Law, Policy, and the Convergence of Telecommunications and Computing Technologies

March 7-9, 2001

PRODUCING, OWNING, AND USING INTELLECTUAL PROPERTY

March 9, 2001

DEAN JEFFREY S. LEHMAN: This panel is entitled "Producing, Owning, and Using Intellectual Property." There has been a change in the composition of the panel. Hank Barry was initially supposed to be here, the interim CEO of Napster. There's been insistence on the part of a judge that he be elsewhere and so we have with us instead vice president from Napster, Manus Cooney. Mr. Cooney is a graduate of Villanova University and University of Baltimore Law School. He has served as chief counsel and staff director at the United States Senate Judiciary Committee where he was the principal legal and policy advisor to the Chairman Senator Orrin Hatch. He is currently the Vice President for corporate and policy development at Napster. He is responsible for setting the company's strategic course on legislative policy issues that affect the company, its users and artists. He represents the company before Congress and the administration.

Our three panelists will speak in the following order. Moving from Manus towards that end we have Yochai Benkler who is an associate professor at the New York University School of Law where he teaches Communications Law, Information Law and Policy in the Digital Environment and Law in the Information Economy and Society. His research focuses on the regulation of the digitally networked environment.

Rebecca Eisenberg is a professor at the University of Michigan Law School where she has taught a variety of courses about intellectual property and the regulation of science and the Human Genome Project. Her research focuses on patent laws applied to biotechnology and the role of intellectual property at the public/private divide in research science.

Randal Picker is a professor at the University of Chicago Law School where he teaches courses in antitrust, network industries, technology, innovation and society and the legal infrastructure of high-tech industries. His research has concerned competition policy and regulated industries. So we'll begin with Manus Cooney.

MANUS COONEY: Well, thank you. Sitting in for Hank Barry is an honor but I've seen the look on your faces before. It was my first and only blind date and when the door opened and she was expecting someone different, the look on your faces was similar to what I saw.

This is a fascinating conference and I'm very happy to have the chance to speak with you all. I'm with you here on behalf of Napster.

We are the world's largest file-sharing community. We are, as you all know, the center of some considerable controversy and interest. You may have seen over the last weekend that Napster

announced that in a first step in our on-going effort to comply with the three-judge panel's decision, we began implementing a screening technology to block access to certain files. We will block access to files where a copyright holder has complied with a notice requirement of the district court's preliminary injunction submitted by the trial judge earlier this week.

Although we are appealing the decision of the three-judge panel of the Ninth Circuit Court of Appeals, we respect the court's authority and we are working to comply with its decision. Our screening initiative comes on the heels of several months of repeated settlement offers by Napster and which the record labels have, to date, rejected.

The topic for today is producing, owning and using intellectual property. That's quite a bit to take on in a few minutes, but perhaps we can focus our discussion, at least my area of discussion, on one important part of intellectual property and that area is copyright.

Napster presents important questions for the legal profession, policy makers and the general public--as far as the intellectual property debate is concerned. One question is: is copyright law and the content community's interpretation thereof suitable for the basic infrastructure for our world's information policy? It is important when discussing Napster that you keep in mind that Napster is not being sued for copyright infringement. Rather, the record labels claim we have committed contributory and vicarious infringement. Their theories of liability rest entirely on their view that Napster's users are infringing and that Napster is facilitating that infringement. Whether tens of millions of Americans are, to use the record industry's terminology, pirates is a question which scholars are increasingly beginning to question.

Professor Jessica Litman asserts in her new book, *Digital Copyright*, that the 205-page copyright act does not address this issue. According to Litman and others, should the three-judge panel's decision be permitted to stand, there needs to be serious public dialogue over this issue before we make consumers liable for unauthorized receipt, viewing and hearing of infringing copies of works. Indeed the rules embodied in the copyright act ought to be updated and made clearer.

At best, the record labels are using ambiguities in the law to advance a strategy of ruinous litigation aimed at having the courts decide these consumer liability issues before the public is wise to what is taking place. That is why I believe that Congress will not sit quietly by while the media establishment advances through the courts a technology paradigm for the future that leaves American consumers with less power and without the resources to make legitimate uses of technology information. Whether every citizen needs permission for each act of reading, viewing or learning from material protected by copyright is the core question that will define the nature of our information society and perhaps that is why the record industry, the motion picture industry and the media establishment have seemed so willing to plow seemingly unlimited dollars into fighting the copyright wars. Whether to impose a copyright based legal paradigm on individual consumer activity over the Internet is an important question. Resolving it requires that we must decide what we have a copyright law for. Is it to give creators complete and absolute control over the use, dissemination and access to a work? Or is copyright about striking a balance between the interests of the public at large and the creators?

Professor Litman argues that we're steaming headlong into a world where consumption will be controlled by a pay-per-use or permission-per-use arrangement and this will significantly decrease access to and use of copyrighted works by making access and use more burdensome

and much, much more expensive. Let's be honest as well. Refusing to require the consumers to pay at all for personal consumptive use may well reduce the incentive to create and distribute new works, which in turn could well decrease consumers' demands for the use of those works and consumer opportunities to access those works. In my opinion, this is not a public policy path to the future that should be resolved by the courts which are applying judge-made theories of liability and relying on statutory, in the words of Professor Litman, "linguistic fortuity."

Let me ask you a simple question. How many people here in the audience have actually used Napster? Thank you, you all are in very good company. As of last week, our software had been installed more than 64 million times. Each day more than 10 million people use the Napster service. So what is Napster? Napster is a community of people who love and buy music. They share MP3 (Moving Picture Experts Group Layer-3 Audio) files by posting a list of the files they wish to share to Napster servers. They send messages to each other to talk about music and they look at our featured music artists section and each other's file lists to find new music. That is all Napster has been and is. It is a community of music lovers built around a list of files. Napster does not make MP3 files. It does not copy files. And Napster does not transfer files. The users of the service do these things and they share files one at a time, person to person, without any expectation of consideration. And Napster is a great promotional tool. Fully two-thirds of our users say they use Napster to try out and sample music before buying. Maybe this is one reason why the record industry had its best year ever selling over 785 million units in the United States alone. That's over 30 million units more than last year in 1999 and $500 million more than in 1999.

There is something in our legal system called copyright and the principle underlying copyright is a sound one. Let me be very clear on that. Although we disagree with the court of appeals decision, Napster respects copyright law. Napster believes the artists should be paid for their creativity and we believe that those guiding principles can coexist and have coexisted with changing technologies for hundreds of years. And in every case to the benefit of the copyright owner. Today we as a company and we as a society must ask however, as we did with the piano rule, the VCR and the Xerox machine, how will we apply this law to new technology. Will new technologies be built around an absolute definition of copyright law? A policy of absolute and complete control over creative works? How do we balance the limited monopoly we give to authors in order to encourage original expression with the limitations that are on that monopoly that society must, must have so that we as a whole can share, grow and build and grow upon one another's creativity.

