carver, and we think Tara Wheatland as well. Researchers are confirming. And this was like a truly terrifying experience. I can tell you, right, I mean, there's a lot of copyright horsepower in that classroom. So I take her course, and wasn't really planning to continue on doing that. Wasn't frankly, really planned to be a lawyer at all. And on August 17, 2006, so late in that summer, Pam sends me this email. It's titled "Open Source Class." And it says, I am writing to say how pleased I would be if you would enroll in the open source class, I'll be teaching this term with Mitch Kapor. It'll be good to have someone with your experience base in the classroom from my standpoint. I hope you had a good summer, I was very impressed with your performance in my copyright class, and would like to get to know you better. And I want to tell you, that email changed my life. Right? I would not be here today, I would not do what I do if Pam had not gone out of her way to reach out to a student that she barely knew and send that email. And again, it seems impossible that she does this for so many people, because Pam shouldn't scale. But she does. And I just want you to know first how much that means to me. And second, that sort of all of us here, have a commitment to continue on that tradition that you've started, and to continue to ensure that this community thrives going forward.

J

Jason Schultz 51:49

Thanks Andy. So we're going to have a little time for comments or questions if you want. But in the spirit of learning and collaborating across, I wasn't really going to tell the story, but I will now because army has been invoked a couple of times. And there was a point, I believe it was

celebrating 30 years of teaching in law school. We had a celebration at Pam and Bob's house and we put together this thing loosely based on Dumbledore's Army, but we called it Samuelson's Army. And it was kind of a semi joke, but it is kind of real now and has become more so every single year. And so in the spirit of that I looked up the harrypotter.fandom.com definition of Dumbledore's Army. And I just want to read a few things because this I think was very much the ethos that we felt and still do about what what is needed. Which is that Dumbledore's Army, also known as the DA, we call it the SA, at the time was a secret organization that was initiated by Harry Potter, Hermione Granger and Ron Weasley. The goal was, of the organization, was to teach their fellow Hogwarts students proper Defense Against the Dark Arts, inspired by Dumbledore in the story and in many ways by you, Pam. And then I'm going to go and jump to the end here because I kind of like maybe this going to some of the comments you've heard today. Dumbledore's Army played a vital role during the second wizarding war. And so as these battles continue to be pitched and as these issues continue to be litigated and fought over your, your people are here, for you and with you to not only learn from you but to learn from each other, and to continue to give the energy and the mentoring and the guidance and the support and the grace that you bring as much as we can to everyone we work with.

J Jason Schultz 53:50

So yeah, we have a couple of hands up. Cindy, I don't know if there's a mic, but maybe we'll start with you.

C Cindy Cohn 53:59

Thanks. I'm a proud longtime member of the Samuelson Army. I'm Cindy Cohn. I'm the Executive Director of the EFF and Pam graciously serves as the chair of our board, but honestly has been one of the reasons I joined EFF back in the day was a conversation I had with her I believe at the Fillmore during a jam band concert that John Perry Barlow put together to support EFF. Pam was so welcoming and so warm. And I showed up at EFF having done a First Amendment case having to do with encryption technology, and immediately had to take over the appeal of the very first case brought in under Section 1201 of the Digital Millennium Copyright Act, the 2600 case or Universal v. Corley. I knew nothing about copyright, they didn't even teach copyright except through an adjunct at the University of Michigan when I went there. It's so delightful to see all the Michigan professors here now. And so I had a crash course in not just copyright, but Section 1201 taught to me alone by Professor Samuelson. And as a result of that, we were able to mount an appeal. In that case, we did not win, we also had to learn to pick up our hearts off the floor from that. But I just, the graciousness and the support to step in and really help us try to do something that was way beyond you know, what I thought I'd signed up for as heading the EFF. It really, I just wanted to add to the stories about Pam reaching out and supporting people and all the way through my time at EFF. I've been there 23 years now and she's been on the board the whole time. And we have we've written some waves, let's just say together and I so appreciate the leadership and the stalwart support that we've had and so psyched to see all of the other members of the Samuelson Army here today, because we still have a lot to do.

