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3C Copyright Law & Concurrent Session. Copyright Potpourri

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SESSION 3 – Copyright Law & Concurrent Session
3C: Copyright Potpourri

Moderator:
Rob Lazebnik
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Speakers:

Sean M. O'Connor
Antonin Scalia Law School, George Mason University, Arlington
In the Court of TikTok: Are Fan Mashups That Call Out Copying Changing Music Writing Credits?

Mehdi Ansari
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Emerging Trends in NFTs

Fiona Phillips
Fiona Phillips Law, Sydney
New Copyright "Access" Reforms in Australia: Lost in Translation?

Nicholas Bartelt
U.S. Copyright Office, Washington, D.C.
Thin Copyright at 30

Panelists:

Ann Bartow
University of New Hampshire, School of Law, Concord

Mitch Glazier
Recording Industry Association of America (RIAA), Washington, D.C.

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RON LAZEBNIK: Welcome, everybody. I'm Ron Lazebnik. I'm a professor at Fordham University. This is a great panel, Copyright Potpourri. I wish there was some kind of theme I could discuss that ties everything together, but as is the nature of this particular panel, it's just copyright, that's the theme. And we're going to get to hear some very interesting remarks. With us are Sean O'Connor from the Antonin Scalia Law School, Mehdi Ansari from Sullivan & Cromwell, Fiona Phillips from Fiona Phillips Law, and Nicholas Bartelt from the U.S. Copyright Office.

And our two panelists are Mitch Glazier from the RIAA and Ann Bartow from the University of New Hampshire. I'm assuming even though that name doesn't say, Ann Bartow, that is Ann Bartow, but if not, you know, we have a special panelist that I wasn't aware of. In any event, I will not take up any more time because I'm very curious to hear some of these topics, especially when I read the title for yours, Sean. I was very curious to know what you wanted to say so you get the privilege of being the very first speaker today. So please take it away.

SEAN M. O'CONNOR: Okay so can everyone hear me? Good. Wearing earbuds so that it worked better. Let me get my slides up. Can people see the slide deck now?

RON LAZEBNIK: Yes.

SEAN M. O'CONNOR: It's good? Okay. Thanks as always to Hugh, Ron, everyone at Fordham for bringing me in. I love to come to these every year. I love it even more when we were back in-person again because it's such a fantastic event in New York all the time. So yes, this is a fascinating topic that was actually brought to my attention by someone else much younger and hipper than I am because I would've had no idea this was going on.

I don't spend a lot of time on TikTok, it might shock you. I'm not posting dances; I'm not doing anything like that. So, there's a fairly well-known Twitter copyright person, Copy(right) Cat @biglawgothgf, who is in our program actually at Scalia Law School now at the Edison fellowship at my center. She's doing a lot of great copyright work. She is a one of the big law firms.

And so, as we were discussing music law issues, she said, "Have you heard this thing going on and TikTok?" I had not. Again, this is for information if anyone wants to follow her and see what she's doing. What I realized was that there has now been an explosion of fan mashups, but it's really more than just fans, it's influencers who have found that they can tweak the controversy algorithms in TikTok. Because all social media loves to fan the flames, and they want to have things where people are going at each other.

They find that if they highlight some songs that seem to possibly have a copied section that these videos are just going viral. So, what I'll do is here's the outline of what I'll talk about, but the best way is to just demonstrate one of them. And so, let's take a look at it and hopefully, the sound will come through on this. This is exactly one of these TikTok videos. The song is *good 4 u* by Olivia Rodrigo. *Misery Business* was an earlier song by Paramore. Here's what this particular gentleman has done.

[starts the video]

RON LAZEBNIK: Unfortunately, the sound doesn't seem to be coming through.

[pause 00:03:48]

SEAN M. O'CONNOR: Okay, hold on. Let me get away. Did that come through for everyone? Could you hear that?

RON LAZEBNIK: No, unfortunately, not.

SEAN M. O'CONNOR: Oh, very frustrating. I wish somebody said something sooner. I don't know how I can tweak this to make the sound come through, but in the interest of time, we might continue.

MEHDI ANSARI: Hello, Sean.

SEAN M. O'CONNOR: Yes.

MEHDI ANSARI: I might be able to help. When you do your share screen for your presentation, there's a button at the bottom that says share audio. You might have to unshare and share again and just click the share audio function.

SEAN M. O'CONNOR: Okay. I'm going to stop share. Then down at the bottom, I'm seeing a few things. No, No, it's not that.

