

BEYOND NAPSTER: DEBATING THE FUTURE OF
COPYRIGHT ON THE INTERNET

PANEL THREE: NEW BUSINESS MODELS, REGULATORY
OPTIONS AND THE FUTURE OF COPYRIGHT ON THE
INTERNET

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PROCEEDINGS

PROFESSOR KAUFMAN: Welcome to the afternoon panel. This morning, we heard about what was and, I guess, what is. This afternoon we are going to try to discern what will be. The good part about that is for now we can't be wrong because nobody knows what will be, so whatever hypotheticals or concepts we come up with, no one will know if we are right or wrong.

We talked about Napster and MP3.com, but no seminar on this topic would be complete without Gnutella. This is what is going to spread fear throughout the whole industry, so I thought I'd bring Gnutella to be with us today. For those of you who don't know, about Gnutella, I'll spend 30 seconds on it. Nutella was a programmers favorite food, it's a great little chocolate, it has hazelnuts in it, it's delicious and his name started with G, so he called his program Gnutella. It is a peer-to-peer program, which brings fear in the hearts of IP owners, so I just thought we should have a jar here with us.

We have a panel that contains lobbyists, lawyers, business people, and academics. What I want to do is throw out a few ideas and then let each of them range over the different concepts as they wish.

One of the things we're supposed to discuss are new business models. One of my theories is, the lawsuits between Napster¹ and MP3.com² are probably the best thing that ever happened, even if infringing to the music industry, because until now nobody really had a good business model for online music sales. As we've been watching so many dot-coms crash and burn in the last year, I doubt whether Napster or MP3.com would have survived another year, solely based on their business models.

The music industry, clearly, didn't have a way of making money, you know, EMI's idea of selling songs at \$4 a clip or \$44 an album, wasn't going to go very far. The lawsuits have brought them together. And they are now, it seems, creating new business models that might actually work. One of the things that I hope we can all talk about is what these new business models are, how they're evolving, and will they succeed?

In terms of the copyright aspects, I always look at copyrights and

1. A & M Records, Inc. v. Napster, Inc., 2000 WL 573136 at 1 (N.D. Cal. May 12, 2000).

2. UMG Recordings, Inc. v. MP3.com, Inc., 2000 WL 524808 at 1 (S.D.N.Y. May 4, 2000).

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technology as oval pegs being placed in round holes, they don't really work, but you can kind of make them fit in, and that's what the judges and practitioners have been doing. We've been taking those oval pegs and jamming them into the round holes and, by-and-large, they've been working out. Some of the real wild cards, though, are with the DMCA and fair-use. Does the DMCA spell the end of fair-use? The other issues that we are "crystal-balling" will be the key issues that confront us in the area of copyright.

And last, are the regulatory options, or legislation. As you know, Orin Hatch has called for hearings if Napster loses. Right after the MP3.com decision came out, legislation was introduced to overturn that case. Are we going to see Congress sit back like it did throughout most of the 60s and let the industry decide what it wants to do and just scribe it, which was to a great extent how the 1976 Copyright Law³ came about? So, what's going to happen there in terms of the legislative agenda?

We have an hour or so to talk about this topic. I guess, we can just start. Keith, why don't you begin—

MR. KUPFERSCHMID: Sure.

PROFESSOR KAUFMAN: Everybody has everybody's bios in your materials and, since we don't have a lot of time, rather than tell you how wonderful and qualified the panelists all are, you can read the details about how illustrious they are in your materials.

MR. KUPFERSCHMID: Well, thank you very much. I want to thank WCL for inviting me and my organization to participate here today. I will give a one-second background on SIIA, the Software & Information Industry Association. Unlike many of the other previous speakers, we don't represent sound recording companies or motion picture companies but, rather, we represent over 1,000 high-tech companies that develop and market software and electronic content for business, education, consumers, the Internet and entertainment. Our companies are software companies, like Oracle, Sun, and Novell; information companies, like Reed-Elsevier, West; Publishing, and the McGraw-Hill Companies; and e-commerce companies, like AOL, Cybersource, Travelocity and IBM. So we come at this issue with a different perspective and when we get to the business model part of this discussion, you'll surely see that different perspective come out.

SIIA members have a wide range of business and consumer interests. Although their views may differ to some extent, our members are very, very interested in intellectual property protection, because they realize

3. Copyright Act of 1976, Pub. L. No. 94-553, Oct. 19, 1976, 90 Stat. 2541 (codified at 17 U.S.C. § 101 et seq.); *see also* H.R. REP. No. 94-1476 (1976).

that without that protection their businesses could not flourish and in many cases, they would not survive.

The issue that we're confronted with here today, the Napster issue, is not an issue of whether copyright infringement is taking place. Copyright infringement is taking place. The issue is who is going to be liable for that infringement. I don't want anyone to be confused about the issue.

Now, there's been a lot of discussion about the law and there's been a lot of discussion about the technology. I want to put a little different spin on things. I want to be a little bit more creative here, because I think if we focus exclusively on the law and exclusively on the technology, we are missing the big picture. We must not forget about the very large and very important role that education plays in all of this.

Given that one of the topics of this panel is "the future of copyright," and this symposium is taking place at an institution of higher learning, I think it's essential and appropriate to talk about the role of education in protecting intellectual property. If we don't discuss it I think the problems will persist.

For the full potential of the Internet to be tapped, many of the concepts that have served us in the old economy must be translated to the new economy. While we must celebrate new technologies and what they afford us, that should not be at the expense of fair and lawful behavior, including complying with the copyright law.

Ironically, Napster's Shawn Fanning was spotlighted as one of Business Week's E-Biz top 25. Certainly, his site has opened the eyes of the recording industry here and abroad to online sales possibilities. But—and a big but—he has also opened our eyes to the dark side of the Internet. That is why we must reinforce to the world the appropriate rules of the road on this global information highway. Let me get a little bit more specific: worldwide intellectual property protection—sounds like a pretty simple idea. We teach our children not to take someone else's property without permission. We call that stealing. We teach them not to copy someone else's works or words in school. We call that plagiarism. Yet, for some reason, these notions have been obscured in the Internet environment. The Internet's very foundation is built on the ability of transferring information across borders unimpeded. And therein lies the conflict. Because of this revolutionary capability, somehow the idea that information should be free has taken hold.