We need to build systems and processes that work right now so that we can have a system that will work well in five years. If CDs (Compact Discs) are eventually to head the way of the dinosaur and be replaced by MP3s, the record companies have time to develop consumer-friendly technologies and Napster would support and work with them in doing that. But time is our common enemy, so we ought to be getting busy fixing the problems now. But even if we reach a settlement with the record labels, there may be policy implications or legislative requirements. And this brings me to a final issue that I would like to discuss.

Before I joined Napster, I spent over a decade working on these and many other issues on Capitol Hill for the Senate Judiciary Committee. I'd like to share with you a few key observations on how businesses and those interested in technology can best approach the

interplay between technology, public policy and the like. The enthusiasm the general public has for Napster has spread to the halls of Congress and the executive branch. Does every member of Congress appreciate the distinction between an MP3 file and a Windows Media file? No, of course not. But they do understand that the technology at use in Napster has been unleashed. They understand that its scale is unprecedented and the understand 64 million users. And they do not believe that millions of their constituents are pirates. Napster is a technology issue that actually resonates with the public. It's a technology issue that while we hope it doesn't prove necessary, many feel is ripe for a legislative solution. And Napster is a technology issue which cuts across political ideology. Conservatives, moderates, and liberals all love music.

Washington is also learning how Napster's helping to drive demand for broadband Internet connections. According to Rob Chen, CEO PC Pitstop, using Napster helps people realize the usefulness of having broadband connections in their home. Those of you who are students who have access to broadband here on campus are going to expect, no you're going to demand, the deployment and access to broadband when you leave campus. Napster is the demand generator for the consumer broadband market. It is also increasingly a demand generator for the PC market place. OEMs (Original Equipment Manufacturer) have all amended their financial forecasts and are turning their attention to generating consumer demand for their products. Napster, in my view, is the PC industry's ultimate demand generator.

I'm a father who this past Christmas had a choice between buying a $500 Internet appliance or a $2000 PC with a ton of memory, a CD burner and a Pentium 3 processor. I also have three daughters. Guess which product I purchased?

In short, policy makers are beginning to see Napster and a favorable resolution of the issues surrounding us, as a spur to the development of peer-to-peer industry and thereby prompting continued investment in Internet companies. And Napster provides a true market challenger to the established media, which creates benefits for artists and consumers alike. The threat that tens of millions of Napster users and countless other beneficiaries of this competition in the recording industry will lose the benefits they currently enjoy is far greater today than it was six months ago as evidenced by the recent demise and downsizing of many online digital media and digital music companies. Just to name a few, Scour, Riffage, Music Maker, Listen.com, EMusic, Myplay and many, many others. In conclusion we should let history be our guide. Every time a new technology makes it easier for listeners to discover, enjoy and share music, the copyright holders, the artists, and publishers end up benefiting. Digital media should be no different. But it requires that we have a discussion, a public discussion, of these issues and that we do not leave these matters to the courts or to "linguistic fortuities" of a statute written before Sean Fanning and the technology he unleashed were born or contemplated. Thank you.

DEAN JEFFREY S. LEHMAN: As our discussants respond there will be two people in the audience passing out blue cards to collect questions from the audience for later. Please fill them out. Also, in your registration packets, once again, please remember to fill out the yellow sheet of audience participation questions to return in the hall in the basket after the panel. So with that we'll go to Yochai Benkler.

YOCHAI BENKLER: Thank you and thanks for inviting me here. It's great to have Napster make stuff that's not so sexy be sexy and mean a lot to a lot of people. But it is a symptom of a much broader phenomenon, and I would like to spend a few minutes just locating it in that context.

The first thing to object to in this panel, though is its name. "Producing, Owning and Using Intellectual Property." Only lawyers produce intellectual property. Other people produce information, culture, knowledge, music, poems. Lawyers produce intellectual property and so we tend to think about it. And this name is symptomatic of a broader concern. The real policy question is how we further information production, cultural production. Intellectual property is one heavily studied but poorly understood institutional mechanism to do this. So what I'd just like to do for the next couple of minutes is identify for you mechanisms of producing information that have nothing at all to do with intellectual property other than to suffer from it, and then talk about the implications of recognizing these mechanisms.

Let's start with Slashdot, which I mention these here to mark two things. First Linux and Open Source software development smack in the middle of our information economy. Some of the most robust pieces of software are written by a few, maybe a few dozen, and up to over 10,000 people collaborating. No one asserting a property right other than to claim that no one else can take, improve and then not let you share the software. Second, and more important things that are less often focused on. People producing, for example, news. On Slashdot, for example, people post news about an area that they share. Nobody is being paid to post. People are contributing. Well, you say, how do we know that it's worth anything? Well this is a tough one. What we see developing is peer review. Well you say, maybe it's just the techies. Maybe it's just the people who are sitting in front of their computers.

Let's look at The Vines. It has articles about history, books, home and garden, movies, music, pets, there's also poetry. People contributing because people want to write, people want to talk to each other and have been living in an economic context that makes it impossible to publish. So what do we have here? We have people who read and then rate. Everybody reads and then rates. How do we know what's good? Well it depends on what other people who have read say is good. And so we find stuff that other people liked sooner, more easily. We can go to other things that other people liked and accordingly will get things that those other participants think are good. So, for example, you get ratings if you look here on the bottom, you'll get ratings based on what it is that people like. Again, what do we have here? We have culture, information, commentary being produced, not in a proprietary model. And then we have relevance and accreditation produced by common reading, not on a proprietary model. But even this seems to me to be too narrow. What we might be thinking of is just the web. The amount of information that is available out there on a non-proprietary model that we take for granted. I just took Google. And the reason I took Google by the way is what makes Google much better than all other web searches is it does one thing substantially better than anyone else. It tells you which is going to be the best source. And it knows which is going to be the best source because it counts how many other people linked to the pages. So people vote by linking to a page and Google tells you this is the stuff that other people on the web thought worthwhile linking to. Again, people vote by linking to something, not on a proprietary model, but as a function of using it. So if you look

at who writes about Viking Ships you'll find things all over the place, not necessarily commercially produced, a wide variety of academic and commercial and just amateur, not property based. And perhaps, the most intriguing, the open mind initiative that's actually trying to get people to participate in developing very complicated software projects where the model of collaboration, if you compare to open source, uses non-technologists to perform functions like querying software, working with it, teaching it, collecting thousands of people to work together on a project, giving what it is that they have to give.

Okay, now imagine that this is how software is actually produced, this is how poetry can be produced. What does that tell us? What does it tell us that in the context of an environment that is so pervasively covered by non-propriety information, we nonetheless talk about "Producing, Owning and Using Intellectual Property." The first thing to understand is that in an environment where information is produced not because of IP (Intellectual Property), IP only makes using information harder. That's all it does. The only time that IP starts helping is when it brings in those who wouldn't produce otherwise. But when you're in the context of a world where so much non-proprietary production is going on, the tradeoff of IP is very different.

