

Pam Samuelson Session 06 Innovation

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SPEAKERS

Rob Merges, James Grimmelman, Erik Stallman, Mary Hewitt, Sharon Sandeen, Rochelle Dreyfuss, Felix, Mark Lemley, Margaret Chon, Rebecca, Claudia Polsky, Michael Geist, Molly Shaffer Van Houweling, Chuck Weisselberg, Participant, Thomas Vinje



Molly Shaffer Van Houweling 00:12

So as we've heard all day, Pam is a scholar of innovation, a champion of innovation and an innovator in how to conduct scholarship and championship and how to conduct a scholarly life that has an impact on the real world. So it is fitting that the topic of our last panel is just that, innovation. And it features leading scholars of patent law as well as intellectual property more generally. And our moderator is our own Rob Merges, the Wilson Sonsini Goodrich & Rosati Professor of Law here at UC Berkeley, he will introduce the rest of the panel and take it away, Rob.



Rob Merges 00:54

All right. So we get a chance to tell a couple of Pam stories. For me, they go back quite a ways. We, I think we may have met before, but the time I really remember getting to know her when I had a job talk at the University of Pittsburgh, when I was on the job market. I think was around the time the 14th amendment was being debated something. And she was so gracious and made it seem like there might be room for me in this IP field, which you know, from early days was relatively balanced in terms of gender balance, which was unusual at that time in the law school world. I think that may be part of the reason it's always been a welcoming field. And a field that tries to give feedback to young scholars. As as helpfully but but nicely as possible. As compared with the other crowd I used to try to present to, the law and economics crowd. The famous story of somebody getting up to make a presentation at Chicago, you know, and Stigler says, Hey, I got a question about your title. Before even opens his mouth. So anyway, they used to have a race who could ask the question the fastest. Anyway, that wasn't how it was an IP, and I'm glad for it. So our position switched around. Now when I was coming to interview at Pitt, I had been an undergrad at Carnegie Mellon up the hill, just seven years before. And seven years after that Pam was coming through here, giving a job talk. When we were fortunate enough to recruit her. I sort of started out on a hot streak in my recruiting career. I think Pam was the first person I really pushed for. And the second was Mark Lemley. So I think my first

two hires, I've probably should have just retired from the, from the recruiting business. What I can tell you about Pam, from my point of view, is as a colleague, so without, without Pam, we don't have a Berkeley Center for Law and Technology, the way it's put together today. Especially memorable to me, besides the scholarship, which is fabulously broad. I mean, everybody here on this panel has affiliations, or connections outside copyright. But everybody's been fundamentally influenced by Pam. And you could say that, certainly for anybody who studies trade secrets, but also for patent people, especially on topics of software patent or, or interoperability and how they relate to patent law. The breadth of the scholarship has been really fantastic. And even though the major thrusts has been copyright, I'm here to tell you the impacts been quite a bit broader across fields. So the other thing that I can say from a colleague perspective is some of the early conferences we had. Were, I think, important convening events. I don't remember conferences with titles like digital content before '97 when Pam came. And I think that the convening power and the community building, that we saw in those years has had a long lasting effect, you know. The clinics and the work in policy. Everybody here has a lot of information about that. What I remember particularly was a couple of pitch battles that got a little bit rough. And I would echo the last speaker saying, Pam brought an adult sensibility, but the old Article 2B wars got pretty nasty. And Pam never, you know, they went low, and she stayed quite, quite above. Likewise, I think in some of the, there were some significant, you know, conflicts around Google Books, with different authors groups, and the surfing that went on there was sort of, you know, Mavericks quality, just to get through that, to keep everybody civil with each other and try to get the right policy outcomes. So I noticed that. The other thing as a colleague is, you know, nobody except a colleague know stuff like this. But Pam is a superstar, triple A, can't do any better colleague when it comes to committee work, right? I'm not in that category myself. In fact, the rumor was, if you want Merges to do any work on a committee put Pam on the same one. Because, because she knows how to how to keep him moving forward, and paying attention. And in the nicest possible way, you know, on schedule. And so I certainly joined with the people who've talked about you know, how can one person do all this, that doesn't seem possible? And so my offering on that would be in as a derivative work or maybe a parody of a well known cartoon? I say, we rename the clinic, Pam Possible. Now the first job that clinic is going to have is defend against the Kim Possible people. But what could be better? What could be more meta than Pam Possible? Having as its first job, A fair use case defending its own name? I think it's a great, it's a great idea. Anyway. I feel like the academic joke: enough about me, what do you think about me? Yeah. All right. What I need to do is now get to my my introductions. We've got the basic A+ superstar lineup. So let me just come down the line. Professor Grimmelmann, James Grimmelmann is here from the, he's the Tessler Family Professor of Digital and Information Law at Cornell. Nobody here who knows innovations policy needs any more than that. The next speaker is Mark Lemley, the William Neukom Professor of Law at Stanford Law School. And my former colleague here and definitely doesn't need any introduction. Professor Dreyfuss, Rochelle Dreyfuss is here from NYU. She's the Pauline Newman Professor of Law at NYU. Emerita, it says, but I still don't really believe that. And down there we have Margaret Chon, Professor Chon from Seattle. She's the Donald and Lynda Horowitz Endowed Chair for the Pursuit of Justice at the Seattle University School of Law. So we're going to have some comments about the impact of Pam's research and activism on the field of innovation. James, I think you're up.

J

James Grimmelmann 07:38

All right. It is wonderful to be here. And I guess we're calling it Pamfest. And as soon as I saw that name, I thought of the Bob Dylan 30th anniversary concert, for the 30th anniversary of his

first record. Held a big concert at Madison Square Garden. And it featured everybody, Stevie Wonder, Tom Petty, Tracy Chapman, George Harrison, Chrissie Hynde. And in his set, Neil Young at one point says, This is for you, Bob, thanks for having Bob fest. And that's what it feels like here, that not only is the group of people who are speaking from the stage in the audience, and in conversations today, some of the most extraordinary people in IP and in technology law. Just the most all star group you could ever hope to be part of, but everybody is playing covers of Pam's work that we are all here because she's inspired us. And we want to give back to somebody who towers over this field in the same kind of way. So this is for you, Pam, thank you for having Pam fest. And the other thing I thought of when I was asked to speak here is about the old joke and I'm sure you've heard this one. There is a factory and they're having terrible problems with some of the piping and they just don't know what to do. They call in a plumber and the Plumber stares at it, looks on and squints at it and then whacks the pipe. And then everything works again. And he submits a bill and it's for \$10,000 and they ask, can you itemize that, please? And so he takes on he says \$10 for hitting the pipe and \$9,990 from knowing where to hit. And this is exactly what Pam's work is like, except that she puts in an equal amount of work once she knows where to direct her efforts, that a huge part of what has made her work so important and influential is knowing what matters and where she can have an impact at a time. So I'm going to tell four vignettes of Pam's work as seen through my eyes and my career coming to technology law. And I want to point out that there are dozens more that I'm not going to touch on that this is just a tiny sketch of one edge of her work. So the first of these comes from before that I knew technology and law was a thing. Her work on software and software IP goes back to my case when I was learning long division. And so I was, you know, blissfully going on through my elementary school, and secondary education. And then majored in computer science, amazed by these wonderful computers, and blissfully unaware of everything that was happening in the fights over how copyright law would apply to them. And so I came to this work only retrospectively, when I came into copyright and copyright law, and went back to find this amazing trail that every time Pam had written on something, it was a decade before the world realized it was important. And everything she had written held up, that it was technically precise, she identified exactly the right issues. Everything in there is still relevant today. And considering how much the software industry and society has changed since then, it's astonishing that she spotted not just what was important to them, but was enduringly important. I give some of her older copyright papers CONTU Revisited and the Manifesto, I give those to my students in my courses, and they come back to me raving about the Pam Samuelson and how everything in here makes so much sense. It's so so accurate. The second moment, for me came after I knew that this stuff mattered. I'd gone back to law school, after thinking I was going to be a programmer. And so in the spring of 2003, I was lucky to attend the BCLT Symposium on the DMCA and DRM. This is a conference that Pam organized and anyone who's been to a conference that Pam organizes, knows how it's going to work. You're going to have a couple of days of panels, where the speakers have been exquisitely curated, to present a wide range of views and make things seem inaccessible on policy seem possible and open for lively debate. We've heard multiple examples today. This is another one of those moments for me because it took a set of copyright and IP fights that were distant and abstract into someplace where I could see how scholars working in the academy could make a practical difference. Poking at how DRM affects resale and the value of works on secondary markets. The privacy implications, the security concerns, and seeing economists and technologists and lawyers and legal scholars coming together, put these things on the agenda. And the amount of work that Pam puts in to make these happen is immense. But also, there's a sense of timing, that this was a moment when the tide was just starting to turn, even though none of us quite believed it or realized it yet. She knew where we would have to push in order to prevent the dystopian DRM future from happening, and put a huge amount into making that happen. My third moment came around Google Books in 2008. The setup, the lawsuits have been filed in