To set this right again, we must come together and educate the public, both here and abroad, about why it is appropriate to compensate those who provide creative and useful products and services rather than to take the fruits of others' labors for free.

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We have to ask ourselves, do we really want a culture where people who steal or make it possible to steal are heroes? I don't think so.

We must also help people understand that taking intellectual property without permission on the Internet is just as bad as breaking into a bookstore, taking a book, computer software, CD or a videocassette. It is heartening to see that the courts are beginning to render judgments in keeping with these established intellectual property standards. Welcome as these cases may be, intellectual property owners cannot and should not rely on the courts to do their bidding. And I think that was represented in some of the panels earlier today. Circling the wagons will not work long-term. We must work together to find solutions.

All the laws and all the technology, will have little effect, if the public does not understand and appreciate the value of intellectual property and the harm caused by stealing it. We must, therefore, educate the public to appreciate the need to protect the incentives for authors and creators to maintain a strong and steady flow of creative works; educate the public to recognize that quality, dependable content is worth a price; educate the public to realize that just because you all of a sudden have the technical ability to do something does not necessarily mean you should do that something; and educate the public to understand that on the Internet everyone is a publisher and if you fail to respect someone else's intellectual property today, you can be certain, it will not be very long before someone else comes along and steals the result of your hard work, effort, and creativity.

Now, having gone through that there's just a couple of additional points I wanted to make, if I can just have an extra minute, to address some of the comments that were made earlier today. Professor Ghosh, I think, made a comment about metered use and suggested that is where the industry should be going as it relates to business models.

Well, I know, where the software industry would like to go, and if given more time, I can talk a little about the application service provider model, or what we call software as a service model, where all software would be made available over the Internet. And to use it, all you have to do is—just like you'd access Lexis/Nexis or Westlaw, you'd put in your password and it would be metered use, so you wouldn't have to spend lots of money to actually buy the product if, in fact, you just wanted to use it for a simple little use.

The other comment that I wanted to make was something that was just mentioned here earlier today by Jonathan Band, that content providers are their worst enemies. He mentioned Sony, or EMI, that charged \$2 or \$4 for a download of software and the comment made by

Jonathan was, if I quote correctly, “well, duh, customers will go to Napster to get it because they can get it for free.” He also mentioned that content providers are not being flexible or fast enough to the market. Well, I think that’s kind of interesting because here it is, you’ve got a company that’s trying to provide a product and trying to establish a legitimate business model for music to be made available, and they’re being undercut by someone who is doing it illegally.

The legal business models will never be successful as long as the entities that don’t play by the rules are able to steal their thunder by offering others’ content for free. E-music is a good example of one of these legal business models that has difficulty getting up and running because of Napster and others. So, with that, I will turn over the floor and thank you very much.

PROFESSOR KAUFMAN: Okay, let’s go back and forth so we can do this: Brian is from enews. Would you tell us a little bit about enews and then jump in with your comments?

MR. HECHT: Sure, sure. Thank you for giving me the opportunity to participate in the forum today. My name is Brian Hecht, and I’m the CEO of enews.com, which is a Washington, D.C.-based company that is the world’s largest Internet marketer of magazine subscriptions.

Just to give you a little context of where we’re coming from, we carry about 100,000 different magazines. We sell them only by subscription. We don’t sell single issues, single copies or single articles, and we can—it’s interesting why we don’t. We can get into that later. And, we are backed, as investors by folks as diverse as Barnes and Noble, Time, Inc., Hachette Filipachi magazines and a variety of venture capitalists, as well, and we’ve been around since 1996.

I bring really a completely different perspective, probably, than some of the other speakers, because I’m a marketer and I’m in the business of marketing what I consider the ultimate bundled content. If you think about what a magazine subscription is, it’s bundled in several ways.

If you take sort of the unit of content, which would be, let’s say, a magazine article or a photograph. Those are bundled by the magazine publishers into a package that we recognize as a magazine and then that is, in turn, for marketing and for business reasons, bundled with other copies of that magazine over a series of time that we think of as a magazine subscription. We actually bundle one step further, and we offer continuous service so people continue to receive the magazine on a negative option unless they forbid the subscription to rollover, so we’re then bundling bundles of bundles of content to do that. And,

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one of the most interesting things for us, and I'll spare you the details of the magazine publishing industry, although they're endlessly interesting to me, is that this traditional method of selling bundles of content is under immense pressure.

As law students and legal professionals you'll know that the traditional methods of selling magazine subscriptions via sweepstakes and Ed McMahon and folks like that has come under scrutiny. And as a result, the two leading marketers of magazine subscriptions through sweepstakes, Publishers Clearing House has stopped using sweepstakes and American Family Publishers has filed for bankruptcy. As a result, magazine publishers who typically required on this mass infusion of new subscribers every year, who were sort of tricked into thinking that Ed McMahon might show up at their house, which I could never tell if that was a promise or a threat, if they bought a magazine subscription. Magazine publishers now desperately need new sources of subscriptions to drive advertising revenue and so forth.

Where I think my business overlaps with the theme of the day here is to think about the differences between the way that we bundle print intellectual property, which are the magazine articles and music, which is the Napster example that we're all talking about. If you think about it for a moment—the moment before Napster emerged, with music, what we had is a product that was high-demand. People love and will seek out music, but there was a high technology barrier to people reproducing it freely. You remember you used to actually have to use a cassette tape and there would be a degradation of quality to actually reproduce a piece of music. Now, that has been eliminated.

With magazine content, or any written content, we have always, since the dawn of the computer or even the Xerox copier, had a low technology barrier. If you wanted to reproduce *Time* magazine, all you have to do is scan in your page and then send it, as an Adobe file, to someone or just scan in the words. But how often does that happen? How often do you receive an attachment which is actually the entire contents of *Time* magazine scanned into an electronic format. It just doesn't happen.