Now, the blindness to non-proprietary production and its centrality to the production of information, knowledge and culture in our society is widespread. When we look at it politically, what we see is a systematic imbalance in the political economy of intellectual property law because all of the benefits of such laws are concentrated in a small number of industries, in a small number of companies. So Hollywood and the recording industry push copyright and its neighboring rights for example. Elsevier pushes the database protection right. What we see is very heavily concentrated private benefits on the side of IP and very diffuse costs to all of these thousands of people who could be producing in all of these ways on the other side. When you get this kind of imbalance, you get a lot of protection.

Intellectually, we also see a very poorly understood mechanism, intellectual property. Poorly understood in the sense that the economics of it are very difficult, that the traditional welfare economics of it would suggest there is such a thing as too much intellectual property and we may well be there already. The few empirical studies that exist, such as recent studies by Wesley Cohen's study for Carnegie Melon, Josh Learner at the Harvard Business School, Adam Jaffee's survey of empirical studies, in specific industries as well as across industries systematically fail to find an effect that increasing patent protection increases innovation. Maybe I'm overstating the case, but the current studies don't show a very strong effect. Nonetheless, the absence of evidence the IP does what it's supposed to do, is not part of our conversation.

What we do have, when we look at the past five years on the legal side, is a pervasive enclosure movement in all dimensions of intellectually property. We see more, and easier to get patents in business methods and in software, which we didn't see in business methods at all or in software as much, in the past. We see trademark moving from a confusion concept and a consumer protection like concept to a good will or proprietarian type concept. We see the attempt to create database rights, rights in raw data that didn't exist before.

Copyright in particular, is where Napster then stirred so many hearts. We have seen the extension to individual use as a core aspect of enforcement, which it never was. In particular, we see expanded criminalization, "Pirates" is one word, but actually making millions of users into

felons is quite another matter. And when you're talking about No Electronic Theft Act, if you read the Ninth Circuit opinion in Napster, you might be talking about millions of felons in the technical legal sense. That's a problem.

Most importantly, we see dramatic expansion of private ordering through the digital millennium copyright act and the uniform computer information transactions act. Two pieces of legislation that effectively permit owners of inventories of copyrighted materials, in fact, even non-copyrighted materials, in fact, even non-copyrighted materials, to close them up technologically and contractually well beyond anything that we in the past did in copyright. And this is potentially displacing intellectual property, displacing the public balance between access and incentives with a private set of constraints imposed by those whose business model it is to charge for every access. And that is a serious policy problem, a policy problem that we will not begin to address unless and until we overcome the intellectual barriers of understanding that intellectual property could be bad not only good and should be limited based on public policy concerns. And it is a problem we will not begin to solve until we solve the systematic political imbalance that pushes us to increase as intellectual property protection without really accounting for the cost side of it properly.

REBECCA EISENBERG: I'm Becky Eisenberg and I'm an intellectual property scholar but by no means an expert on either telecommunications or information technology. You notice I'm the only panel member who didn't come here with a laptop today. I'm speaking from hard copy notes here. I write about biotechnology patents. That used to be way over on the other side of the intellectual property universe from information technology, but they've been moving closer together as biotechnology has converged with information technology in any number of ways. So I'm starting to go to more conferences where people like Yochai Benkler and Jessica Litman are talking about information technology and I'm starting to hear about their concerns and their perspectives. Within that community, Napster is quite a hot topic. But their normative bearings are somewhat different from mine. I guess I would quibble somewhat with Yochai's characterization of the empirical literature as offering no support for any positive benefits from intellectual property. I would say that the empirical literature suggests that the impact is quite different in different parts of the economy.

The part that I study is where I think the case for intellectual property is clearest, the biopharmaceutical research area. There's a pretty clear story about the importance of patents in promoting private sector investment in research and product development. That story might be contested in certain places. Certainly academic scientists and increasingly medical practitioners are ambivalent about patents, which often means they feel entitled to pursue their own patents but they feel that their activities should not be touched by the patent rights of others.

But, in any event, you have a strong voice coming from the private sector about the importance of patents in motivating their research and development. In information technology, I think that the story is quite different. Even within the private sector the story is quite different. That is, some firms love intellectually property and pursue it aggressively, talk it up without apology. Others think IP, particularly patents but also copyright sometimes, is just a huge threat to progress, is killing the industry, is strangling the industry. Copyright scholars that I read are by

and large skeptical about strong intellectual property claims to information products and that's very interesting to me. It's becoming increasingly relevant to what I study and to what I understand, but it's not really where I'm starting. It's not central to what I'm looking at. So when I hear a generally strong pro-Napster viewpoint coming from that community, from people like Yochai Benkler, I'm impressed and I'm interested. But I'm not ready to join in the chorus necessarily. My normative bearings from the biopharmaceutical research setting tell me that intellectual property rights sometimes do matter, that they motivate socially productive investments and that we shouldn't lightly assume that we lose nothing but shackles when we set them aside.

I have another context for thinking about Napster, however. And that is my kids, who adore Napster. I'm a Napster mom in other words. I think that status has informed my perspective on Napster at least as much as my status as an intellectual property scholar. I don't use Napster myself for a variety of reasons, including that it seems to me I'm probably infringing on other people's copyrights when I do that. I think it's not clear whether Napster is infringing anybody's copyrights, you can make arguments about that, although I guess the Ninth Circuit has given its view on that question. But I think it's a lot harder to make the case that the users are not infringing, and I don't feel like I need to do that and I see no particularly good reason for me doing that. I feel quite differently about the use of copyrighted works in my course packs or in my scholarship, which I think should plainly count as fair use, although it's not clear that courts would agree with me. But my normative bearings are quite different for Napster than they are for course packs.

But I'm not stopping my kids from using Napster, and that's also interesting. I talk to them about it. I guess maybe the chorus of support for Napster from people like Yochai Benkler and Jessica Litman has moved me somewhat, at least to the point where I'm disoriented. I'm not sure that I want to spend a lot of parental capital in prohibiting my kids from using it. So instead we talk.

I would feel quite differently if my kids were going to Tower Records and stealing CDs. I would be very angry and very upset if they were doing that. I wouldn't stand back. I'd go to great lengths to make them understand that they were doing something that was very wrong. I would compel them to pay for what they had taken, to apologize, to promise never do it again. I would restrict their privileges in ways that made it harder for them to do that again.

I'm not entirely sure why I don't feel the same way about my kids using Napster, but I don't. I plainly don't. And the fact that I haven't stopped them from using Napster provides me with a kind of interesting window on Napster culture. I talk to my kids about Napster. My 10-year-old recently wrote a school paper about Napster. I showed him the Ninth Circuit opinion as he was working on his paper, I've talked to other mothers about Napster use, whether their kids are using Napster, how they feel about it, what kind of conversations they're having with their kids, and I just kind of pay generally more attention to what's going on with Napster from the user perspective because it involves my kids. And on the basis of all of the signals I'm getting in my capacity as Napster mom, I think there's an interesting social phenomenon going on here that's quite different from anything that I recall happening around the introduction of earlier copying technologies like cassette tape recorders and video tape recorders. It's kind of fun being middle aged sometimes. You get kind of a longitudinal perspective that makes certain things salient that you wouldn't otherwise notice.