MEHDI ANSARI: All right. Maybe it's better to just--

SEAN M. O'CONNOR: Yes, I don't want to blow that time on this. Yeah. Okay. Well, that's unfortunate. That's one of the challenges we have of being in the virtual world. But in some ways, the visuals were as important because those of you who know music production, now, you know that was going on behind him, or on the screen was, essentially, a digital audio workstation, a pro tools, or something. I don't know which one exactly he was using. So, it shows the clips. He's basically showing how it's going from one song, and then you hear the other song, and then it goes back to the first song, and then they're playing in parallel together. And if you heard it, it would sound like just one seamless song.

Of course, he's really highlighting that "Oh my gosh, these things sound identical." Then a key part of these videos is that they do this holding like, "Oh my gosh, this is crazy." These things are getting millions of views. Not only getting millions of views, but people are weighing in in the comments. It's not just the views but it's extensive like thousands, tens of thousands of comments coming in, and people weighing in. Let's get into the heart of this because again, I only have a few minutes to give the overview, and then I'm going to have a great discussion when everyone does their stuff.

So, what we are suggesting is that there's a new court of public opinion. It's not playing out just in traditional media but in TikTok now, you have essentially this new court of a public opinion for music copyright disputes. And We may have, essentially incentivized, at least, the algorithms have incentivized a bunch of influencers out there to seek out these things that sound similar. So rather than just the artists themselves, the original composer who may feel that their song has been infringed now. Now, you have this army of TikTokers out there and are looking for things that may sound similar, and then trying to highlight them, and to drive the algorithm so that then they'll get a lot of virality, and then have a lot of comments.

And then keep in mind too, that that feeds on itself. Once these things are going up, then it's like a playlist, getting on a great playlist, and then more and more people see it. Now, suddenly, if you have out there, and that's why I'll be interested to see Mitch's response to this, you know however, he will respond to this without putting him on the spot. I'm dying to know behind the scenes what's actually going on. As you have all these folks now, maybe declaring that "Oh my gosh, this does seem like a copy," there's at least this one case with Olivia Rodrigo and Paramore where writing credits were added.

The timing seemed to be suspiciously linked to when there's a video, and this TikTok video had gone viral. So, is there a sense now that this is influencing behind the scenes that there should be some negotiations? Maybe those negations were in place already. I think in *Variety* or *Billboard*, there was a story about this particular dispute and the official line was that they had already been talking about it with the original composers, and there was already something in the works. But then the writing credits got added only after this dispute was out there. Do we have these influencers being again being their own detective slews, trying to find these things and highlight them? Is this influencing what's going on behind the scenes?

My interests, those of you know some of my work on things like musical Scène à faire and trying to unpack compositions and not just view them as just one unitary thing. There's lots of sections in songs that really are musical Scène à faire, there are certain court change pattern that everyone's done a million times. This is, at least, in my opinion, again, the *Stairway to Heaven* case, that descending chromatic line intro, the famous Jimmy Page part, and then in the song *Taurus*, it really is just something we've all done as guitar players for decades. It was done long before Jimmy Page and Randy California.

So, if it's something like that, one of these TikTokers can show, "Oh my gosh, that sounds identical," but it doesn't really matter because the original thing was not protectable and so there is no infringement. So, is this now driving a lot of false controversies? That's something that we're going to have to unpack. Again, what is this doing to the industry? Is industry paying attention to this? Is it driving some of the stuff behind the scenes? Why don't I stop there in the interest of time?

RON LAZEBNIK: Thank you, Sean. I guess, Mitch, you were already called out directly, so I figure I should give you an opportunity to respond.

SEAN M. O'CONNOR: Hi, Mitch.

MITCH GLAZIER: That's all right. As far as the clip itself, TikTok is a licensed service. So, you know, basically, fees have been paid for any music that is part of-- for Merlin, indie, or for major record companies to be posted on that. So, I don't think it's an issue about the clip itself and the use of the clip itself.

SEAN M. O'CONNOR: I'm talking about, is it driving behind the scenes, adding, writing credits?

MITCH GLAZIER: Well, I don't know. That would be up to the company that produced that may know about it. You know, whether or not that timing is purely coincidental or not, I have no idea. I have no idea if it's driving it, but it really is fascinating. I mean, it'll be interesting to see how many lawsuits are

produced that will otherwise be undiscovered because of fans calling it out. Maybe it'll influence the already changing body of law on this as more of these cases that are harder to discern come to the courts. Maybe that's a feeder that we don't know about. Look at you, Sean.

SEAN M. O'CONNOR: I know I'm more hip, but it's all that they can get at. I have that fellow in my program, and she's all-over social media. And. Otherwise, I'd have been clueless. I don't even have a TikTok account, so I'm way out of my own image.