It's an interesting business issue to try to predict whether print formats will face the same fate or the same concerns as music formats will and what is the role that the desirability of the actual content plays. So, what we found is there have been a variety of companies—we haven't tried this, because we've learned from what others have tried—who have tried unbundle content and either give it for free so you can, for example, search magazine archives, some people can do it for free—or charge per unit, for example, \$2.95 for an article. And, what

the overwhelming consensus has been is that in certain very specialized ways—some people, yes, professionals use Westlaw, and business people might subscribe to the archives of the Wall Street Journal. But, in general, the companies that have tried to unbundle content and charge per article for archives have failed in that business model; which is why I have seen probably, and there's a new one, Contentville, which is Steve Brill's venture, that claims that it is the poor man's Lexis/Nexus. That business has never succeeded to date. So, it's going to be an interesting challenge for us. I'll wrap this up, and if there are interesting questions, I'll chime in. It's going to be an interesting challenge for our business to see if the attractiveness of the bundled content that is irrationally bundled—despite the fact that mass reproduction is possible with almost no technological barrier—to see what is the future for this sort of irrationally bundled content into a culturally attractive package.

PROFESSOR KAUFMAN: Great. Bill, you want to tell us a little bit about what Congress is going to do?

MR. CORWIN: If you can tell me who the President is going to be.

PROFESSOR KAUFMAN: Well, I think we can free the Palm Beach 20,000.

MR. CORWIN: Yes. By way of introduction, I'm a hired gun, and I work at the sausage factory on Capitol Hill. We've already heard the Bismarck quote about how one should never see the making of sausage or legislation. My favorite political quote, although it wasn't about lobbying, but it's a good description of what we do, is from the late Mayor Daley, made during the 1968 altercations during the Democratic Convention in Chicago. He stated that the police were not there to create disorder, the police were there to preserve disorder. And, I've always felt that's a good way to describe what we often do. The one other witty—intentionally witty—remark I'll make here is, when I speak to technology audiences, I try to explain the difference between what they do and my job. I say, just remember, the Internet evolved subject to Moore's law, but Congress operates subject to Murphy's law. And we've certainly seen that lately.

Let me give some broad thoughts and quickly hit what I think are going to be the big debates in copyright, and other issues that affect the digital music space. Remember, Congress, generally, is a lagging indicator. Congress does not tend to initiate change, Congress tends to ratify changes that have already taken place in the marketplace when things are starting to settle down and solidify.

With all respect to Judge Kaplan, and I do have some disagreements

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with his DVD decision,⁴ I think a big question you have to ask here is not what copyright law is, but is it going to be—is it really enforceable to a great extent? Is that what you're going to primarily rely on to protect your property? Does anyone believe that Judge Kaplan's decision is preventing any hacker from getting the code for DeCSS and utilizing it if they wish? Does anyone think that if you can crack down with litigation to eliminate efficient peer-to-peer music file-sharing, like Napster, that you're going to be able to prevent less efficient forms, like people just sharing CDs and burning copies through CD-ROMS? I would venture that while no one has brought a contributory infringement suit against Hewlett Packard despite their aggressive advertising of their CD burners, if you look at the sales of blank CDs, particularly around college campuses, I would say that the amount of infringement and the loss of economic value to the music industry is much higher from that hardware than from any of the software that's floating around on the Internet.

So, I think the real key to protecting the value and the ability to continue to monetize intellectual property is not going to be found in copyright law, though copyright law should keep up with the times and make some sense vis-a-vis modern technology. It's not going to be with encryption and other security measures, particularly when you're dealing with something like music, which has to be decrypted and run out of a sound card and once it's—once those bits are streaming out of the sound card, anybody can capture them and create an open, unencrypted and transferable file. It's going to be in business models that offer consumers an easy-to-use compelling value proposition, where it just isn't worth it to steal the stuff.

And, as the music business makes the migration it's making now from music as product to music as service, that's really the key. Also, one last comment generally before hitting the legislation, I don't think the DMCA's a very good law for two reasons. First, it's incomprehensible, and you can't expect the public to conform their conduct to the law when even the best copyright lawyers in the country can't agree on what the DMCA says about basic issues. Second, I don't think of it as a copyright law, I think of it as a technology law. And, it's a technology law that really has gone the opposite way from what Congress has done, generally, the last few years. They said we're not going to try to dictate in technology, we're not going to try to pick winners and losers, but the DMCA as a technology law is a terrible law. One, the webcasting

4. See *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (holding that the promulgation of "DeCSS" decryption software violated the Digital Millennium Copyright Act).

provisions are anti- what the technology does. The compulsory license is only available very narrowly for non-interactive services. And of course, what the Internet offers and what makes it different is interactivity. But as soon as you become the least bit interactive, you can't get the compulsory license, you have to do individual negotiations with multiple copyright owners, and it just won't work as a business model.

Second, what it's all about, when you read the legislative history, it's all about protecting an obsolete technology called—a twenty-year-old technology—called the compact disc, which is zeros and ones on a piece of plastic, physically distributed, unencrypted and unprotected. That is not the way music's going to be distributed by and large in the 21st century. And, yet a large part of the DMCA is about protecting that obsolete technology.

What's coming up in the copyright area? I think the overarching issue that all of them are going to merge into is a very heated debate over whether one or more new compulsory licenses should be created for the distribution of music on the Internet. I'm even surer of it in the wake of the BMG-Napster announcement. Because, thinking about what they announced, my own opinion is that I don't think it will work. I don't think peer-to-peer makes much sense for the type of business model they're talking about. I don't think the other labels are going to put their content on there and create an easy-to-use service where consumers can find most of the music they want to listen to or download. And I think it's just going to prove the point that you need new compulsories to make the music space work.

Fair use is a huge issue. As Professor Lawrence Lessig reminds us, code is law. It's now possible for the first time in human history to meter and control every single use of digital content. So while you may have a theoretical fair-use right under the law, when you look at the code operating with the force of law, it may be impossible to exercise that use, particularly, if opinions like Judge Kaplan's are upheld on appeal. So I think we're going to be in a debate on whether we need to carve out something that's akin to fair-use to allow some type of—that meets the public purposes that fair-use has met in the past.

The MP3.com bill, as introduced, I believe is dead-on-arrival. The concept that someone can aggregate other peoples' copyrighted works into a database and sell access for commercial gain without paying licensing fees is just a nonstarter. If they really believe it, they're not getting good counsel. If they don't, I think it's more likely to be a marker to give them a stake in the whole compulsory license debate.