When earlier copying technologies were introduced, I think most people felt that what they were doing when they used those technologies, when they made a tape recording of a record or a TV show or something like that, was perfectly fine. It was probably legal if they thought about it. If they didn't think about it, they thought it should be legal, it's harmless. It's nobody's business. People didn't have the sense that they were violating any important social norms through using those copying technologies.

I don't think that's the case for Napster use. You may disagree, but it seems to me from my perspective that Napster users often believe that they are violating the copyright laws. And they don't mind that. In fact, that's part of what they like about using Napster. Many of the kids who are downloading music with Napster could easily go to Tower Records and buy the CD. Downloading the music for free saves them some trouble, it saves them some money but it's also doing something else for them. It's not simply improving their access to music. It makes them participants in a social movement, a transgressive social movement. A movement of rule breakers. They get a kick out of that by using Napster they proclaim their affiliation with a new generation of Internet-savvy, free music listeners that aren't going to let these ossified copyright laws from an earlier era cramp their style.

When I search for an analogy from my own youth I don't think about cassette tape recorders, which are nothing like this. What comes to mind is transgressive attitudes about sex and drugs. We take it for granted nowadays that you don't need a license to have sex. But 35 years ago many people thought that it was morally wrong, that sexual intercourse outside of marriage was morally wrong. It's almost hard to get back into that frame of mind. And the loosening of that norm began as a transgressive youth movement. Somewhat like what we see happening with Napster today. Various moves by the authorities to tighten the rules against unlicensed sex were ridiculed, protested, evaded, ignored. Very much like the various efforts to clamp down on Napster use.

Smoking marijuana has had a somewhat different history, but it looked, like it was on a similar track 30 to 35 years ago. Everybody on college campuses knew smoking marijuana was illegal, but there wasn't a lot of respect for those laws. The law stopped some people from doing it, but it didn't stop everybody from doing it by any means. These were considered pointless laws of an earlier generation. The metaphor was Prohibition, this was a latter day Prohibition, it was misguided, destined to wither away. Not everybody smoked marijuana, not everybody uses Napster, but you were a traitor to your generation if you called the cops. Right? Nobody wanted to do that either. So you kept quiet, you didn't inhale, and you became a part of the movement in effect. That experience of going along with the prevailing culture, which said that these are rules to be disregarded had the effect of the non-participants in their normative bearings.

I'm not sure what the Napster equivalent of neither calling the cops nor inhaling is, but I suspect there are a lot of you out there who are doing just that. It's sort of like what I'm doing, I suppose, as a mother in allowing my kids to use Napster, and it's hard to stay motionless at the top of that slippery slope. Here's an example of one of the things that happens in my role as Napster mom. One of the favorite things my kids love to download is Weird Al Yankovic parodies of various songs that they've never heard (mostly because these songs were way before their time). And I can't stand it that they're laughing at these parodies without any familiarity with the original. Now, my husband is an Audiophile. He has an extensive music collection, and often we own the

original and we can play it for them, and they go back and play the parody again with new understanding. Often we don't own the original, because the original was a really terrible song that was ubiquitous on the airways for three weeks and then disappeared and I don't want to go out and try to buy that song. Well, my son has an idea for where we can get that song. He wants to go look for it at Napster. So you can see how I'm compromised, how you get swept along by the movement if you aren't going to say this is an absolute violation of the rules.

Today, looking back with the benefit of hindsight, the drug laws have regained a lot of their normative luster. I think many people think that drug laws are a good thing, worthy of enforcement. Not everybody. Some people retain their libertarian attitudes. But I think the drug laws are in much stronger shape as a normative force in our society than they were 30 years ago. I don't think that's the case for the sex laws. I think the sex laws have never recovered from the assault on their normative force. Some of us nowadays only practice licensed sex, but you have a hard time getting indignant, morally indignant about people who practice sex without a license.

So what about Napster? Is Napster the new sex or is Napster the new marijuana? I'm not really sure. When the thrill of the transgression wears off, or when the current generation of Napster users moves beyond the age at which they get a thrill out of the transgression alone, will they decide to give up unlicensed sharing of music files and the copyright line? Or, like most of my generation did with the laws about smoking marijuana, will they decide that well these are really good laws and I'm going to abide by them? Or, will they conclude that copyright laws are simply an anachronism, not worthy of their respect? I think this is a very serious question that may determine the future of the copyright laws.

The copyright owners face a challenge, I think, that the opponents of unlicensed sex and the opponents of marijuana smoking didn't have to worry about. And that is that they can't simply rely on the ossified laws, they always need to come back to Congress for more. Maybe the current laws will be sufficient to shut down Napster, I don't know the answer to that. But they're not going to be sufficient to shut down the transgressive movement entirely. They need to keep coming back, and this has been shown repeatedly throughout history; Jessica Litman's work chronicles this for over a century. New technologies require coming back to Congress and seeking stricter laws. They need a new legislative fix in order to preserve their rents as market incumbents. They can't simply rest on their current rights. Whether Congress is going to keep indulging them may, at some point, depend on popular attitudes toward copyright in the information economy. Napster, I think, is playing a formative role in the attitudes of the generation that's currently coming of age. It's a generation that's very comfortable with computers, that's used to getting information for free over the web, that's much more sanguine about the capacity of business models to adapt to that phenomenon.

Last year, I heard a talk by a lawyer from Microsoft who does enforcement against software pirates around the world. And she told kind of an interesting story about efforts by Microsoft to take the pulse of the public, to identify the most appealing arguments against software piracy. They assembled focus groups and threw various arguments at them to see which ones appealed. And to their great surprise, the argument that played the best with the focus groups was that software piracy sets a bad example for our children. That was very interesting to me. With Napster, I think the tables are turned. Now it's our children who are setting the example for us, as they lead us into the use of these new technologies. And that's really a force to be reckoned with.

RANDAL C. PICKER: I think I have the answer to Becky's question which was the equivalent of don't inhale. Manus asked if we used Napster and I dutifully raised my hand. I downloaded, but I never listened. I assume I'm clean.

I want to talk about a variety of issues. I want to say a few words about the Ninth Circuit's opinion; talk a little bit about the future; and then, showing the ability of a law and econ person to take any sexy topic--a topic about whether Napster is the new sex--and make it dull. I want to talk about virtual inventory, which is what I think this case is really about. I think managing and regulating virtual inventory is precisely what's at stake in the Napster situation and I'll try to persuade you why that is.

The Ninth Circuit opinion I think is actually a very interesting opinion. I urge you to read it if you already haven't. As Manus pointed out, obviously it's a two-step process to get to Napster here. The first step is finding the underlying violation by consumers. A second step is taking one of our theories of third-party responsibility and somehow attaching it to Napster. That's a two-step process.