J Jason Schultz 56:06

So, Blake right there. I don't know if there's a mic that can get over there. And then we'll try and come back to you and you, Blake over there. He's standing up.

B

Blake Reed 56:19

Hey, Blake Reed. I've had the pleasure to direct the Samuelson Glushko Technology, Law and Policy Clinic at Colorado Law for the last decade. And because Carl invoked, I think for the first time, we've been talking about Pam a lot, but he invoked Samuelson and I have to say and I bring this up with some trepidation. Vicki Phillips who runs the Glushko Samuelson clinic at American and I often have a debate about the canonical name of the Samuelson clinic. I'll just say for the record at Colorado Law, it's the Samuelson Glushko clinic. And I emphasize that because in clinic we write Samuelson a lot over the course of the semester. We write at the top of the syllabus, and actually a little footnote explaining Samuelson and Glushko, and students will often say what's the Samuelson Glushko thing? And of course, my first response is like, you have to read the footnotes, you're in clinic now. But the second response is that we actually have a chance to talk about the legacy of the public interest internet. That goes back to for many of them before they were, they were born. And we also get a chance to explain how the clinic was meant to give them the kind of opportunity that many of us have talked about today. For me, it was sending an email over to EFF and asking if I could do some help with the 1201 Triennial Review and Fred von Lohmann kindly responded and said, Well, do you have a professor that could help you do that? And I stumbled into Paul Holmes' office and he said, I think we've got a Samuelsson clinic now that could help. And that was it for me. We write at the top of comments and briefs, right, and we think about and we talked about, what it means to be where we are at an agency or at a court, doing work as a Samuelson clinic, that we're there for our clients, but that we're also there on behalf of a fairer and more just internet. And at the end of comments and briefs, we sign them with the name of the clinic. And we want to make sure that our work reflects the rigor and zeal and, and your commitment to sound and vigorous and collegial advocacy. And in the spring of clinic, we reflect back on the experience that we've had. And one of the things I often have my students do is designed like a t-shirt or a logo. You have so many students who have your name emblazoned on the back of their laptop or on their water bottle or on their shirt. And I don't think that's true of a lot of law professors. And then the last thing I wanted to say is the last place that students write the word Samuelson is on their resume, right. And we often reduce on a resume the whole experience of law school to a GPA, right, like a number that conveys all the experience that we've had. But all my students have a paragraph about being a Samuelson student attorney. And they get to say something about what they did in clinic. And, in Catherine's lovely remarks earlier, she pointed to the many students that have found success, and many of them are here in this room as high profile copyright lawyers and policy wonks and the like, but there are also students that go off and do other things. And sometimes they get like a year or two or three years or five years in, and they're in practice, and they decide they're not happy. And I can't tell you how many times over the years, I've had a conversation with an alum who comes back and says, you know, I'm thinking about making a pivot, and I was thinking about what we did in clinic and it gave me an idea, and that's the start of the change in their career. And that's a real mark, I think of the Samuelson brand. And I think that really is a brand. As Jason said, law school can really grind people down and hide what they want to do behind what they feel like they have to do. And being a Samuelson alone means that you've had a seed planted in the back of your head that reminds you that you've got agency, that you were made to do great things, and then you can flourish. And as one of your many students. I just want to add my thanks for everything that you've done for all of us.

J Jason Schultz 1:00:27

We have time for one quick one. So Andrew, if you. Blake if you just pass the mic to Andrew. And Andrew, I know you're a litigator so I'm going to give you two minutes to make your argument. I'm keeping this on time, Pam.