Work-for-hire is another key issue. Last year the Congress—the RIAA

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slipped a provision in that said all sound recordings were works-for-hire. They had to agree this year to have that repealed, with a lot of surrounding language saying that the repeal just returns us to the status quo ante, and we really haven't changed a thing. Still it did change a big thing. It activated the artist community, which is notoriously disorganized—it's getting more organized, perhaps they finally realized that they must. Most musical artists sign the worst personal service contract in the United States, and they're going to be a big player, I think if they get organized. Senator Hatch has already said that the repeal of the '99 work-for-hire provision is just the beginning of the debate on artists' rights in the digital age. And, I think they may be very powerful voice for a compulsory license.

And, against what's shaping up, if you look at what BMG is talking about with Napster, it looks an awful lot like a record club. And, a record club, from a musician's point of view, is the worst possible outcome for the Internet, where they lose all the potential benefits and actually wind up with a smaller share of a bigger pie than they're getting under the current physical distribution model.

We're also going to have all the technical copyright issues. There are a lot of groups very unhappy with the Copyright Office for its recent pronouncement on exceptions to the anti-circumvention provisions of DMCA. We have a hearing later this month on application of the first-sale doctrine and archival copies to digital copyright. The Digital Millennium Copyright Act was enacted in the last millennium; I think we need an update for this Millennium.

Then the big one that's waiting out there is, I think, the terrestrial broadcasters, the radio stations who are a very powerful lobby. Unlike the music industry, whose strength seems to be concentrated in New York, Nashville, and L.A., the broadcasters are in every congressional district and are very important to the political process. I think they're going to lose on the Copyright Office's interpretation of the scope of the webcasting rules and find that not only do they have to pay the new compulsory webcasting license fee when they put their radio broadcast on the Net, but that they're subject to the content restrictions. They'll have to stop doing a lot of things they've been doing, like announcing we're playing the new Radiohead album in its entirety tonight at ten o'clock. I can just imagine the phone calls that are going to be made from the heads of the major broadcasting conglomerates to the head of the National Association of Broadcasters. Which, leaving out the expletives, is basically going to be "How did you let this happen? And you damn well better fix it and fix it fast." And, that constituency is going to reopen the entire webcasting provision of the DMCA. Where

it all winds up, I don't know.

Of course, it's going to be more than copyright that shapes the Net. Another big issue is privacy. We know we're going to have a huge privacy debate in the next Congress, and it's very relevant because the big Net gain that everybody wants to get a piece of is the new information about customers. Data about what they like, what they listen to, how often they listen to it, is all useful for marketing. But we're going to probably see new privacy legislation that restricts the transfer of that information from the original collector to third parties like record companies, musical artists, et cetera.

It doesn't just apply to websites, it applies to DRM—digital rights management—technologies, because all of them operate by tracking use tied to some customer identifier so that you can monetize that use through some type of payment mechanism. So, it's all personally identifiable information being gathered and used.

The other big one issue is antitrust. I don't expect new legislation, but a lot of oversight, and possible Justice Department or FTC action—take Napster. If the other record companies decided, okay, we'll license to Napster, too, if we all get a piece of the equity, just like BMG did. Well, the concept of the big five record labels, soon to be the big four, after BMG and EMI merge, controlling—having a controlling equity stake in the only web music site that's licensed by all of them, you think there's an antitrust issue there? Of course. There are also antitrust issues with the new compulsory fees and who's going to administer them. The RIAA's set up an organization to administer the distribution of those fees to record companies. And, there's going to be oversight of industry structure, which is rapidly shaping up as BMG-EMI-Napster versus Universal-MP3.com versus AOL-Time Warner versus Sony—which is usually Sony music versus Sony hardware and fighting over what the corporate strategy is.

But until there's a website that offers a broad range of content this online music space is not going to really happen, and I think that's why compulsory licenses are the overarching debate in the next Congress. Even though it's going to be a highly partisan atmosphere, copyright issues have not been partisan up to now, so don't assume that nothing can get done even in a difficult Congress.

PROFESSOR KAUFMAN: Ed Black, do you want to tell us what the CCIA is and then your perspective on all this?

MR. BLACK: Okay, Computer and Communications Industry Association is a trade association with a very broad cross section of hardware, software, and telecommunications service companies, so we have some of the same members that Keith has, but we have AT&T,

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Verizon, Oracle, Sun, Sabre, Yahoo, Estamp. The goal really is to have some companies from almost every sector of the industry as broadly defined.

We have a long history in this area. We were deeply involved in the early white paper that Bruce Lehman talked about at the beginning. We were involved and had people over during negotiations of the WIPO treaty, were deeply involved in the DMCA legislative process, and we claim credit for its successes, but not its many flaws. Additionally, we have been very active and filed amicus briefs in a number of the relevant important cases, including Napster.

We're a little different from many trade associations, although we do just represent industry. We have a long-term commitment in our bylaws also basically to work for the interests of our industry's customers; enlightened self-interest, if you will. So, we have often taken positions that have stressed the well being of the industry at large, including the end-users. That has led us to be chief advocates of a balanced intellectual property structure. We reject the idea of a maximalist approach to protection. We don't think it is healthy in the long-run. We do think the smart industry takes care of its customers and doesn't try to squeeze them to the nth degree.

I think we're in a time of such a dynamic change. We really do view everything going on with the Internet as truly revolutionary, and I think it's worthwhile to step back and take a look at the fundamentals.

And you know, some of this has been said before, but, remember IP rights flow out of the Constitution and the key provision is not, I think as someone earlier mentioned, to maximize incentives. The goal is to promote the progress of science and useful arts. The incentives are a tool to that end, they are not the end. This is very important to keep in mind and often is lost in many of these discussions.

And, I think it's fair to ask, as we look at the new technology, new business models, whether or not we measure what we come up with in laws and models. Is there an adequate and necessary incentive to promote creativity, rather than is it the greatest possible incentive conceivable that we wind up putting forth. The simple example is if technology and the Internet is, in fact, bringing forth and delivering to creators a huge new world, is there not a tradeoff that is legitimate to ask, in terms of expanded fair-use and accessibility and something being given back to the Internet and to all the users thereof.