Step one of that process involves this inquiry under fair use. I guess I want to disagree with Manus in saying that this is about "linguistic fortuities" or in some sense ancient ideas. I think the Ninth Circuit is actually quite sophisticated about this. I think it has a good intuitive sense of what's going on here and I think it's fairly simple. They look at the world and they say, "Look, offline fair use doesn't scale online." So things that we accepted in the offline world as being perfectly acceptable, and you can sort of run through the situations--Becky, copying with cassettes--those things might have been perfectly fine as fair use in an offline world, but online when you have lower transaction costs and perfect copying technology, that doesn't scale. It doesn't scale because the commercial consequences of those activities are changed. And it's those commercial consequences which led the Ninth Circuit to conclude, I think correctly, that what otherwise would have been a fair use in an offline world doesn't count as fair use in the online world. So I think actually it's not about "linguistic fortuities." I think the Ninth Circuit was reasonably sophisticated.

Step two of that process was to look at where Napster fit under the Sony decision. And I think what is interesting, is how willing the Ninth Circuit was to in some sense do an end run on Sony. I think that's, when we talk about this kind of thing at lunch at the University of Chicago--we're pretty dull, this is what we talk about at lunch--and my colleagues would say, "Oh, Napster they have to lose." I'd say "well no, not necessarily because the test under Sony merely talks about substantial non-infringing uses." And Napster certainly has a good story about the garage band allowing consensual use. So one might have said if you sort of woodenly apply the Sony decision, Napster would have won. Would have won not because there wasn't a copyright violation--this was the consumer question--but rather when you turn to the third-party question, the substantial non-infringing use test protects Napster.

The Ninth Circuit didn't do that, and, I think, makes a key shift in how this doctrine operates. I think that's important. The key shift is to say "look, unlike the VCR which was out the door once they shipped it and there was nothing to be done. Napster could continue to exercise control." This is the language of the opinion that the Ninth Circuit looks to. And I think that's to embrace a

world in which we say design matters. Design decisions matter, software design decisions matter. And if we were to go back to the VCR, maybe VCR design decisions matter. That's a change I think in the doctrine. It's an interesting move. I think it is the right move here, but again it's a switch from where Sony was.

All right, going forward. I want to talk about three issues. I want to talk about music sharing, want to talk a little bit more about third-party liability doctrine, and I want to talk about compulsory access, which will get us to the exotic topic of virtual inventory.

In terms of music sharing, I think we are going to see an interesting response to the Napster decision. I think what's clear from the Napster is that because Napster in some sense was the hub of this peer-to-peer world that that was what gave Napster control and faced them with potential liability. Well, the solution to that, if you read the Ninth Circuit opinion, is to kill off the hub. And we know from a software standpoint that's reasonably straightforward to do. Gnutella and other approaches to this are genuinely peer-to-peer approaches where software sharing or music sharing can take place, where you won't have the hub with the continuing control. And under the Ninth Circuit's opinion, I think read at least narrowly, you won't have liability. I think that's the world we'll embrace.

There are questions about how well Gnutella scales: the fact that we're going to have to look at lots of computers turns out to be fairly clumsy. Napster was a very efficient system in many ways. Having that hub there was quite useful. So it's not obvious that this will be as attractive, but free is attractive and obviously Gnutella will continue to support a free approach to music for Becky's kids.

Second issue here is third-party liability doctrine. I think that that's going to change and I think the natural extension of what the Ninth Circuit has said and I think this gets us to Gnutella being a problem as well, is to say "when you make design decisions you have to accept responsibility for those design decisions." This would create a duty to respect an inexpensive consent technology where a holder of a copyright can effectively wave his or her hand and say "yes I'm in, no I'm out." I think that kind of responsibility is sort of the natural extension of the Ninth Circuit's opinion. An obligation imposed upon creators of these tools to make sure that these tools actually respect copyright. That wasn't an issue at the time of the VCR. That wasn't an issue at the time of the Sony decision, but I think increasingly that's going to be an issue. I think the Ninth Circuit opinion hints at that if it doesn't get there directly.

Finally, the third issue I want to talk about here is compulsory access rules and that will get me to virtual inventory. Manus talked about a congressional solution to this situation and the press has described that as a compulsory licensing solution where the Big Five record labels would be required to license songs to Napster. And the vision here would be that we're going to have a world in which the distribution mechanism online seems very attractive and we can either have that controlled by the Big Five or we can allow entrants like Napster. If we're going to level the playing field between those two groups, we need to give them access to the music. That would be the idea.

I want to talk about compulsory access a little bit. If you've been following the newspapers and Rob Howse mentioned it this morning, there have been two issues of substantial significance in the IP world recently. One is obviously Napster; the other is the possibility of compulsory

licensing of AIDS drugs in the Third World. One somehow thinks that's a more compelling situation than the Napster situation. Also, the compulsory access issue that has loomed large in the AOL/Time-Warner merger where the open access issue there is effectively a compulsory access issue. The point of these two examples is to make clear that we're going to see compulsory access emerge as an important issue in situation after situation. These are two of them. The virtual inventory situation is the other one.

Let me talk just a little bit about that. A couple of situations there. One situation where we've seen this already is in the C2C market, in the consumer-to-consumer market, which is basically the world of eBay. The compulsory access issue there, if you've been following this story is, is that there were a number of auction aggregators as they're called; companies that say, "you know, there are lots of websites where you can auction stuff. We'd like to pull all that together in a single site." One-stop shopping. So eBay's got auctions, Yahoo's got auctions, Amazon's got auctions. Pull all those together and put them on a single site. It's called being in the auction aggregation business. eBay didn't like that. eBay is a company which is very successful and has a substantial market share. eBay has been willing in some circumstances to license access but not willing to give non-consensual access. That resulted in litigation where at the end of a day, Bidder's Edge, which was the target of this litigation, died. Died under a virtual trespass theory where the idea was that eBay didn't give access to its computer system, Bidder's Edge was using it non-consensually, that was a trespass to chattels, which I don't think we even teach in law school anymore. Through this virtual trespass theory eBay was able to protect its position and deny Bidder's Edge access. Put differently, eBay had a virtual inventory. Bidder's Edge wanted access to that virtual inventory. eBay was able to prevent that access under this virtual trespass theory.

Version two of this. This hasn't even happened yet. Yet there's been Senate hearings and the Department of Justice supposedly looking at Orbitz. Orbitz, as you may know, is a travel website that is being organized by the airline industry. Where the airline industry will sell seats on the airplanes on their website. Travel agents, as you can imagine, both offline and online are very worried about this website. Why? Well they need access to the same ability to sell if they're going to be in business. That is they need access to the same inventory--that is the airline seats--if they're going to be able to sell. So one of the things they're very concerned about, is neutral rules regarding access to the airline inventory. Again, this is virtual inventory, and if you've purchased an airline ticket online it's a very natural way to do it. Again this is a situation where there's going to be a fight. Senate hearings have taken place already about who controls access to that inventory. And this is a situation where you actually have a history. If you go back and look at the early days, the first virtual inventory case was computerized reservations systems where there ended up being substantial antitrust litigation and ultimately regulation by what was then the Civil Aeronautics Board.