2005, and then disappeared. And then in October 2008, Google and the authors and publishers, the Authors Guild, and publishers came in with a proposed settlement. And I made the mistake of reading it, and having a couple calls with people to discuss it. And I blogged a little bit about it. And I think that this was something that happened, I could contribute a bit. But I sort of figured I was going to leave it at that. I had another scholarship I wanted to work on. And then I got an invitation from Pam to a roundtable she was organizing to discuss the settlement and to think about what we as a community broadly considered, ought to do about it. And I just said, no, I was too busy. I traveled too much. And then I thought about it for a couple of days. And I realized that no, if Pam was interested in taking this seriously, I should take this seriously. So I came back and I said yes, I'll come out. And I can remember sitting in that room at the Bancroft as dusk gradually fell in the winter of 2009. And coming to the realization, oh, this is going to be the next couple of years of my life. Like somebody is going to have to do this. And Pam has identified the agenda. Okay, I guess it's time to start gathering some students and start doing things and writing about this. And, yeah, Pam identified a cause. And I knew I had to stand up and rally behind it. And then the fourth vignette is moment. This past fall, a year ago, with the launch of Chat GPT and other generative AIs, I had been talking to some of my students about the legal implications, some of them are very interested in the copyright and privacy dimensions. And I hit a sort of sinking feeling sometime in November, like, oh, wait, this is going to be Google Books all over again, isn't it? I guess it's time to roll up my sleeves and start working on this. So I started talking to my students who were coming from the computer science side and deeply invested in the issues from technical perspective, what can we do? We started talking about writing explainer pieces for the public, we started thinking about how we could write something scholarly about the copyright and privacy issues. And we realized we should probably bring some people together for a conference. So we made lists of who would we invite if we can get a little funding for this. And the first thing was, of course, Pam Samuelson. I said, well, Pam was very, very busy, it's going to be hard to get her. There's no harm in asking, but prepare yourself to be disappointed when she's not able to make it. Pam said, yes, I think within 24 hours, and then it was on us to say, oh, now we have to put on a program that is worthy of this. And so that Pam has been not just an inspiration for doing the work that matters. But a model for what we have to do to do that work well. We have, I think all of us, in our professional lives, have to ask fundamental questions about who we want to be, what we want to do with our careers, and our lives as people. And I tell my students that when you look at the work of somebody in the academy, you need to have mentors and models. People that it's worth being, trying to emulate their example. There are three things that you should look for. Do they do good work? And that means do they do the research? Do they put in the time in the chair to get it right? And do they also get, have the ideas to execute well on it. just the pure lawyerly good execution on something? The second is, do they pick good problems to work on? Do they know where to hit? Did they put their time into something that really matters? And the third is, are they a good person? Do they have? Are they good to other people? Do they create a good environment to be in? Have they made choices with their lives, you can say not just they did good work, but they did good? And Pam is an absolute model at all three of these.

M

Mark Lemley 18:34

I will just warn you up front, I'm definitely going to be on Team cry. So I want to start off by just noting a couple of things, right? We've talked about an enormous array of things that Pam has done and worked on. I think that's the first time I heard the word manifesto today. Right, which for those of us who were around in the 1990s is astonishing, because it was sort of the defining moment in software. And my story with Pam begins with another word we haven't heard today,

which is patents. I was an articles editor on the California Law Review, and interested in patent law of which there was absolutely none at Berkeley. I was very excited to see an article about patent law come in, by Pam called Benson Revisited, and I did my best to fight for us to publish that article. And that's how I sort of first got to know Pam. Pam's scholarship. Several years later, when I joined academia, I emailed Pam out of nowhere and said, Hi You don't know me from Adam, but I am a law professor and I'm a big fan of yours and, and I'd just love to talk to you, which is kind of a brave thing to do, particularly in 1994 when emailing people wasn't really a thing that happened. And Pam was incredibly gracious. And that was the beginning of a sort of 30 year friendship. And a collaboration on a case book. We had a case book on software and internet law. Brian Carver's here, right in physical form. It was published, we submitted the manuscript in 1999, November of 1999. And our publisher took 8 to 10 months to actually get the book out. We, you know, some things happened in 1999 in the software and internet world. So we ended up posting a, an update website for the book before the book actually came out, which is, I think, some sort of a record. More recently, Pam, and I have written an article together on interoperability, which is what I want to spend most of my time talking about today. We have occasionally been on other sides. I'm a little trepidatious, to mention that I was Google's lawyer in the Google Book Search settlement in this case, in this room, but even when we're on other sides, I think it was always delightful to do. In between the people have heard the UCC 2B Conference, which we organized together, which I think really did, as people have said sort of fundamentally change the trajectory of that project. And I also want to note something people haven't really talked about, which are the sort of many projects and ideas that sort of took form at Pam's and Bob's house in St. Helena in their conference center. And I just want to sort of note about this. If you think about the sort of, the old people have talked about the Samuelson Glushko, and Glushko Samuelson clinics. When Pam and Bob sort of came into money, and when Pam won her MacArthur grant, right their first thought if what to do with that money was how can we help build the community? Right, and that extended not just to building clinics, it extended to building a conference facility at their house, so they could actually bring together scholars who could, who could figure things out. And I think that's, it's what she chooses to spend her money on, I think is quite notable. All right. interoperability. Interoperability exists, I think, in significant part because of Pam. So she started writing about the issue in the 1980s. Well, before the legal cases we mostly know and that were settled. And it's worth understanding, because I think it's actually hard to put yourself back in this mindset, where it's far from clear, 35 years ago, right, that this idea that things could connect to each other, that you could connect to somebody else's software without their permission would carry the day. Right. The whole concept of open source was a fledgling concept. The case law to the extent we had any was broad look and feel. It was very broad copyright protection, and this whole concept of freedom to copy an interface because there was a legal right to do so to make your product work with somebody else's was a new and very dubious one. Right. And and, to the extent there were any cases that had thought about it, they'd rejected it. And it really was Pam's writing and Pam's briefs that changed that. That starts at the foundational LAST Frontier Conference. I've always loved the name of the LAST Frontier Conference. And it sounds really mysterious. Here we are in the last frontier. I went back and did the research and discovered that LAST actually stood for law, science and technology. Right. But, but it ended up turning out to be a good name anyway. So she wrote the early works on the copyrightability of interfaces. She wrote with Suzanne Scotchmer, the definitive treatment of reverse engineering in the law and both the law and economics. And I think her brief in Lotus v. Borland, but also her writing in a number of other cases, moved the law in significant positive ways that other people have talked about. I guess I want to note that, while she she did, in fact, succeed as an advocate in writing briefs, right, Pam, while an advocate with strong views is first and foremost, a scholar, right. And her work on reverse engineering and interoperability, like all of her work is characteristically detailed and nuanced. Right? Like her work on the public domain, like her