In any time of flux, we think it's important to look constantly back toward core values, the core purposes in that context. Remember that copyright and property protection, as highly as we may think of it, does have contradictory values of the First Amendment, of other elements of

the creative process, which require an open exchange of information. It has antitrust issues that have also often juxtapositioned against it. So, it should not be viewed only as isolation of copyright and IP issues itself.

Our issue has long been originally focused on interoperability. We saw the industry as absolutely needing to have interoperability. For many years, this was not a widely held or accepted position. I think we now hear it talked about as a little bit of motherhood and apple pie. But what that meant was the ability to reverse engineer and to understand other peoples' code and the efforts to do that early on were being severely restricted—attempted to be restricted in court by companies in the software world.

And, basically what we saw is that other companies were using an interpretation of copyright law, not really to protect intellectual property, primarily, but as an anticompetitive tool to block competitors and competitive products. And so, our real focus and involvement in many, many ways was stimulated more by a commitment to a dynamic, open, competitive industry, rather than on the relatively narrow area, frankly, of laws of copyright.

When software came on the scene, there was some discussion as to whether there should be a *sui generis* IP protection and, basically, we wound up adopting copyright over to be the law which would cover software and much of this industry. The metaphor may be, you take a suit of clothes and you give it to a cousin and you need a tailor to make it fit, everybody recognizes it needed some adjustments. I think the development of the Internet may well raise the issue whether or not, instead of trying to make the suit fit, we shouldn't have been talking about what kind of sweater we need to knit to deal with the new world. It's questionable whether or not, perhaps, some of the aspects of copyright law and some of the really relatively arcane provisions that have developed over many, many decades—which were designed for the culture of artists and authors and not the economic engine of our society—that what we have is copyright laws which were all of a sudden being applied to the fundamental economic infrastructure of the entire economy, which increasingly is becoming software or the Internet, telecommunications structure. If we start out with the premise that law should generally be used to help society achieve its goals and purposes, then we could well be finding ourselves here in a tail-wagging-the-dog phenomena. Copyright law developed in an era of books and paintings and artwork and was administered and developed by constituencies with those emphases and perspectives. It has been translated over into the high-tech telecommunications infrastructure world and the tailoring, frankly, has not been that good. It may well be that it needs a

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tremendous amount of alteration as we adapt. And so, I don't think we should be scared about recognizing and making some substantial proposals for change.

Having said that, I think it's also important to say that we don't know where we're going. The business models are being proposed—we've heard some creative ones. With most people in my industry, whether it's the hardware folks or software folks, for the last decade if you asked them, "well, what's going to be happening down the road?" if anybody gave you an answer with any certainty more than eighteen months out, you knew they were just bulling you. It did not make sense. And, we're still there.

The difficulty was trying to rigidly transfer some of our existing copyright law, which I think was one of the mistakes of DMCA. Bruce Lehman, this morning, said they were trying to get ahead of the curve. We don't want government regulation to get ahead of the curve. We have a dynamic, creative industry, dynamic technology, dynamic business models. We don't want all those options constrained and restricted by laws, frankly, that come out of another era trying to guess where this industry and dynamic is going.

When there are problems, we'll fix them. Nobody wants to promote piracy. We can deal with these problems, but we'd just as soon not have a superstructure which is overly rigid and confining, and we think a number of provisions in the DMCA really wind up having had that impact.

I do think it is, again, advisable to be very humble in predicting the future. Let's remember that our predictive capability is really quite limited.

A couple of quick final points. The political dynamic is changing. We've all battled and fought in this area for a number of years. And fundamentally, the relevant committees of Congress were largely owned lock, stock, and barrel by the major contributors, which were the content-owning entities. That's where the staff went to work when they left, that's where the contributions for those members have come from.

A new phenomenon with Napster that we've seen is basically, 30, 40 million people all of a sudden say, "hey, we care about this stuff, we're interested." Whether that political power can be channeled and translated into the dialogue over intellectual property law evolution, I think, is yet to be seen. And, recognizing that potential power, the traditional forces of content are really gearing up for a major battle in the legislative arena. But it is a new world. Those people who have fought alongside the libraries and education institutions, some of us in industry, always viewed ourselves basically as heavily outnumbered and

outgunned on these issues. It is yet to be seen whether the reinforcements can be organized and come to play.

Two other things I don't think anybody's really focused on: first the global economy. We talked about U.S. copyright law, and we talked about the WIPO treaty,⁵ but we've got a world out there that cannot be corralled. Boundaries are less and less important. The WIPO treaty is an attempt to create some structure but the truth is, we do not have institutions, we do not have the sense of global government, we don't know how to deal with the differences between harmonization of law and the desire for local independence and local control over their laws, and those are huge battles which are going to shape all this, and force how we operate in many different directions I think that are unforeseen.

And, another issue connected to that, domestically as well as internationally, is the whole digital divide issue, which is not at all irrelevant when we're talking about this. The pharmaceutical industry, which has a major intellectual property component, has had to deal with concerns about the pressure of expensive drugs that could never be afforded or bought by large portions of the world. In fact, there was pressure to give them out—to give them away. I think it's debatable, if you still have an economic model which provides dominant power to the content providers, whether or not the ability to restrict information and content dissemination around the world will, in fact, create the same kind of pressure which will be very hard to resist and likewise generate new business models.

PROFESSOR KAUFMAN: All right, thank you. Professor Ann Bartow is now going to give us an academic perspective on all of this.

PROFESSOR BARTOW: I wanted to talk, first, about this idea of educating people about copyright because that raises a lot of red flags for me. I have a son, eight years old, who is in third grade. He goes to a public elementary school in South Carolina, which is not a particularly well-funded entity. Like many public schools, they have Channel One. Everyone know what Channel One is? It's a for-profit company that provides "free" educational programming for schools, which also features commercial advertisements. So in addition to learning grammar and multiplication, my son is also learning about brand name chocolate bars, and is being educated to buy expensive sneakers. I have some real concerns about that, and I have some real concerns about letting content owners drive the nature of the education if we begin educating people about copyright.