P Participant 1:00:37

May it please the court. Judge Leval referred to the heat of impassioned warfare, in referring to the opinions in the Warhol case, opinions that I think brought discredit upon the authors and the Supreme Court. The heat of impassioned warfare has been my experience in copyright litigation from my first day doing it, in the big cases starting in 1998. It has been vituperative, nasty, personal bear knuckled. And in my years of getting to know Pamela, and talking to her, I wish that the two Supreme Court Justices had been her students. Because, yes, she has always shown passion. Passion for the public interest, passion for clarity, passion for intellectual honesty, passion for fairness, which has been missing in a field that I think has spawned the political situation we're in today. So I want to salute the way she has approached her mentorship, her intellectual leadership, her political leadership on copyright issues, as Pam has been the adult in the room of copyright law, and I want to salute that. Thank you very much.

J Jason Schultz 1:02:19

Thank you very much. And thanks to everyone on the panel. And we're moving to our next toast, I guess, right?

M Molly Shaffer Van Houweling 1:02:24

Exactly. Thank you so much, Jason, and panelists, Pam is impossible, that's going on the t shirt. So I'd like to call to the stage our next next toaster Eric von Hippel, Professor of Technological Innovation at the MIT Sloan School of Management. And I'd also like to call our next panel to come ahead and take the stage as Eric walks up, in order to make a smooth transition so we don't have a break, coming up in between. And with that, I will take my toasting equipment and pass things over to Eric. Eric, thanks so much for being here.

E Eric von Hippel 1:03:06

So I come from a different community than the copyright community. I study innovation and problem solving. And until today, I thought I was Pam's only friend. Apparently, this is not the case. Anyway, she's been wonderful to me as well as to others. I also think the biggest gift to Pam is actually a new problem. So I would like to raise a new problem that is coming from our field that will be relevant to intellectual property generally. Which is that really, now we say copyright or the Copyright Office says it's for humans. It's not going to hold. I mean, now, maybe you've already done this in 2005. Because usually you have, but it was a very busy year for you. But in psychology, or neuro psych, there's this idea of cognitive offloading. Now, cognitive offloading is, in the simplest form, manifested by, for example, a kid keeping count on

his or her fingers as they grow up, right? You're offloading some of the math score keeping to your fingers. Now you can say okay, we move on to other tools that are now like computers that are doing amazing things. It's still us posing the problem, and the computer, like our fingers, makes it easier for us to get to the solution, often in ways that we could not do it with just our minds. Now it's really getting to the point where the problem solver and the problem poser is going to be AI. And so then we really have to rethink what the hell, you know, this restriction of copyright to humans is all about. I've been playing with this a bit and in, for example, GPT, you can pose a problem. Like, I want to find a way to measure the age of objects. And it will come up with things like the standard things that we know, like, carbon-14 dating, and so on, for things that were once organic and stored carbon and so on. And then you say, well, yeah, but okay, I want to cover a different range and I also want to cover it in different ways. And it searches around and comes up with things like, well, you know, when a picture ages, there's a sort of a sequence of microbes that over time, populate the picture. And I assume what they do is consume, you know, microbe A outcompetes B, but consumes whatever its food is, and then dies off, and so on, or whatever it is. Now, you can say that that really is solving a problem that I posed, but it's really solving it without my doing anything more than posing the problem. Now, the next step is that I don't have to pose the problem. Because really, when this AI is searching the internet, for example, it can say, people are concerned with the following kind of problem, self formulate it and solve it. We have the components now that we see, for example, marketing research firms, do things like say, what do people care about with respect to diapers? Oh, there's a lot of complaints about leakage. Oh, let's fix that says Procter & Gamble, r&d or whatever. AI can do all that it can, it can see that there's a lot of complaints about diaper leakage, it can solve the problem. Now. So where does that leave? In my case, I know more about patents, not much, but more about patents than copyrights. But I'd say, you know, how can we continue to say that patents are only for people, or, you know, inventions granted only to people. So I think you're going, this is going to be the core of the universe in five or 10 years. And so, since you have many free days, Pam. I just thought I'd pose the problem to you as my gift and warmest best wishes.