work on Section 102. She expands what our sense of what can fit in the concept of reverse engineering, she thinks through in this amazing taxonomic way, sort of all of the different implications, and not just the implications that kind of seem to go in the way that she'd like to draw a conclusion. And I think that is both sort of both kind of indicative of a great scholar, but also indicative of a very successful argument. So today, interoperability is taken for granted, I think, at least in copyright law. And it's taken for granted to such an extent that in the Oracle case, Oracle, right tried hard to pretend that the case against Google didn't actually involve interoperability, right. You don't need to do aside this because Google isn't actually doing interoperability, because even the people who are sort of most adverse to the concept have now sort of come around to the idea that I've got to accept it as a fundamental part of the law. That doesn't mean interoperability is okay. I think it's under threat from various sources. Today, it's under threat from contract law and the sort of Terms of Service idea from the Computer Fraud and Abuse Act. It's under threat from market forces, right? The fact that we all carry walled gardens around in our pocket and use them increasingly to the exclusion of the sort of open computers of a previous generation are significant, but it is not under threat in copyright law. And Pam is a large part of that reason. So people have mentioned this, the history of copyright law at the time I've been here and I think in the time Pam has been here often seems to be a rearguard action. Right? What we're trying to do is slow the speed with which things get worse. And Ruth Okediji talked about sort of the constant vigilance as our job. You know, I it's particularly in the wake of the Warhol decision. I you know, I feel that. I absolutely feel that and with Pam, I've had my share of losses. By the way, as an aside, I think I have a way to sort of compromise between Pam's and Judge Leval's positions on Warhol. Pam thinks the idea that we basically narrowed transformative use down to parody and nothing else is really bad, but that we can save the case, because actually, it turns out to be only about the licensing use, right. Judge Leval thinks the idea that we're going to focus on each individual licensed use is really bad. But we can save the case, because it's faithful to the sort of principles of transformative use from Campbell. And as well, I want to take an intermediate position between them. I think they're both really bad. I think the court both screwed up the law of transformative use enough in a significant way. And that the decision to say we're going to focus on the license and say each individual use not just the creation, is the rule is a terrible thing. But all right, aside, done, nonetheless, so things get worse, right? They don't always get worse, though, right. And I think it's important to recognize, right, that with interoperability, right, things fundamentally changed for the better. They fight, they change for the better in such a fundamental way that we often just sort of take it for granted that of course, this is the rule. But it wasn't, of course, always the rule. It's the rule because Pam and a lot of other people in this room made it the rule. All right, now the crying part. So Marcel Proust said, never meet the people you admire or look up to, you'll be disappointed. One of the great blessings of my life has been the opportunity to meet my hero, get to know her, and ever still be my hero.

R

Rochelle Dreyfuss 28:20

So, like everyone else, so I'll start with the meet-cute. So, NYU, had had a great IP Professor in Alan Latman. And unfortunately, he suddenly died in 1984. And I'd been teaching civil procedure, but I picked up his IP survey course. And my colleague Diane Zimmerman had been teaching torts, she picked up copyright. So we were both sailing along, cruising along, having a grand old time, and then we hit the software cases, and they utterly flummoxed us. So luckily, Diane wrote a lot about the right of publicity. And she knew this article about Zacchini, which Pam Samuelson wrote. So another whole field, right of publicity. She'd been very impressed by that article. And for some reason, looked to see whether you had written anything about software and found that CONTU piece that Niva talked about this morning. And I have to say it

absolutely saved us. Both of us. That next year, we were both at the ALS, and that was a very small IP group in those days. But sitting to Diane's left was this woman with the pants, a thing that said Pam Samuelson. It felt like Batman was sitting next to us. I mean, we were just wow. So that's my meet-cute. Since then, of course, I've watched Pam move to UC and build this magnificent program. I've been in awe of her activism on so many socially important IP issues. So Mark just talked about Article 2B conference and Jessica did too. But I've still got the swag. And I drink out of that cup every single day. And think about Pam and the incredible impact that she's made. On the slideshow you can see the cup, I took a picture of it for this conference. I've also been inspired by how hard she works to make the IP community helpful, rather than competitive, inclusive, rather than elitist. And I've always enjoyed being a grandma with her and Jessica and Becky and Wendy. We love Pam for all the things that you've heard about all day. But Becky urges me to also mention something else we love her for, which is her ever so slightly snarky sense of humor. She's just been wonderful that way too. And it's a huge privilege to be Pam's friend, and Bob's friend too. So with that said, onto what Molly asked me to talk about, which is actually Pam's work on reverse engineering. So I'll say another word that hasn't been heard yet today, or term trade secrets. So I have to thank Pam for the topic. Thank Molly for the topic, because it lets me discuss the blockbuster piece that she wrote with Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, which was published in the *Yale Law Journal* in 2002. I thought I'd be the only one talking about this piece. But when you're the next to last speaker, you have to figure, you're not going to be the only one. But I do think it's worth drilling down a bit on that article, as a way to illuminate the strength of Pam's enormous contributions to scholarship and to the scholarly. So first, as you heard, Suzanne was an economics professor here at UC Berkeley. Until her untimely death in 2014. She was unique among innovation economists, because of instead of assuming an IP system, the way economists are said to assume a can opener, and then writing about what they imagined the regime was like, Suzanne went out and learned about the IP system. And most especially she learned about it from Pam. So for all of Suzanne's great contributions, Pam is partly responsible for them as well. And so I'm really pleased to talk about a piece that they wrote together, because it honors both of them and their powerful collaboration. As I said, and other people have said too, it's a blockbuster piece. It's been cited many times, and even now at almost the same rate at which it was cited around 2002 when it first came out. And that's because it does many really important things. So first, collected the circumstances in which reverse engineering is used to find out trade secrets. So they talked about traditional manufacturing. They looked at the time at Boalt Hall's, at semiconductors, they looked at the CHIP act and computer software, of course, and also technologically protected digital content. It was I think, probably one of the first piece that looked at the impact of the DMCA. So these contexts had mostly been discussed by other people, but always as a completely separate phenomena. By looking holistically and developing a taxonomy, I guess we now call it a map. Pam and Suzanne, exposed the commonalities and differences among these practices, and deduced lessons and overarching principles regarding information learned, not by reading articles or patent disclosures, but rather by extracting information from embodiments. So the first thing that piece did was discussed the multiple circumstances in which trade secrets were learned through reverse engineering. Second, the authors examined the social and economic impact of revealing trade secrets this way. So they consider the consequences along a group of dimensions, the cost of reverse engineering, the use of the reverse engineered information, the public benefit derived from that use, various incentive effects, harms posed by secrecy and also by nongenetic attempts to protect secrecy. And now reverse engineering had been considered a valid method of appropriating information, not a violation of trade secrecy law, because the expense was regarded as so high, the original innovator and the reverse engineer would wind up competing on a level playing field. Pam and Suzanne showed that things were much more complicated than that. So the third important thing they did was to discuss governance issues, questions