5. WIPO Copyright Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997).

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When Metallica brought its lawsuit against Napster, I saw a press conference in which Lars Ulrich stood up before the camera and said, these Napster users have the moral fiber of common looters. And, I thought, “strong words from a man in leopard Spandex.” It was an emotional press conference, and he was pretty upset, obviously, but after Michael Madison was kind enough to fax me a copy of the complaint, I saw that those words were actually in their complaint. That’s one of the counts they have: “Napster users have the moral fiber of common looters.” That’s what their attorney had written; it wasn’t, apparently, just Lars’ view.

But, in fact, using Napster is not like being a common looter. This is not to say that sharing can’t be wrong and copyright infringement can’t be wrong, but it’s not the same as common looting, and I think if we try to analogize it to common looting, we really lose the essence of copyright and the balance that is supposed to exist in intellectual property protections.

The copyright industry has certainly attempted to educate the public into believing that sharing equals stealing, which makes one wonder, well, what about libraries, are they dens of inequity? Should we tell our children, “Avert your eyes, son, it’s a library, sharing goes on there, people are reading books they haven’t paid for?” Of course not. Culturally we allow, and actually encourage, a lot of sharing and appropriately so. This is not to say that content owners shouldn’t be able to make a good living as, quite frankly they do, and that will be a subsidiary point, but sharing is not the same as looting.

If you steal someone’s diamond ring, the ring is gone. If you copy somebody’s song, maybe you’ve deprived them of some revenue, but they still have the song, they can perform the song, they can record the song, they can make copies of the song. So, maybe they’ve lost something, but they haven’t lost the song, like they would lose the ring, and we shouldn’t talk about it as if they have.

What we need to do is look at context. In the context of one copying a song, we need to ask whether there has been an infringement, an actionable infringement. I think that needs to be our focus and the Supreme Court has, in *Sony*,⁶ set out a test that forms a workable framework.

I also think that some very important points were raised this morning concerning technology, including the questions: Is technology good, is technology evil, or is technology neutral? I think the only way we’re going to reach a point where technology can be viewed as neutral is if

6. See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1984) (finding that the use of video tape recorders for “time-shifting” constitutes fair use).

the focus is on acts of actual infringement, in other words, focus on the copiers: Are they fair users or are they infringers? You have to get away from contributory infringement. Frankly, I'm not a computer person, but it is my strong sense that you will not have any digital technology that doesn't do some copying; every digital technology is going to have to do some copying, inherent in how it works, or its end use. There's always going to be copying and if that's always going to be infringement, then guess what? Copyright owners are going to control every technology, because they're going to say copying is going on here, it is possible the technology will be used for infringement and, therefore, capitulate or we will bring suit. This is the future if contributory infringement is construed too expansively.

As a result, there will be two phenomena, which in some ways contradict each other. The first is that you see a chilling effect on new technology. Shawn Fanning, Napster's creator, was a college student; he didn't really know any better. When he came up with Napster, I don't think he had any idea how it would take off and what the good and evil things, depending on how you look at it and where you sit, that would evolve. But I think if he knew then what he knows now, he might rethink what he'd done, and Napster would look radically different if it existed at all. I think that the chilling effect that the threat of these lawsuits can have anytime you have a technology that copies, is pretty extreme. I think this really will chill the development of new technology, which as Shubbha Ghosh pointed out, is also something the copyright laws, and intellectual property clause of the Constitution says we're supposed to encourage. So on one hand we're chilling technology, which is also potential copyrighted content or patented content that we're supposed to be encouraging.

People like Fanning who are brave or foolish enough to proceed with the creative process will be faced with copyright lawsuits and this rhetoric about copying as looting. But let's look at the big picture for a second. Not to be a conspiracy theorist or anything, but if you look at Napster, and you look at Scour, and you look at MP3, it looks an awful lot like these big content-owning companies may be, possibly, using at least some aspects of the litigation as a way to negotiate a better deal with which to appropriate the technology. They negotiate by making offers or not making offers and, also, filing suit and the copyright suit is then a bludgeon that they can pound these inventive companies with until a favorable compromise is reached for licensing the technology.

Now, my contradictory point is that technology is actually going to resist arrest. On the whole, technological development will be chilled, but particular types of technological development will actually be

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encouraged. We heard this morning from Declan McCullagh about MoJo Nation as a more decentralized frame work for sharing music. We have Gnutella and at least ten other music-sharing technologies that are out there now. And what's going to happen is that as these content owners increasingly bring copyright suits is that technologies like MoJo Nation, as Declan pointed out, will become increasingly decentralized, which means that ultimately, as users switch to these technologies, it will be harder and harder to catch the actual infringers. And really, the content owners will only have themselves to blame. If they're going to be this aggressive about technologies like Napster, where you at least have the potential to do some monitoring, then technology is going to be driven in the direction of being as decentralized and difficult to monitor as possible. Ultimately, that will hurt artists and other content owners and content providers, because large scale commercial infringement can potentially thrive.

My next-to-the-last point is that Americans are probably not the scumbags that content owners make us out to be. According to *Variety*, the recording industry made \$15 billion last year, alone, which suggests that somebody's buying some CDs.

Maybe it's someone in this audience that had \$15 billion of pocket money and the rest of us are all using Napster, but somebody came up with \$15 billion big ones and it was the most profitable year, ever, for the recording industry. At the same time the recording industry is crying about Napster killing them, which, again, leads to my conspiracy theories that the content owners like Napster and want it, so they are using copyright suits to leverage a better licensing agreement with which to acquire the technology.

My final point is that one of the things we don't know and we're never going to know as these copyright suits progress, is what model of copyright law best facilitates and encourages creativity and the creation, not the ownership, or the protection, but the *creation* of content. We're never going to know, because the model that we have, discourages the creation of some technologies, and also some copyrighted works.

When BMG controls Napster, they're probably going to follow the same model they do with Metallica, which is just to pick a band and form a business plan around it. They hype Metallica, and then they don't sign any other bands that look or sound like Metallica. So, if there are five other bands or maybe even 500 other bands out there creating similar music, do you really think those other bands are going to be on Napster, if they're going to compete with the Metallica audience? I don't. I don't know. I might be wrong—I hope that I'm wrong—but I think that while there may be some new room for new

artists on Napster after Bertelsmann buys it out, there won't be anyone who looks at all or sounds at all like Metallica or Dr. Dre or any of the others in the BMG roster or library. Any new musicians that compete in any way with current BMG artists are not going to have a shot, and now where do they go, after they've lost Napster. Maybe promoting new artists wasn't a big part of Napster, but it was more exposure than new artists are going to have now.