Version three of this is video. Sony's already announced that it intends to sell video directly online at a sight called Moviefly.com. And at least so far the press is reporting that Sony has made a decision--driven again by concern about antitrust liability--that this will not be the exclusive site for Sony content. Instead, they will make Sony content available to other entrants who want to try and sell Sony content online. Again, it's a question about control over the virtual inventory. Sony could take the hard line and say, "We're the sole source of this inventory. We control the delivery online." But for antitrust reasons Sony has chosen not to do that.

Finally that gets us to music, which takes me full circle to Napster. I think Napster's essentially a virtual inventory case. This is a situation where we have this inventory, which has gone online because of the joys of ripping CDs and putting them on your computer. It's a very nice technology, no question about it. To embrace compulsory licensing there would be to take a model which says that we need to have multiple sellers of this virtual inventory to establish a level playing field. I think that, that is the strategy that Napster will take in the next go-round. I think there are three key issues associated with virtual inventory that we need to pay attention to: the feedback loop; scope and bundling issues, which will take us back to this morning's discussion; and finally the question of pricing compulsory access.

eBay's strategy has been very clever. It's a strategy, which says people come to eBay, buyers go to eBay because the sellers are there. Sellers go to eBay because the buyers are there. So it's a winner-take-all situation of the type that Van Alstyne talked about this morning. It's a virtuous circle, self-perpetuating in that way.

Auction aggregators put that model at risk. If I knew that if I picked some obscure website to sell my stuff that it would effectively show up in this combined set of listings because an auction aggregator was taking obscure sites and matching it with eBay, as a seller I have less of a reason to go to eBay and, obviously, I'm going to a competing website as a viewer, a potential buyer. So eBay understood that and in terms of structuring the competition in that market place very much wanted to make sure that it controlled the access to the virtual inventory. Put differently, virtual inventory policies support winner-take-all outcomes. And the consequence of this virtual trespass theory is to give eBay control over its virtual inventory. That's one issue we need to focus on here, consequences of virtual inventory policies for market power.

Issue two is entry scale, scope and bundling. Obviously with regard to the scale issue there's a standard issue here: Napster could go into the music business directly. I could say to Manus right now, "I'm a great singer, it turns out. Let me sing now. Sign me up, promote me and distribute me." They could go into the music business, maybe they're thinking about going into the music business. They certainly could do that. They could do the whole thing. That obviously changes the scale of entry. They can't merely go into a distribution business, but they have to go into the full promotion business and that' s obviously a more complicated undertaking. If we want to simply facilitate competition and distribution, then it's useful to say to Napster, "Napster you only need to enter that sort of area you think you can compete on best. If you think that's distribution let's have you do it. And to do that we need to give you access to this virtual inventory." So again our virtual inventory policies have consequence for the scale of entry.

More interestingly--and I think for this issue the discussion this morning by Van Alstyne of Barry Nalebuff's work, was quite useful--there's also the bundling issue. Turns out to be very valuable. The economics, he went through it nicely; I think it's reasonably straight forward. It's valuable to be in a situation where you can bundle intellectual property goods together. That means having lots of pieces is useful because you can put the pieces together in an intelligent way. An entrant is going to have very few pieces to put together. And if we again want to facilitate entry into the music business, we may need to give access to more pieces to make that possible. That is we'll have multiple bundlers in this situation and Napster would emerge as a bundler. The good thing is, the Internet makes that easier. The lower transaction costs of the Internet means it's really possible to have many bundlers. Again in the offline world, pre-

Internet, bundling was done by getting 16 songs on a CD, that was a form of bundling. Now in an online world, it's fairly easy to have many kinds of bundles, many bundlers, so long as they have access to the virtual inventory. So again our virtual inventory policy is going to have important consequences and the bundling literature suggests that bundling has important social consequences. So I think we're going to need to think about that issue as well.

And finally, and I think more traditionally, if Napster's going to get a compulsory license, we've got to figure how to price that. Pricing these things historically has turned out to be quite tricky. We have to worry about investment incentives. Yes, there's certainly a world of people happy to create stuff for free, but there's also a world of people who aren't so willing to do that. I'm happy to have people who want to create for free. I'm happy to have copyleft. But I also think we probably need copyright and I worry about that here. So I think virtual inventory is the future. It's not very sexy, but I think it turns out most economic things aren't that sexy. I think that's the world we're going to embrace.

DEAN JEFFREY S. LEHMAN: Okay we have time for some questions. Let me begin which is a general question for the panel and this is a question about how we go about resolving these disputes. And I guess the implicit question is whether courts are a good place for this. It seems that we need a new procedure for resolving IP (Internet Protocol) disputes on the Internet, such as ICANN's domain name dispute resolution policy does for domain names. What do you recommend and are any such alternative procedures being discussed?

MANUS COONEY: Well I don't think it's best to leave it entirely to the courts. We heard some defense of the Ninth Circuit's decision. It's worth noting the Ninth Circuit also found the Sony Betamax to be infringing and had ordered the trial court in that case, I believe, to enjoin Sony from distributing, making available, the Betamax. Fortunately, the Supreme Court eventually took the case and Sony was never enjoined from selling the Betamax. But one can only ponder what our culture would be like today, whether we would have the videotape machine, whether the benefits that the motion picture industry has received as a result of the videotape machine, had as in the case of Napster, had the plaintiffs in that case been able to obtain a pretrial preliminary injunction essentially ordering Sony and all other videotape machine distributors to stop selling their product. I don't think that courts applying, as in the case of Napster, a judge-made theory of liability (contributory and vicarious infringement is not in the copyright act) to a statute, which was written before Sean Fanning was born, is the way to resolve these important technology and access to information issues that, frankly, are going to have a profound effect on our economy and the development of technology.

YOCHAI BENKLER: I'd say that it's not a process question. It's not an institutional competence question. It's a question of getting a very, very, very difficult question right. I think intellectual property is difficult under technologically stable conditions and I think it gets even more complicated when a lot of the parameters around which certain settlements have congealed change. I think there are systematic problems with Congress as I mentioned when I talked about political economy. There are systematic problems with judges who are professional IP lawyers, many of them, who sit on these cases and have a certain bias to try to normalize events to fit their understanding. Certainly, pushing it into an organization like ICANN is not necessarily going to

make it better. Within each of these institutions there are advantages and disadvantages and we need to try to make the best arguments possible in there. But it's not a question of institutional competence. Both of the relevant players, both courts and the legislature, have internal resistance to seeing or evaluating completely neutrally the skeptical or the critical positions that more IP is good and it is a hard question. I don't think that it is a simple question and therefore I'm not sure it's an institutional competence question.

DEAN JEFFREY S. LEHMAN: Okay, well staying in the process domain just one more level, this is a question about globalization. Napster serves an international community. It's a global Internet. U.S. copyright law might not reach worldwide. Why doesn't this lead to some kind of international competition that would lead Napster or an overseas version of Napster to emerge in a jurisdiction with less restrictive copyright law?