about how to use reverse engineering as a policy lever, how to treat the release of information in ways that promote social welfare without destroying incentives to create. So that's the paper. The next step at these events is to show how truthful the paper has been, how much it's inspired other people to build on those ideas, but that's not entirely possible here, because Pam has done much of the work herself. In fact, a distinctive characteristic of Pam's life as a scholar has been her stewardship of her own work. So I'm going to stop here. For an aside, it's been referred to by others, but I wanted to make a point of it. Pam has found a really interesting strategy, one that young scholars in the audience may want to consider, which is to publish follow up pieces in specialized journals, rather than in fancy schmancy law reviews. The piece with Suzanne was mainly provoked by what was going on at that time, which is cases like Sega and Accolade on making products compatible with a platform. Many of the follow ups are published in journals that the software industry reads, and that are directed at explaining the law to the industry. So it can speak up when the regime takes about an alternative. And we've certainly heard about that today. Similarly, some publications are in specialized legal journals, or symposium issues, aimed specifically at IP scholars and practitioners, and judges entertaining IP cases. These papers are valuable. And they were to me and Diane, because they explained software in ways that were relevant to the application of law, and help the legal community fully comprehend the industry's problems. It's not just that you get more sophisticated readers in these journals. Many of these outlets are less fussy than traditional law reviews. They don't expect a ton of background information and a zillion footnotes. And so they let you be much more nimble about addressing issues as they emerge. And Pam has been very nimble indeed. So one thing she did was to add the context in which reverse engineering occurred, and I'm here I'm thinking about Google against Oracle, and interoperability. Another example is one of my favorite pieces. Pam's 2016 article on the right to tinker. Here she provides us with the most joyous understanding of innovation and the values in reverse engineering. As she put it, people do it to have fun, to be playful, to learn how things work, to discern flaws, or vulnerabilities, to build their skills, rather, to become more actualize, to make improvements in the artifact, to adapt them to new purposes, and occasionally to be destructive. Emphasis added to show her snarkiness. She goes on to discuss the freedom to imagine, to enjoy privacy and autonomy, to develop skills, to learn, to distill, to disseminate the results to others, to act upon to create new artifacts, to share with others, and build community. You can write about legal doctrine until the cows come home. But it's language like that, that really makes people sit up and take it seriously. And I've noticed how many people have quoted from things that Pam wrote today because her writing is so incredibly distinctive. Pam has also focused on the right to repair and recent legislation that allows consumers to fix the products they purchase. That strand of her writing can be seen in the broader context of sustainable development and the circular economy. You going to talk about that? Okay, I'll stop here. So those are additions to the first part of the original article. She has also added to the second part of the article on the impact of reverse engineering. So here's she's considered new impediments to the process, which change the balance between the originator and the follow on creators. So she's considered the shift from selling to licensing and doing it with restrictive terms such as bans on reverse engineering, self help in the form of digital locks that destroy the product, if an attempt is made to discover or work with what's inside. She's similarly looked at legal developments, including the shrinking ambit of fair use, the expanding view of the derivative work right, the adoption of design rights. For all of these changes, she's discussed how to preserve the appropriate ambit for reverse engineering. But things have become even more complicated in recent years. We're now we're confronted with what I call deep trade secrets, information that can't be reverse engineered, but is still needed for the purposes that Pam so eloquently described. Deep secrets. So Pam and Suzanne touched on that problem in their sections on manufacturing processes and encryption. But here I'm also thinking about life sciences information. So genetic code can be reverse engineered. However, unlike with

software, it can be very hard to figure out its functionality. Diagnostics, vaccines and therapeutics, their composition can be reverse engineered. but not the data the originator relied on to obtain market approval and not the method of manufacturing, a version identical to the one that was approved for marketing, AI training data used in critical decisions, bail, entitlement to public housing, educational placement. Similarly, those huge databases, datasets that are used for generative AI, there's also marketing data, known only to search engines and marketing platforms. These deep secrets can't be reverse engineered. And yet, because of their importance, serious thought is now being given to force disclosure through regulatory bodies like the FDA, by antitrust law or patent law, to legislation like these rights of repair law, or as a condition of government purchase, or even as a condition of doing business. The problem with these efforts is that as Pam and Suzanne warned, disclosure could decrease incentives to innovate. So here is where the third part of the reverse engineering article, the part on governance is of increasing importance. The techniques Pam and Suzanne discussed for regulating reverse engineering seems equally applicable to force disclosure of deep trade secrets. So first, Pam and Suzanne suggested the courts require trade secrecy holders to show convincing evidence that revealing the information will in fact have market or incentive destructive consequences. At least some of the secrets I mentioned, were not the result of deliberate investment, but rather someone was in the right place at the right time. So Myriad acquired for genomic information about gene sequences. At the time, they held these patents that turned out to be invalid on related genomic information. Amazon and Google have so much marketing information, because of lead time advantages, network effects, and arguably antitrust violations. In the AI context, the training materials pre existed the AI, it's not, at least so far, information that the developer of the AI created. Second, they suggested that in cases where there is an impact on the original innovator, of the law and pose a breadth requirement, so that might mean that a generic company can't make the exact same pharmaceutical as the originator, but could use the information to make drugs that treat different diseases, or more importantly, are designed for low income countries, markets that the innovator never planned to exploit anyway. Their next proposition was to consider the purpose of revealing the deep secrets and allow use only for that purpose. So as Mark said, they pointed to interoperability. But we could also think of public health, due process, sustainability as valid goals as well. Interestingly, they noted that once a purpose is regarded as legitimate, the problem of inducing disclosure may solve itself. Avoluntary exchange will more likely occur because the trade secret holder will understand that it's useless to fight disclosure, it will simply waste time and money. Finally, the authors discussed restricting publication so that the information is only used for those legitimate purposes, or put exclusively in the hands of particularly trustworthy and important users. Now, of course, as people have said, Pam is not done yet. Indeed, for all I know, she's already written the paper on deep secrets. If so, I look forward to reading it. And indeed, I look forward to all my interactions with this amazing colleague, friend and legal thinker.

M

Margaret Chon 43:52

Well, unfortunately, I'm terrible at humor. But I will say that I'm quite honored and somewhat intimidated to be part of this panel helping to wrap up what has been such a wonderfully sort of generative and impactful conference, honoring Pam and her legacy. And I want to thank Molly for inviting all of us. So can we give Molly a hand in organizing this event, but this isn't about me, this is about Pam and but I'm going to start with a little anecdote about myself. So I teach at a Jesuit Catholic school. I'm not religious myself, possibly, like somewhat, perhaps 5% Buddhist. But I attended an Ignatian thought seminar. And you know, the Ignatian philosophy is centuries old. And there was a Jesuit in the room who, we were talking about social justice, and

we were talking about the passion to make social change. And I don't know what I was saying at the time, but he kind of interrupted me and he said, Well, passion is really important. But don't forget about compassion. And I feel that Sam, Pam, not Sam. Pam Samuelsson embodies both traits, both the passion and the compassion for social justice. So I want to reflect not only on these qualities, but how that's sort of translated into what I think are non instrumental interactions with me. Because oftentimes, when I'm with Pam, I think, what does she see in me, you know, we just have these conversations, and it's not directed towards a particular end that she has in mind. And you might have somewhat of the opposite impression given many of the things that people have said that she's always has a goal and that she's kind of, you know, kind of arranging people on a chessboard to get to a certain end. But I don't think that's true. I'm pretty sure that Pam and I first met when she was visiting at Cornell and I was still pretenure at Syracuse. And she sought me out, I was a nobody. But I had just produced my first full length Law Review piece. And I think she probably found me because I had cited to the Computer Associates v. Altie case. So she thought I must know something about software or be interested. And I'm glad she did find me. And I remember that we had a really lovely time together, a really lovely lunch. And I didn't know enough to be intimidated by her because she was so approachable and low key. And over the years, even though I'm really bad at maintaining connections, Pam has consistently reached out to me with little notes, little emails, messages, or even invitations occasionally to participate in workshops that she's organized in which some of you have also attended. And when she's in Seattle to meet her Dovie Samuelson undergraduates that are referred to in her toast. These are scholarship students that full scholarship, full ride to University of Washington that she gives to undergraduate female science and engineering students who are members of underrepresented communities. She always touches base with me. And most recently, I received a message from her, a very terse email message saying that I needed to see a movie called Past Lives. And it's a beautiful film about being caught between two cultures, specifically Korean and American. And I didn't have the time when she emailed me. But then I found myself on a flight recently where it was being offered. And I started watching it and about halfway through, I started crying. And I didn't stop. Many other people have already said this today, but as a member of sort of underrepresented group and minority group, whether by race or geographical happenstance, being part of Appalachia, for example. It's rare and important for someone to see you and to demonstrate care for you based on this specificity of what Mari Matsuda and other critical legal scholars have called situated perspectives. And so Pam suspected that the film would speak to me and she let me know that. And the sense of being in two places at once has informed a lot of my scholarly work. Molly had asked me to speak about innovation and global intellectual property. But I'm going to be speaking about something else. Although I think it's a concept that cuts across borders. One passion project I've shared with Pam over the years, dare I say decades at this point, is articulating legal and theoretical bases for what I've explored through the prism of human and sustainable development in global IP frameworks, and what Pam has explored, largely, although not exclusively, through exceptions and limitations to copyright, particularly fair use. So inspired by Pam's corpus, especially her recent article, which several people have already referenced, including Rochelle just now, freedom to tinker. I'd like to introduce the concept of relational innovation to describe a large part of the innovation ecosystem that's often unrecognized by lawmakers, and scholars interpreting the 1976 Copyright Act. Even those who tend to be what we would call pro access, and then speculate on where this concept might fit into the copyrights and copyrights doctrinal framework. You know, it's hard to believe but it's been 50 years since the 1976 Act went into effect in 1978. And, you know, this concept of relational innovation is grounded theoretically, in various scientific insights developed in that intervening time, that half century, and brought to the table by many scholars in this room, influenced by and encouraged by by Pam. And it gives lie to the sort of homo economicus template that has largely shaped interpretations of the Act to date. So consider this, our legal