I think ultimately the big, bankable, established performers are going to make out the same way they do now, which isn't always all that well, sometimes depending on the contracts that they have. New artists will lose whatever promise the Internet held for them. By and large, I don't think this model is the optimal model for fostering creativity. If the content owners keep prevailing in their copyright suits, I don't think we're ever going to get a chance to experiment with alternative models of copyright and content distribution that might better foment creativity, and increase the production of creative works.

PROFESSOR KAUFMAN: Thank you for that unimpassioned presentation. That was great. Next, I guess, we're going to go to David and I want you to know, for those of you who use his locker, the drop box folder things are fixed and ready to use, I'm happy to say. David from Myplay.

MR. PAKMAN: Thank you. Just a question to start with—some great opinions on the panel, and today has been fantastic, so far, so thank you to the organizers.

How many people in the room have not listened to any music in the last 24 hours? It's this incredibly universally appealing form of art that just about everyone in the world is interested in hearing. Does anyone know how many records were released last year? Anyone shout out a number?

SPEAKER: By the majors?

MR. PAKMAN: No, in total?

SPEAKER: By indies?

MR. PAKMAN: Thirty-six thousand CDs were released last year in the United States, 36,000 titles. The average consumer heard of about 30 of them.

So, I contend that the issue really is not that there is disincentive today for the creators to create, but there is an efficiency problem in the marketing and promotion and distribution of the works themselves. Those mechanisms for promotion, marketing, and distribution are controlled actually by a very few number of companies today that are an oligopoly that's existed for about 50 years.

This inefficient industry can be the beneficiary of a huge amount of

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improvement in that distribution and marketing system that's been availing itself. It is the Internet and digital technologies, because that medium is inherently a more efficient medium for distributing digital bits, which is exactly what music has been reduced down to or been created upward into—it's not necessarily a reduction.

Yet, that industry has been very slow, the actual industry itself, to embrace the technology to use it to improve these efficiencies. In fact, previous to the digitization of music, the industry has controlled the migration of every new format on which music is released. They really were the creators and controlled the rate of rollout for the audio CD, and for some failed products, like the digital compact cassette and the mini disc, the DAT audio tape.

The format shift that, I contend, has already occurred from CD to digital download or digital distribution, was created unprecedentedly entirely by consumers. In fact, the major industry contributed nothing to that format shift. It was really the technology industry and consumers. That shift is an incredible shift, and, in my opinion, should be welcome by the industry, because it's such a more efficient means.

You can send a song over the Net in a second and it costs you, essentially, nothing to do that. Yet, it's very expensive to ship trucks and buy stores and have bricks and factories. So, really, it's this realization that there's a new efficient medium out there—that realization, in and of itself, is not what has driven the industry to contribute and to start to be a part of this change. In fact, it is the fear that's been created by someone else controlling, or someone else creating or maximizing their profit, a new middleman, if you will, between the creator and the consumer.

So, I think many of the companies that have launched themselves into the Internet music space, including Myplay are companies that really had aim to do three things—to of improve the efficiency for three reasons: One, consumers really deserve more selection, since there are so many titles and works of art out there, it would be great if there was an efficient way to get it to them. Two, it'd be really great if there was a more efficient way besides the incredibly consolidated radio format and MTV to promote the works of art, the music, that people—these artists have created, because it is a really inefficient means today to depend on these two really cost ineffective promotion mechanisms.

And, thirdly to increase the pie. The music industry, actually, it's about \$15 billion in the U.S., but it's a \$40 billion industry worldwide, two-thirds of the world's music sales occur outside of the U.S. And for all intents and purposes, in the United States, the music is actually a flat industry. It's growing in single digits, about 2-to-3, maybe about 4

percent a year, despite the great profits. But it's really not growing very much, because there's not any new products or services of substance that are really being released to give consumers more choice so that they'll pony up a couple bucks to take a part in.

So, companies like Myplay and others, I think, have come in to try to create or help to create mechanisms for new services or new products to be released so that the pie can get bigger. And sure, Myplay and a few other companies should benefit economically from that. It's not an act of generosity exclusively but, still, I mean, I think that's the profit motive, that's what we hear about.

So, I contend, if this is the situation, how do we work together to kind of create and maximize these new channels of distribution and marketing? Today, the real roadblock to creating or to using these new technologies to increase efficient distribution and promotion of music, is not the technology itself. It exists in hundreds of different companies.

And, it's really not the consumer resisting it. I mean, forty million Napster users shows that kids today would be much more interested in receiving music digitally in their spare time, as opposed to, maybe, going skateboarding or renting a movie or instant messaging someone. So there's this strong consumer desire. It's the licensing process. It's the content—copyright holders' desire or intent to negotiate licenses on reasonable terms with companies that are interested in profiting from the use of these works and distributing them to consumers. It's not the artists, generally. The artists, in many cases, are interested in supporting these things, but it's the copyright holders, the record companies and, in some cases, the publishers, who are holding back.

And, it's for a couple of reasons: It's really hard—it's really hard to negotiate with hundreds of companies at one time, and also because they don't want to do anything wrong. If you've ever been inside of a record company—every record company has three frames on the wall. The first frame is a frame of the guy who allowed radio to happen, without the music industry—without the copyright owner of the sound recording really benefiting from it. And, right above this wall of three pictures it says, "wall of shame." Then, next to that one is the frame of the guy that let MTV occur, that made the first licensing arrangement with MTV to license the music videos. They didn't get a big piece of that.

The third is an empty frame, and it says Internet underneath it. And it really is—there is a fear, no question, about this industry getting away from the copyright owner. So, I really do believe that a lot of the resisting in licensing on reasonable economic terms to a lot of new

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companies is a fear of losing control or not participating greatly enough, which is why I believe lawsuits have been used as a club to kind of bring new technologies that are kind of running away, sort of under control.