RANDAL C. PICKER: I think that's a real issue and I'm curious to know if Napster's thinking about doing that. I think the ability to choose different regimes is very important here. I go to international websites not as often as I go to U.S. websites, but I go to them frequently.

YOCHAI BENKLER: U.S. industrial or trade policy has a very heavy component of making sure that other countries if they want to participate in the general trade system enforce intellectual property. Actually it's closer to your area, when you're talking about India and generic drugs, that's the closest place where a very large and important industry is being squelched by a country that has no interest in squelching it. It's an internal interest simply because of international trade pressure. And I wouldn't be surprised if the same thing happens with something like Napster.

REBECCA EISENBERG: But that's strictly as a matter of trade pressure, I think, rather than a matter of U.S. intellectual property law reaching beyond its borders.

DEAN JEFFREY S. LEHMAN: Manus you are invited.

MANUS COONEY: Napster is a United States company; we're an American company. But the point that Randal makes, in so far as the departure of the Ninth Circuit from the Supreme Court's decision in Sony and that is that third parties, technology companies, may very well be liable for their technology. That has profound implications for Internet service providers. It would not surprise me one bit that the next step that the content community would take, were there to be a Napster-like company established in some Third World nation, that they would seek (we heard from Peter Chernin and other heads of motion picture studios and the like that the time has come) to put the burden and liability on Internet service providers and the Internet backbone companies. They could have the obligation to police the Internet for the content community. And, again, that is the road you head down when copyright law serves as the foundation around which our information policy is developed. It is filled with problems and I don't think that the public, frankly, is aware of the consequences of a failure to engage in a meaningful discussion of these issues.

YOCHAI BENKLER: Bucking the question's queue and picking up on this, I really thought the most concerning aspect of your presentation, Randal, was the focus on liability for non-copyright friendly design. The idea that you would be liable if given a menu of design choices you chose to design your service not in the way that makes it easiest to enforce copyright. Or in this case, to enforce consent. This is something that I don't know I wrote about five or six years ago on making sure that the ISP (Internet Service Provider) liability cases go not in the direction that enforces design liability, but in a way that is neutral as between designs and enforces liability to the extent that you structure your design as something where you add value by exerting control. Or not impose liability when you're adding value by eliminating controls. The DMCA (Digital Millennium Copyright Act) itself has essentially resolved legislatively, at least, that level by trying to give the core ISPs, the backbone and carriage ISPs, carrier immunity in order not to force them to go there.

RANDAL C. PICKER: Yes, assuming they meet certain standards obviously. Yes, obviously.

REBECCA EISENBERG: Once you decide you're going to have contributory infringement, you really have taken a big step in that direction, it seems to me, if you decide that we're going to hold people liable for enabling others to infringe copyrights. That's the big analytical move. Liability for design choices that facilitate or impede copyright enforcement seems like a much smaller step.

YOCHAI BENKLER: And because of that, that's essentially when you get from '91 CompuServe essentially to '94, you get the ISP liability cases on information and copyright. And you get this concern that, effectively law is going to force a particular design; a design that's about controlling. And with the DMCA, the ISPs come back and stop it in a very minimal way. But this does suggest a much broader concern. The copyright industries are involved today in the standard-setting process for hard drives. They are trying to persuade the entire equipment world to be designed around a particular business model rather than wherever it is the technology seems to be most effective for a variety of uses. That's a problem.

RANDAL C. PICKER: I confess I don't know what I think about the merits ultimately. I think it's a hard issue. But I think the Ninth Circuit opinion is one which clearly looks at this idea of design control and responsibility for it.

MANUS COONEY: That's why I believe that there is good chance that we'll be heard en banc and it'll be heard by the Supreme Court. They departed from *Sony*. And the Ninth Circuit's record on contributory infringement isn't a very strong one.

RANDAL C. PICKER: I confess I usually assume the Ninth Circuit is wrong.

DEAN JEFFREY S. LEHMAN: But if I could just go one further step with this. I do think one could have read *Sony* as saying the Supreme Court was really straining very hard to find the existence of non-infringing use there. Mr. Rogers assumes a very large, large role in that opinion. It seems to me that in the Napster case, the Ninth Circuit is taking the opposite line and is ignoring the possibility of a wide variety, as Yochai's been talking about, of non-infringing uses.

The suggestion that Randy made about an explanation for this, was a technological shift and that the notion is that here there's the possibility of unlimited free identical copying and that might account for the difference in posture. I'm curious if the other panelists think that's a plausible account for what seems to be a very strong difference in orientation behind the opinions.

REBECCA EISENBERG: That might be the underlying real politic. I think there's a question as to what you do in a circumstance, suppose that events have changed to the point where the analytical approach we took earlier now has vastly different consequences. What do you do about that? Where does the burden of inertia lie? Do we need to go back to Congress and see if they really like this concept of vicarious liability and want to expand it or not? The Ninth Circuit, I think, was viewing this, again getting back to my model of Napster as the new marijuana or sex, I think they view this as an enormous college prank. That's sort of the tone of the opinion. You need to figure out a way of preventing these people from outsmarting the rules, in effect. They look to this as people outsmarting the rules, rather than technology moving in a way that doesn't fit the rules. Maybe we need to go back and revisit the rules.

MANUS COONEY: There are some assumptions built into your theory that I have to disagree with. Number one is that most of the people who use Napster somehow don't intend to pay and don't want to pay for music. We've done extensive polling of our users and a majority of our users would pay and want to pay for access to Napster. They're incredibly loyal to the Naspter service as well. I also question the notion that these are all young people, 42 percent of our users are over the age of 30. The notion that this is all a bunch of high school kids is crazy. I'd say 80 percent of the people here raised their hand when asked if they have used Napster. I think that a lot of the policy makers over the age of 40, perhaps, who aren't using Napster, their only familiarity with it is the fact that their children are using it. But it's much more than children who are using the service. And I think you have to ask yourself whether Napster would be what it is today if the content community of the recording industry was serving the needs of consumers. I don't believe that Napster would exist on the scale it does today were it not for the fact that the record labels are not making their content available online. I worked in the United States Senate for several years. Year after year after year the recording industry and the motion picture industry came to Congress asking for this change or that change in copyright law in order to incentivize the deployment of content online. Congress responded and that simply hasn't happened. Instead they have used the changes in copyright law and any modifications there too to bluntly assail anyone who threatens to enter the industry without their approval. Any nascent technologies, any upstart companies that threaten to disintermediate them, the ultimate, traditional aggregators of these pieces of plastic that people pay $20 for, the notion that someone would step in and remove them from the process, remove them from their entitled role to distribute the content as they see fit, they will fight it as they are today. They're using lawyers, a mountain of lawyers and a ton of lobbyists to shut Napster down. And you have to ask yourself an important question. Where would we be today if it wasn't for Napster? The fact that Riffage is gone, Scour is gone, that EMusic is dying for lack of oxygen, that Myplay is dying for lack of oxygen. None of these companies have been licensed. The fact is that there are companies that have played by the RIAA (Recording Industry Association of America) and its member companies rules and they're going out of business. They're not being licensed. The RIAA has no intention to embrace the Internet on anyone else's schedule but their own. And the fact of the matter is, when Napster was sued, it was 10 kids with black T-shirts and a two-room office. And they thought they'd be able to shut it down in a matter of months. They didn't count on

investment from Hummer, Winblad. They didn't count in October of this year of Bertelsman investing in Napster and keeping Napster around. Right now Napster is the only thing standing between the environment, the world that the content community wants. A world where Wall Street and investors will not invest in technologies that are not designed in a way that is satisfactory to the content community. And a world where copyright powers will be used to control the development of technology and, in turn, affect what consumers are able to access, how they will access it and what they will have to pay to access information.