profession generates a huge number of works, theoretically protected by copyright. We use written words which are the quintessential mode of creativity, regulated by copyright law, and much of our resultant work product is both fixed and original, albeit perhaps more fact bound than other types of creative works. Therefore, most of what we produce is arguably protected by copyright law. Putting aside the assertion of copyright in state law reporters that Carl Malamud just described in the previous panel. Copyright law, by and large has not taken hold in our space. Indeed, in the first copyright case to reach the Supreme Court, *Wheaton vs. Peters*, the court soundly rejected the idea of copyright in its reporter, and more recently, as we heard from the previous panel in the *Georgia v. Public Resources* decision, thanks to the efforts of our copyright activists. That decision reiterated that there's a particular public interest attached to legal works that transcends that public interest that transcends copyrights incentive structure. Despite the general lack of IP enforcement within the legal profession, we've managed to generate many new forms of expression that have led to innovative legal arguments, concepts, doctrine and theory. So lawyers comprise a specific community of innovators. And we're also exhibit A for the inadequacy of incentive theory to capture what is often at the core of innovation. Our community literally could not function if we were always looking over our shoulder to see whether what we just wrote is substantially similar to what someone else wrote, or if we had to worry about having to pay statutory damages for what was copied from another. We even encourage rampant copying, because we need to communicate with each other and with non lawyers around a shared knowledge base for purposes of furthering our clients' interests, of course, and without detriment to the development of law overall. So as an innovation community, we have the luxury of not having to care much about fair use, because tolerated sampling is an integral characteristic of what we do every day. To use Pam's terminology, borrowed from Ed Felton, we have almost complete freedom to tinker with each other's works. As important however, is that tinkering is an integral part of our relationships, relationships to and with each other. And to our sense of belonging, which is a fundamental human need. Many innovation communities would not function if copyright was enforced anytime and arguably protectable work is involved. In Justice Breyer's recent, and to me somewhat startling reference to the "public benefits that copying would produce" in the context of his analysis of the fourth fair use factor in the *Google v. Oracle* decision reflects this, this intuition. The APIs were valuable not just as assets to deploy for licensing revenue, but because so many programmers had become familiar with them. And were creating large amounts of third party applications precisely because of this familiarity, this interoperability. And the source of Java's value lay according to the majority in the eventual widespread adoption of Java and its APIs by this larger innovation community, which outweighed the need for financial incentives to Oracle or more accurately, its predecessor Sun and coming up with Java in the first instance. So within the standard incentive justification for copyright, the existence of public benefits that copying would produce could be characterized as an aberration, perhaps specific to software, or even blasphemy. Per conservative theory, the primary purpose and perhaps sole purpose of copyrights exclusive rights is to prevent the kind of economic free writing that Justice Thomas's dissent derided. But as the majority states with a nod to the early computer software decision, *Lotus vs. Borland*, "when a new interface like an API or a spreadsheet program first comes on the market, it may attract new users because of its expressive qualities, such as a better visual screen or because of its superior functionality. As time passes, however, it may be valuable for different reasons, namely, because users including programmers are just used to it. They've already learned how to work with it". While the reasoning of the majority makes sense, at least to me, it arguably over relies on economic instrumentalism. Regardless of whether you take the short or long view of innovation, numerous intellectual property scholars, including many in this room, have argued that incentive theory only measures one very narrow dimension of what makes people innovate, and may not be applicable at all in many cases. And while the concept of network effects does

explain some of the social dimensions of innovation, it's linked very tightly to the standardization and interoperability concerns that are arguably more salient for work such as software than for other types of copyrightable works. Furthermore, the fair use factors manifest a peculiar disregard of salient drivers of successful innovation other than market impact and market success, peculiar because of the wealth of insights about the nature of innovation, that legal and other scholars have documented in the 50 years since the 1976 Copyright Act was enacted. So what's missing from Google v. Oracle's economics inflected account of the "public benefits, that copying would produce?" Incentive theory heavily depends on some version of market theory, of course. It cannot exist apart from the assumption that copyright exists its rights holders to monetize content in the popular parlance of today. Yet, this inexorable outcome of market monetization *uber alles* cannot do the work of fully addressing the social in addition to individual nature of innovation. Strong versions of incentive theory miss many pre market post market and non market activities that are essential to innovation and it reduces a community's innovation activities and motivations to an aggregation of individual atomized choices. Rather than understanding innovation as emanating more organically from social relations within these communities, as we've heard today. Not to mention the specific cultures, groups and societies that are comprised of these individuals upon a substrate of common understandings and shared meanings. Bucking the strong bias, the recent Google v. Oracle decision gives primacy to the third party programmers or employees freedom to use their general knowledge, skills and experience, hat tipped to the trade secret scholars in the room to innovate within a specific knowledge ecosystem. It acknowledged the benefits of relational innovation outweighed the harm to the copyright owner. Due to the collective work of so many IP scholars influenced by Pam and other pioneers in this room, we can now choose from many newer conceptual models with which to understand the importance of circulation and diffusion of knowledge to innovation, that is the public benefits that copying would produce. And when I call you out, I'm not going to call you out by name, but you'll know who I'm talking about, right. These range from other economics approaches such as innovation economics, which Rochelle just pointed to, and in addition, which posits that the diffusion of people and ideas can result in increased innovative capacity of individual firms, as well as overall industries. Approaches that analogize knowledge to essential infrastructure as well as the importance of knowledge spillovers, hat tipped to Mark Lemley and Brett Frischmann. And the generativity of open innovation, disciplines such as neurobiology, social psychology, sociology and STS studies show the ubiquity of play and engagement with others in the creative process that Rochelle just mentioned, of specific institutions in the sharing and shaping of knowledge, including cultural commons approaches, and the so called negative space of IP as well as the critical importance of social belonging and emotions in creative endeavors and processes. Many of these approaches share the view of innovation as necessarily social and iterative, that is arising within and from specific creative communities. Individual creativity is necessarily exercised within a collective, and one of the quintessential human desires is to create meaning together with others, not by bowling alone. So returning to Pam's article on tinkering, although one might visualize tinkering as a single person in a garage, trying to fix a problem on their own. It's a highly socially embedded activity. And I have an anecdote from my own lived experience sailing this summer in Seattle on Lake Union. But for the interest, in the interest of time, I'll skip over that. And Pam, we could do that in the q&a, but we almost got ourselves killed, and then we tinkered with the boat to make sure that wouldn't happen again. So with the help of our friends, that's the whole point, with help of our friends. So Pam argues that with the onset of copyright protected software and other types of quasi functional creative works, tinkering should not be actionable as copyright infringement. And I argue further that the informal information exchanges involved with tinkering, and other innovative activities are much more pervasive than the transactions of codified knowledge that are often the singular focus of intellectual property decisions. As I've written previously, in the context of copyright and tacit