A note on copyright, I think, I've agreed a lot with what's been said. I do want to respond to a comment someone made earlier. I don't believe—not being a constitutional scholar by any means, I'm probably out of my league here—but I don't believe the framers intended copyright to exist only because an incentive needed to be created for the artist. I believe they did it because I think, as you said, Ed, that the ultimate goal was for the consumers to have availability of a lot of art, and it was determined that a minor incentive or a reasonable incentive to the creators would incent them to create more work so that consumers can enjoy it. But if the mechanism for promoting or distributing those works is clogged or broken or even corrupt, then copyright shouldn't be enhanced to further restrict the flow of these works through these channels that may be more efficient.

I also don't think the framers intended copyright to exist so that massive corporations could be created to control and restrict access to those copyrights. I believe you want those companies to be completely incented to license those works out on some basis. And, I do believe, today, that the voluntary license that's necessary in order to get access to works, to use an interactive service—I agree with what you said, Phil, the Net is inherently interactive—is such a difficult process, that I believe the only way to break that logjam is by compulsory licensing for interactive services for both streaming and downloading. And, I do believe that this will be a significant debate in the next Congress.

The last point I wanted to make was that I am a bit troubled by the way fair-use has come under attack. I also find myself disagreeing with some of Judge Kaplan's decision in the DeCSS case, because I do believe that there is this exemption provided under the doctrine of fair use, that's supposed to let you, as a consumer for your own personal and noncommercial use do some things with the work, sort of under the roof of your house, or maybe under the roof of your house and your car and your laptop, but still give you some rights there. As soon as a copyright owner puts some mechanism into this work as they distribute it to meet the tests for encryption, which by the way is not a very high test to be met, then you are circumventing that under any means, even if you're doing it exclusively to exercise this privilege of fair-use or this defense of fair-use. You might go to jail, and that does feel like that balance, which I appreciate is a very fragile balance, is shifting a bit in the wrong way.

PROFESSOR KAUFMAN: Okay, and Bennett, who's now in private practice, and who used to be at ASCAP. I'm not sure where he's going to take us.

MR. LINCOFF: I don't think I'll wear either hat—

PROFESSOR KAUFMAN: Okay.

MR. LINCOFF: Following on some of the literary allusions made by earlier speakers, I think this is the best of times and the worst of times for the music industry. It's the worst of times, because I believe, ultimately it will be impossible to stop widespread, unauthorized downloading of perfect digital copies of sound recordings. Consequently, music publishers and record labels will not be able to sustain their traditional sales-based revenue models, which are based on thin margins and driven by the sale of hit recordings. Technology alone will not be sufficient. Technological protective measures which, theoretically, would stop copying, will beget countermeasures, and news of a successful hack will be known instantly by anyone who cares. We've already seen this in the DeCSS case and in other circumstances. Moreover, because of the Internet, the market for sale of individual sound recordings can be ruined in a nanosecond.

On the other hand, the good news is that the industry, both music publishers and record labels, have the opportunity to create new licensing structures which would give them a new revenue flow. And specifically, I would suggest that both groups, the publishers and the record labels, create a new hybrid online transmission right, different than the right that Bruce Lehman was talking about earlier today; a right that would subsume the reproduction, the distribution, and the performance rights in musical works and in sound recordings, and which could be licensed without regard, ultimately, to whether end-users only listen to online transmissions, or also download them.

I believe this approach makes sense, because, in the end, it may not be possible for either the copyright owner or the webcaster or other transmitting entity to know what the end-user is actually doing.

The new online transmission right I am proposing, would be, essentially, bulletproof to infringement. Like the performance right, but unlike the distribution right, an online transmission right could not be subverted by a single unlicensed webcaster or end user. For this I look to the way the U.S. music performance rights organizations, ASCAP and BMI, license the radio industry. If any particular radio broadcaster is not licensed at any particular moment or for any given month or year, the loss to ASCAP and its music publisher and songwriter members is the amount of the license fee that was not paid by that radio broadcaster. That money, in any event, can be recouped

in the infringement action that would be brought for these unauthorized performances. The fact that any particular radio station is not licensed has absolutely no impact on the ability of ASCAP to derive revenue from licensing the other 9,000 or so radio stations in the United States. If you implement an online transmission right, you don't run into the problem of Napster being able to undercut your entire revenue model.

I'd like to address the legislative issue just for one moment. I think that it is utterly unavailing to the webcast community—to the Internet community, generally, to look to Congress for compulsory licenses, for statutory exemptions, and for any extension of the fair-use doctrine. If a transmission originates in the United States, any statutory exemption that may apply would only extend to the transmission in so far as it begins and ends within the United States. However, receipt of a transmission in France, England, Canada, or anywhere else, is not subject to exemption by reason of U.S. law, and would be an infringing act in these other territories if not exempt under their law, or licensed separately by the copyright owners. So if one proceeds thinking that they're going to rely on a statutory exemption that they've managed to get from Congress, they may find that they were not insulated against liability overall.

PROFESSOR KAUFMAN: One point that I've heard throughout the afternoon that we just touched on, which I think is going to be one of the key issues is globalization. What we do in the United States can no longer be viewed in an isolated way, we have TRIPS,⁷ GATT and other treaties which are going to impact us. Then, there is the whole discussion as to whose laws are going to apply. For example, last week in response to the Yahoo auctions, where they were selling Nazi memorabilia on Yahoo USA, a French court ruled the sales were violating French law, even though the auction wasn't on Yahoo France.⁸ Do we look at the French law? Will their law be imposed on the United States? It is an open area, which I think, in terms of the future of intellectual property is a huge new area to be talked about.

Perhaps there is going to be a new copyright law just for the high-tech, which is a proposal being bounced around. This discussion could go on for many, many hours and probably should—but we are

7. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments—Results of the Uruguay Round, vol. 31 (1994), 33 I.L.M. 1197 (1994), available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (last visited Apr. 27, 2001).

8. See Pierre-Antoine Souchard, *France Calls for Net Zoning: Judge Orders Yahoo to Restrict Access to Site Deemed Racist*, WASH. POST, Nov. 21, 2000, at E15.

out of time.

I want to thank the panels for a very engaging and stimulating discussion. I will end by saying, try as we may, que sera, sera, the future is not ours to see. Thank you all for coming.

(WHEREUPON, THE PROCEEDINGS WERE ADJOURNED).

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