YOCHAI BENKLER: Another point that came up here that I think is important. This is technology control litigation. In other words, if you imagine the post-Bertelsman deal, I have no inside information about the deal, so I'll just imagine. Imagine a situation where Napster competes with free. There are all sorts of services for free out there but for $4.95 a month, the 64 million people get a better search engine, easier scalability than Gnutella, perhaps advance sales of tickets, etc. For $4.95 a month. People today pay $21.95 a month for AOL when they can get Internet access for $4.95. That's a much bigger price differential that people are willing to pay for potentially degraded service as opposed to paying for better service with all sorts of good stuff. Let's say that ends up being what emerges from a settlement in one form or another. That shifts us from a situation where you buy things in which a certain preset order of songs are embedded, usually in some mix of desirable and undesirable, to a situation, where you pay a monthly fee for unlimited access to anything you might want. That is enabled by a particular technological shift introduced by a particular company, that makes, potentially, everybody better off. The problem with technology control litigation is that it raises the cost for any new technology to compete with the incumbent business model. This affects investment incentives, and potentially causes us to lose. No one was thinking about peer-to-peer sharing before Napster, now everybody is thinking about peer-to-peer sharing and distribution systems. That's a big social cost if the threat of litigation prevents companies from going forward and trying to do such things.

RANDAL C. PICKER: But is it your contention that the only way that works is if we start by sharing peer-to-peer someone else's stuff as opposed to sharing our own stuff peer-to-peer?

YOCHAI BENKLER: I'm just talking about the specific historical event here.

RANDAL C. PICKER: I'm trying to understand what the general point is. I accept the history, but the question is if we had said up front, "Oh, no, you can't share other people's stuff peer-to-peer, you want to share your own stuff go to it, but not other people's stuff." Would that have killed off peer-to-peer sharing?

YOCHAI BENKLER: I'm not sure we would have been able to develop that law because we would have had to have first imagined the situation that we disallow. And that's the concern. The concern is that if the expectation in the investment community is that when a new idea comes around, if it threatens certain existing business models, it will be shut down; then you don't get the experimentation with all sorts of ways of doing things. I'm not sure. I don't think actually we wouldn't have gotten peer-to-peer if that statement were made in advance. I just don't think we know always in advance, what it is that we want to block.

RANDAL C. PICKER: Your talk emphasizes that there's a flourishing, robust community of people who aren't driven by commercial IP concerns and that world, I suspect, is happy to

experiment and play with peer-to-peer and I take it it would have taken place there, absent Napster.

YOCHAI BENKLER: Yes, and the truth is, one reason why I tried to pull our eyes away from Napster is because my concern is more general and it is about specifically the concern where you get a particular set of industries with a particular set of business models in mind trying to shape the equipment, the entire network architecture around the concept that there's an inventory that gets delivered to consumers as opposed to a sharing system. And in a sense, as I said, I started out by saying Napster's great because it made this issue sexy but the stuff in a sense that's interesting, I'm sorry I don't want to offend you, is well beyond this particular company or for that matter, well beyond this particular industry that is very copyright dependent, as opposed to other industries that claim to be copyright sensitive but are not as copyright sensitive.

DEAN JEFFREY S. LEHMAN: Let me try one more question and this can go in a variety of directions. When you say the organizing principle of the question here is the CD burner. It begins with the observation that a year ago Hank Berry was here and he said that the majority of Napster's users download an MP3, listen to it and then dump it off their hard drives. Obviously they have limited space on their hard drives. Then comes the CD burner, since he was last here and many people would speculate that that's no longer the case. That now we have a separate independent technology produced by someone not associated with Napster. So two questions here. The first question is, absent the CD burner technology, Napster's case might be stronger than it is given the presence of the CD burner technology. How should the interaction between the two affect the way we think about the doctrinal question of whether Napster is itself a violator in a world where there was limited space, it really was just time shifting or sampling or something like that? The second question is, why then does the recording industry choose to pursue Napster rather than the manufacturers of CD burners who as far as we know have not been sued? Anybody want to go with any of that?

REBECCA EISENBERG: It seems to me that the CD burners would look a lot more like VCRs. It would be a lot harder to distinguish from the Sony case. I would guess that. But I don't know. Maybe not. Maybe when analyzing the effect of the new technology on existing markets, you would take into account the factor of Napster.

MANUS COONEY: The problem with this, let's just back up a little bit. The problem with this whole discussion is its premise that this is all a battle about copyright law. And it's not. The reason why manufacturers aren't being sued is because Sony Electronics also now owns Sony Records. What we're really talking about here are multimedia companies. We're not talking about the record labels. We're talking about the Vivendi Universal, a telecommunications company which owns a ton of content. We're talking about AOL-Time Warner, an Internet company, which owns a ton of content now. We're talking about Sony, an electronics manufacturing company that owns a ton of content. The chairman of AOL was quoted in the Washington Post two weeks ago saying that Aimster users aren't doing anything illegal. Aimster, now why are Aimster users not doing anything illegal but Napster users are? I submit to you that the reason why AOL takes that position is because Aimster's built on AOL's proprietary instant messaging service. And they see an opportunity to invest in and perhaps purchase Aimster and take

advantage of a market and invest in a market and deploy this technology for their own purpose in the market place. There are other file sharing companies out there that aren't being sued. The reason why Napster's being sued is because it's an aggregated market place of unprecedented scale of unprecedented reach, that they don't control period.

YOCHAI BENKLER: I think there might also be something more specific than that. We had in a sense the CD burner case. It's the Diamond Rio and MP3 files and the recording industry lost. I imagine that if Napster weren't so well tailored to sharing music, but were designed from the start as a file sharing system that was equally used by researchers in the Human Genome Project to share their data as music fans to share music, it would have been a much harder question for the Ninth Circuit. And I think that that has a lot to do with it.

DEAN JEFFREY S. LEHMAN: Please join me in thanking the panel. I want to urge everyone once again to please fill out their yellow sheets and leave them as they go and I want to express all of our gratitude to all of the panelists and speakers over the past three days for a wonderful conference and for the audience for their very thoughtful questions. We look forward to continuing discussion of what is obviously a critical set of issues for law and policy and technology, for our country and for the world.