knowledge, "we may overestimate the potential of content, digital or otherwise by itself, to promote knowledge, creating content and creating knowledge are vastly separate projects." Harry Collins calls some of what I'm discussing here, collective tacit knowledge and refers to a strong version of this as social Cartesianism by which he means "the collectivity rather than the individual is the location of the knowledge." We think and tinker together, therefore, we are. So if this is also, what is next? Justice Breyer's concern with the "risk of creativity related harms to the public," also lodged within the fourth fair use factor analysis expresses the undue burden placed upon relational innovation through the over protection of copyright. And I have a number of different doctrinal ideas of where we can locate the value of relational innovation. But in the interest of time, I can talk, I'll talk about some of these fair use hacks in the q&a. Here, I'll just note that the doctrinal recognition of relational innovation is not confined just to fair use, it is present in assessing the correct scope of copyright as well as its other exceptions and limitations in the 1976 Act as well as global copyright frameworks provide many spaces to allow courts to reach beyond market values. So if we measure innovation by the amount of stuff that's protected by copyright, or the amount of filed patent filings, we're mistaking the trees for the forest. Innovation cannot be equated simply to the generation of vast amounts of content. It depends upon human relationships within specific innovation communities. And these relationships must be recognized and protected, because of the deeply human and fundamental need to connect and communicate with others within and across borders. Not only our legal community, but also more specifically, our intellectual property community is characterized by an enormous amount of relational innovation. Pam has reached out and supported so many people in this room, including me. And that has resulted in an enormous amount of social generativity and sense of belonging, two touchstones of relational innovation. So thank you, Pam, for your important advocacy on behalf of the public interest values and copyright, and for generating and nurturing so much of the strong relationships that we've seen here today.

R

Rob Merges 1:01:54

Okay, so the schedule says that we're supposed to start audience comments at 5:10. And I'm so sorry that we're two minutes late on that. It's the first time an academic conference ever been that late. Yeah right. I have conferences that end the next morning. All right, anyway, it is time for q&a. And if you could, if you could give your name, I can't see everybody with the sunset behind you. Go ahead.

M

Mary Hewitt 1:02:24

Hi. I'm Mary Hewitt. And I actually want to reflect on something I've been hearing all day. So back in the 90s, there was a group of us, I think Fred invented the phrase, friends of Pam, we became the for profit army of Pam. We studied with Pam, I was a research assistant with UCC 2B, we went off to law firms. And then we started going in house. I remember actually, when Tom Rubin recruited me away from David Hayes, the first email I sent was to Pam and said, How would you feel if I go to Microsoft, and she said, we need people on the inside. And that was just really powerful. And there's a lot of us who took all of this great learning inside companies. And we've quietly shaped those big companies for a long time. And it's always referring back to these very pragmatic guidance we got from Pam, this focus on balance. And when you look at all the big cases of the last 20, 30 years, I would make a claim, there's

probably been less of them than you would have seen if we hadn't gone inside all those companies. Pam's influence has been far beyond just public interest and scholarship. Thank you.

S

Sharon Sandeen 1:03:55

Hi, I'm Sharon Sandeen, from Mitchell Hamline School of Law. And I was, if you look that way, you can see where I was born. But I was fortunate to be a student here in 2001 and 2002, getting my LLM. And I don't know if you remember this Mark, but I was practicing attorney at the time and decided on a whim to apply to the LLM program at Berkeley, and I went to a conference where you were speaking and I went up to you and I said, you know, I'm applying for the LLM program at Berkeley. And you said, Oh, they don't let people from the U.S. in that program. And so anyway, I got in and I remember and I have another story that I could tell about because I'm a Californian and what the tuition was, which was a lot less than they charged everybody else, which was awesome. But anyway, I had the good fortune of having Pam be the faculty advisor for for my LLM thesis. But I want to comment on the article she wrote with Professor Scotchmer. Because I remember something she said at a presentation, I think it would have been like 2001 or 2002 about that paper. You were presenting it with Suzanne, at Berkeley. And you said, when you started the project, you had a particular hypothesis and thought about what how you were going to come down on the issue of reverse engineering. And that in your collaboration with Professor Scotchmer you changed your point of view. And what I learned from that is the importance of intellectual integrity and being open to changing your mind. And that served me well, when Elizabeth Row, my co author here, and I wrote a paper on called Debating Non-compete Agreement. And when we started writing that I was going to be the California, you know, point of view, having been born and raised here. Of course, non compete agreements are horrible and in all circumstances, and we collaborated, and that isn't the paper that came out. What we ended up saying was that basically if the courts would apply the law correctly, as it was developed, the common law, things would be a lot better. And so I want to thank you, Pam, for teaching me that.

E

Erik Stallman 1:06:43

Hi, my name is Erik Stallman. I just want to echo a number of points that were made today. One is just to underscore that Pam spoke in a way that, she speaks in a way that really influences political and policy audiences and technical audiences, not just legal audiences and scholarly audiences. In the mid 2000s. I was the staffer for one of the very few members of the Judiciary Committee in the House who was not a reliable vote for the content industry. And while I wish I could say that Pam's writing was instrumental to getting a lot of really wonderful copyright legislation passed, what I can say during this time, is that Pam's writing, in part by not confining her writing to scholarly journals, but also because she was so clear, was instrumental to some bad things in copyright law, not happening. The other thing I want to say is echoing the point that Andrew Bridges, and another said, copyright got a little bit nasty, sometime around this time. And it could be frustrating, and in times lonely to work on it, and hard to have fun. And it was, I was in that mode when in 2014, I interviewed for a job at the Center for Democracy and Technology, where one of the interviewers was Joe Hall, who, who seemed to figure out how to have fun doing this work. And that was a big part of why I went there. And also, I came to find out that he spent something like six semesters at the Samuelson clinic which I don't know how that was actually allowable, but that was okay. And then while I was there, I also, Joe had a

wonderful intern, who was also had been a student of Blake Reed, who taught at the Samuelson Glushko clinic. And Blake Reed was also a person who seemed to have found a way to have fun while working on some very complicated and times really frustrating intellectual property policy problems. And so I just want to really draw how much it is remarkable that Pam has built around her a community of people who have found a way to have fun working on some things that are really important, really complicated and at times very frustrating. And the last thing I just want to say is something echoing something that Andy Gass and others have said is that is that Pam has a gift for exquisitely timed outreach and expressions of support and care for her colleagues, not just as scholars or practitioners, but as human beings. And I am, and I'm sure many others are very grateful for that. Thanks.

R

Rob Merges 1:09:29

Somebody. Somebody had a question back here. Did I get your? Yes. Right now? Somebody's first, the guy just to the left of David, David Hayes. Well, go ahead.

M

Michael Geist 1:09:44

I'll just go quickly then. I am Michael Geist. I'm a law professor at the University of Ottawa. I was going to reference Pam's amazing contribution to our clinic, the first Samuelson Glushko clinic outside of the United States, but James's comment about her accepting a conference invitation tweaked one of my first memories and interactions with her, which was about 20 years ago. I was putting together a conference together with my late colleague, Ian Kerr. And I was Pam had accepted to come, I was so happy. And I put her on as the keynote speaker, first thing in the morning. And I remember seeing her at 8:30 in the morning, super excited, how you doing? And she said, it's 5:30 in the morning for me right now. And she knocked it out of the park. But she never complained that I put her in what was really a difficult position as it turned out. It taught me not just to make sure that you book your west coast people later in the afternoon if they're coming east, but also to always remember to look at, whether it's from an advocacy or a research perspective, to look at the other person's perspective to see where they are coming from, whether geographically or otherwise. And it's something that I always took with me as things went on. So thank you for all of that.

R

Rob Merges 1:10:56

Okay, here we go.

T

Thomas Vinje 1:11:01

Hi, Pam. I'm Thomas Vinje, Chairman Emeritus of Clifford Chances, global antitrust group, and part time professor at the University of Bergen in Norway. And I wanted, because I think not so many in this people in this room know, so much about what you've done in Europe. Bernt certainly emphasized that. I'd like to echo what Bernt said, with respect to your academic activities in Europe. There was that article that we co published, but you did the most work on, on SAS v. WPL. And I hope it had a role before the European Court of Justice. But then there's also all those visits you made to the European Commission, where you became I think, the

person, American academic, that the European Commission officials responsible for IP and for IP related antitrust issues trusted, you went back over and over again. And that generated trust, and it mattered, I think, to the formulation of policy in Europe on intellectual property. And then maybe just a personal observation. And you can tell me whether you think I'm right. We're all products of our personal backgrounds. And we share some important things in that regard. And there have been so many comments about, of course, your academic brilliance, but how you've handled things as a human being, that I've heard more about that than anything else in this room. And I think your relatively humble origins in the Pacific Northwest, your connection to Hawaii, where you obviously learned a lot about the aloha spirit, and your Norwegian ancestry and just the cultural things that your Norwegian ancestors gave you. I think that many of the ways in which you handle things, even when others are not respecting you, which I've seen on occasion. I won't mention any names, but I think you know what I mean. You respond only with civility and respect. And so I'm really confident that your Norwegian ancestors would be proud of you, not only for your brilliant achievements, professional achievements, but more so for how you've achieved them as a human being. Thank you.

R

Rob Merges 1:13:53

No. Okay. I thought we're going to hear from. I know, but Judge Leval I thought was waving his hands. Did I get that wrong. Oh, it's a sunset wave. Another happy day. Okay. It was Chuck, Chuck Weisselberg. You're next, then we'll keep going back there.

C

Chuck Weisselberg 1:14:14

Thanks. I'm Chuck Weisselberg from the law school here. In the late 1990s, Berkeley was way behind our fellow schools. We didn't have an in house clinical program. The dean at the time, Herma Hill Kay, made it a central point of her deanship to build clinics. I was lucky enough to get hired to come here to develop our in house clinics and be the first director of the program. And so I joined the faculty in 1998. Before I landed here, I got an email from Pam saying, Hi, I'm Pam Samuelson. And I'd love to talk about the idea of a clinic working and I think she said in copyright law, and I had two thoughts. One was what's the public interest in that? And the other one, which I didn't ask her was, what's a copyright? But, but I came to Berkeley and Pam reached out to me. And Pam is, as you all know, very persuasive. And she laid out a vision for what a clinic would look like. I wanted to sort of see more of it. She put together a committee that included students, including Jason Schultz was a member of that committee. And they laid out in a memorandum what a clinic might look like. The different kinds of projects and cases, and it was fabulous. And no one in the United States had thought of doing that, or had considered a clinic working in that area. And it worked so well with the strengths of the faculty and the interest of the students. It was just a spectacular and innovative idea. And it went straight through the faculty which approved it. And we opened the first law and technology clinic in the United States with Pam's vision, Pam's drive, Pam's expertise. And I salute you, Pam and Bob for your vision in creating the clinics.

R

Rob Merges 1:15:52

Felix I've got you next. Yeah, yeah, go ahead.

F

Felix 1:15:59

So like, so like so many in the room, my path to where I am today came through Pam. This was the fall of 2001, actually the same time that Sharon was just talking about in Pam's cyberlaw class. I was a graduate student here at the time, and thinking about what to do next. And among other things, I was considering law but hadn't entirely thought that through. And it was her class that was that part of me deciding to move from technology to law. And I think it was, you know, emblematic of a lot of what she has done to bring those bring those groups together, right to bring technologists, to bring lawyers together in a way that was particularly innovative, I think at the time. And I think which, you know, is become more of a thing now. But right, but like Pam saw this 20 years, 20 or more years ago, the need to bring the fields of technology and law together. The one other thing I'll note is that I remember that it was fall of 2001 because the other thing that I really remember, was walking into class on September 11. And coming in with a sort of shell shocked state, I think all of us, seemed like Pam herself as well, walking in, none of us quite sure what to do, what to think, how to process what was going on. And I remember distinctly that moment where she gave us a moment to reflect, to think, to pause, and then said, it was important to keep going, it was important to actually have class, it was important for us to do our work to do good things in the world, despite whatever else was happening at the moment. And it was such an important moment for all of us in that class, I think that day. And it was a wonderful thing that Pam was able to give us. So thank you for that moment. And for all the moments since.

R

Rob Merges 1:17:57

Okay. I feel like I'm in a slow motion tennis game, because the volley's going back this way. Now, Rebecca, I think is up. Yeah. Okay. So the microphone has to go the long. That's it. Got to work on our passing game. Go ahead.

R

Rebecca 1:18:16

Pam has been extraordinarily influential to my thinking and where I am in my career now. So I want to say thank you to Pam for that. And that's obviously true of so many people here. But I got up because I really want to say thank you to everybody in the room for the amazing stories that you've told, that have opened up a new understanding for me of the breadth of Pam's amazing career that it is so much broader than you would understand from just studying the extraordinary body of her scholarship. Just knowing about the clinics, the stories keep coming. And so now I leave today with this inspiration and model and roadmap of massive open horizons, way to live a life in the academy. So thank you to everybody for sharing those stories.

M

Molly Shaffer Van Houweling 1:19:18

Rebecca, just pass the mic down a couple and that'll be our last comment for this last one.

P

Participant 1:19:23

Sure. Okay. I will try to keep it short, because I'm between you all and cake. So I'm going to

follow in some of the remarks. I think everyone is in line with the fact that I'm also one of the lucky few that had the opportunity to experience Pam's influence throughout the I-school which Marty and Joe mentioned. And for those that don't know, this is a graduate program. A lot of technologists a lot of, you know, startup founders, a lot of policy folks come in, and this is the intro to law class that she teaches. And it was an incredible program. It was my first introduction to the law as a technologist that was, at that time kind of a cocky, you know, know at all technologist, as you've probably experienced in your, in your encounters with your IT folks. And, you know, this was not just copyright class, right. This included liability for defective information, Cardoza, included trade secrets, included. This was 2005, so included the European, the 1995 directive, pre GDPR, on the European Privacy Commission, I reviewed these just to remember some of my projects, my project at the time was expectation of privacy and online social networks in 2005. So to give you a context about, and this was my first introduction to law, and so I was. What I remember most about this is that, inevitably, I would argue with Pam, not knowing, you know, that, you know, her credentials, and her her expertise. And I thought, I understood the technology she was talking about, probably next to her, and maybe next to Bob, I was probably the person who spoke most in this class. And inevitably, she would have the patience, have the grace to kind of inform me of what I didn't know, help me understand. And then inevitably, and I now reflect of how much of a compliment this was, every three weeks or so, she would say, you know, you should go to law school. And, you know, I would, I remember toying with this at the end of my tenure there, my time there. And, you know, it's already mentioned that she had an amazing ability to give lawyers the ability and the confidence and expertise to dive into technical issues. But I think it's been said enough that she gave kind of technologists, the ability to really understand the law and how it functions. I came into it, thinking of it, the law as this like fixed, perfect thing that, you know, that just is out there, and very quickly learned that you know, how to understand it, how to really identify the crux of where the law meets technology, and where there are rooms for improvement where we might want to innovate, to take the word of the panel. And so I was hugely inspired, moved, informed. Through this process. I like many others here, I believe, it's what led me down this path of my work in the privacy space. Though, you know, I've had a career as a journalist, as a researcher. And I've applied almost everything that I've learned in that class throughout my career around scraping, around Fourth Amendment protections and now privacy law. And while I regret to say I didn't actually go to law school, I did have the opportunity to help write some laws, and now help kind of manage teams of lawyers more than I ever really wanted. And, you know, it's all a testament to the support, the guidance, the patience, and the insights that Pam gave me. And I know, I'm not alone, I shared that with a number of other technologists that went through that program, that really kind of experienced the law for the first time through this incredibly inspiring, kind of perspective and respect. Pam's your perspective, not only to share your perspective, but to understand ours and others, where people are coming from, and I think that's an incredible gift. So thank you. And one last thing, actually, you know, I know everyone's here, this is a copyright IP class, or IP crowd, I will say, now kind of being in the privacy space for quite some time, inevitably, new scholars in the privacy space, come into it. And they have two solutions. One is either you fix notices, you make nutrition labels, you know, it's all about notice and fix notice. The other is privacy should be a property right. And so inevitably, I send them to a paper I think was like a 1999 or 2000 paper that Pam wrote that no one's ever, you know, everyone immediately comes to and she has very kind of intelligently laid out the issues both the kind of the structural, as well as the ethical and, and legal considerations of that. So I just want to flag that she's a scholar, not only in all these things like patents and otherwise, but also privacy. So thank you, Pam.



Molly Shaffer Van Houweling 1:24:27

And thanks to Rob and all of our great final panelists.

M Molly Shaffer Van Houweling 1:24:32

So we have a couple more toasts leading up to our grand finale of cake. Oh, and hearing from Pam, a little bit in a few minutes. Before we, before I introduce my my colleague for our next toast. I have an important announcement and that is that there's alcohol in here. We've been drinking sparkling juice all day, but you know, it's happy hour. So, now you've been warned. I'd like to call to the podium Claudia Polsky, my colleague here at Berkeley Clinical Professor of Law and the founding director of the Environmental Law Clinic at Berkeley Law, she's going to kick off a final round of toast. Thank you so much Claudia.

C Claudia Polsky 1:25:23

Good evening, I am honored to close out today's toasts as colleague and friend of Pam's and a disciplinary outsider from the fields of environmental law. And because I share with Pam the trait of honesty, and with apologies to Molly, my remarks are exactly 90 seconds longer than my allotted time, because I will be concluding with a poem. And the only thing I can offer in my defense is that an extremely important choreographic thing at this stage in the day is to leave Pam with very little room for rebuttal. I first met Pam electronically. When moments after my Berkeley Law job talk in 2015, I received a characteristically succinct Pam email. That was virtuosic. Period. I share this with you not because it fortified my ego. In fact, just the opposite. First, unlike all of you, I had no idea who Pam was, making me realize the extent of professional reinvention that would be necessary in attempting to transition from longtime practitioner to academic at nearly age 50. Second, and far more troubling. I thought the adjective Pam had typed was supposed to have a second 't' before the last syllable, and I ran to my dictionary to look up the word virtuosic. Of course, it did not exist. And I have no idea why I thought that was the proper spelling. But suffice it to say the confirmation of this error also did not enhance my feeling of intellectual security at the moment of major professional transition. Happily, however, I did that day draw a proper conclusion. Pam seems to know what's going on around here. I think I'll follow that lady. A second key interaction occurred when I moved to Berkeley Law, and by happenstance was assigned to Pam's old office as she transitioned to one with a better view. Caching her mid packing, I asked if she might just leave a little bit of MacArthur dust around. Because my expertise is in environmental exposure. I appreciate the power of inhalation and dermal contact to effect bodily change. Alas, it was not to be. With characteristic modesty bordering on ego annihilation. Pam responded of her Genius Award. Oh, that's nothing but good time management. In endeavouring them to understand how Panem managed her time given her hyper generative brain, I was delighted to observe that just like me, Pam kept her scholarship ideas in subject matter piles, on floor, file cabinet window sills, space chair, excuse me, spear chairs, and any other place that was amenable to the laws of gravity. Unfortunately, however, this arrangement turned out to be a necessary but insufficient condition for prodigious scholarly output. Thus in Pam's case, each 2016 pile has turned into a well placed and influential published article, whereas in mine, it has represented a slide towards designation of my office as a class three hazardous waste landfill under the Resource Conservation and Recovery Act with the potential for involuntary remedial intervention by the US EPA under the federal Superfund law. Despite this gap in our scholarly productivity, however, Pam has always made me feel intellectually capable, and feel like I had something worthwhile to say. Related, she has never condescended to me, even when I was untenured.

And now post tenure, Pam does not patronize me for being a mere clinical professor. A title that, were our law school depicted as a marine trophic pyramid would probably lie somewhere between benthic, invertebrate and starfish. Beyond the context of these faculty interactions, Pam and I soon discovered we had many passions in common. We love hiking, wildlife observation, fruit picking, cooking, the trills of the principal trumpeter in the San Francisco Symphony. We both love our students, and we really enjoy hard liquor. A more profound thing we share is being fundamentally aesthetes cursed with an activism gene. By this I mean that each time we want simply to revel in the hues and lines of a landscape, a sunset, or savor the tension between the sunkiss and frigid chill and a spatula made of homegrown tomatoes. Our social conscience yanks us back into the gritty, contentious world of advocacy, to try to mend whatever we can have the world's broken bits. Here, Pam and I each find solace, and together find companionship in the realm of poetry. For it is poetry, which holds the untamable complexity of the human condition and by a rare alchemy renders it art. Pam and I have long traded favorite poems, poets, verses and lines. And we share share an awe at the power and economy of a great poem. How in the words of the great former British poet Laureate Andrew Motion, the perfect poem looks like a glass of water, but turns out to be gin. Finally, on a very personal note, I want to confess that there were many times in my stint at Berkeley Law even beyond tenure, that I considered leaving and returning to practice, in whose culture I felt far, far more at home. In those moments of darkness, it seemed Pam would invariably show up in my inbox sharing a photo of an emperor penguin from a recent visit to Antarctica, appear like a deus ex machina knocking on my office door with a bag of sweet and cold William Carlos Williams plums, or invited me for a restorative visit, with her and Bob to St Helena. And in these moments, I felt deeply the truth of Dickens's observation in the Pickwick Papers, where there is darkness, the light shines brighter in the contrast. Pam, thank you for cutting through the sexist, ageist racist and gratuitous hierarchic bullshit of the academy to make me feel seen. Thank you for not abandoning me when I chafed at institutional norms that were unstated and uncomfortable. And with which I have sometimes taken noisy issue. Thank you for being for me, as for so many a North Star, a Southern Cross, a beam that lit the way home. Like all of us here, I am so so grateful. So Pam, on this shining day of celebration of all the multitudes you contain, I offer up a poem. I felt the selection particularly right in this moment of global moral agony.

C

Claudia Polsky 1:33:06

It is by the Palestinian American poet Naomi Shihab Nye. And it is titled Kindness. Kindness by Naomi Shihab Nye. Before you know what kindness really is, you must lose things, feel the future dissolve in a moment, like salts in a weakened broth, what you held in your hand, what you counted and carefully saved. All this must go. So you know how desolate the landscape can be between the regions of kindness. How you ride and ride thinking the bus will never stop. The passengers eating maize and chicken will stare out that window forever. Before you learn the tender gravity of kindness, you must travel where the Indian in a white poncho lies dead by the side of the road. You must see how this could be you. How he too, was someone who journeyed through the night with plans and the simple breath that kept him alive. Before you know kindness as the deepest thing inside, you must know sorrow as the other deepest thing. You must wake up with sorrow. You must speak it till your voice catches the thread of all sorrows. And you see the size of the cloth, then it is only kindness that makes sense anymore. Only kindness that ties your shoes and sends you out into the day to gaze at bread. Only kindness that raises its head from the crowd of the world to say, it is I you have been looking for and then goes everywhere with you like a shadow or a friend. Pam on behalf of all of us, I offer a last line with which you've so often concluded your messages. Thank you for being my friend.