RON LAZEBNIK: So, I want to give Ann an opportunity to respond to this thought I have, which is often when you teach copyright law or when I teach about copyright law. One of the things that we noticed is that the public is often very, for lack of a better word right now, ignorant of the various licensing and contractual agreements that occur to make things smoother right in their consumption as Mitch points out. But there is an arguable element to fair use here as well, in these kinds of reaction videos underlying which Sean is talking about. I'm wondering, do you think this is kind of going towards further confusing for consumers?

Where the fair use line would be when they're reacting to things on a license platform so nobody would challenge them. They may, nonetheless, generate lawsuits for the people who originally created the content that they're pointing out might be infringing somebody else's work? Or am I just kind of making a fuss out of nothing, I guess?

ANN BARTOW: Wow [laughs], that's a great question and great framing. I'm not even sure I can add anything to that [laughs], so, yes. No, fair use is already confusing to consumers and I don't know, you know, people don't talk about that anymore. That used to be a big topic of conversation, it's like consumer reaction, what consumers were feeling. We used to talk about the warnings at the beginning of movies at the theater, we're going to arrest you and going to throw away the key. Or the really high music verdicts when they went after one of those teenagers and got multi-million-dollar damages things up.

That'll teach them to not Napster or whatever. I don't think that we're paying as much attention to consumers generally. I'm glad you raised that point because that's kind of interesting, I think.

RON LAZEBNIK: As Mitch points out now, they may be doing the work for plaintiff's counsel in finding potential litigants. But We're not necessarily informing them of where their own rights start and stop because these contracts do exist. We're really nearing the end of the period for Sean's, but Sean, I want to give you the last word.

SEAN M. O'CONNOR: Yeah, to be very clear, I [chuckles] leapfrogged over the issue [chuckles] from Anna and you, and even Anna talking about because I'm with Mitch. I just assumed that this is all licensed behind. Whatever the influencers are doing on TikTok is fine, right, Mitch? What the issue really is is this driving new litigation behind the scenes and composers, well, new artists are finding themselves in the crosshairs even more than ever perhaps. Because you have these internet sleuths out there trying to find stuff because it will drive their own influencer rankings and that's kind of fascinating.

RON LAZEBNIK: I mean the one, the one other immediate reaction I had to your presentation, you frame it as giving credits right which immediately I think of the attribution moral right. Which we don't have in the US, and, suddenly, like is this culturally creating a moral right that doesn't exist in the US?

SEAN M. O'CONNOR: Well, I want to be clear, this is actually affecting the composer authorship. When I said adding writer credits, what happens is you go and look and suddenly, "Oh, look, just like in the Tom Petty case and you know Ed Sheeran cases, now people are literally being added as co-authors on these works." Literally, writing credits in the sense of copyright. Now you're going to make money off the composition.

RON LAZEBNIK: Oh, okay. Fair enough. [crosstalk]

SEAN M. O'CONNOR: That's what's fascinating here.

RON LAZEBNIK: I guess it brings the question of you know how many people want to potentially litigate to see when authorship credit truly is deserved, versus this is a universal thing, which is often what we see in music copyright cases. You know is this riff theirs or is this riff something that everybody has access to? But thank you for that, Sean.

SEAN M. O'CONNOR: With that one more quick thought, the key here, the woman who brought to my attention is the litigator. And so, she's looking at the perspective of we're screwed because if we can see now, we essentially have a consumer survey. And It's showing that the vast majority of people are saying, "This is flat-out infringement." Now, what has to be worked out behind the scene is if the thing being copied is protectable, but if it is, the litigator might say, "Let's just settle, we're not going to attempt to litigate this." Sorry, I'm over time.

RON LAZEBNIK: That's okay. So. And now, we turn into a completely different topic as is the theme of the potpourri. And Mehdi, I'm sorry, you are up next with NFTs.

MEHDI ANSARI: Great, I'd be happy to walk us through that. Let me share the slides. Can you all see that, okay? Excellent. All right, so we're going to talk a little bit about NFTs. Just because it's a new-ish topic, I'm going to spend just a couple of minutes giving an introduction as to what NFTs are for anyone who may not have come across them. Then talk about a few of the issues that we've seen in either issuing or transacting in NFT. First, what are NFTs? What are non-fungible tokens?

These are things that you might have heard about from your younger cousins, in my case, and then they come up with work. But What they are from a legal perspective is, essentially, I think of them as unique digital tokens. Think of them like a baseball trading card or any other kind of collectible, but they've evolved in the 2020 plus timeframe to be based on blockchain technology, which we'll talk about in a little bit. And because they're digital, they don't have to be static images. They can be videos, they can have functionality embedded within them so you could have a digital token that can be scanned, and allows you access to a backstage area of a concert, or something like that.

They are digital tokens and that they're essentially a piece of code, but that piece of code includes a pointer to what some people refer to as an anchor media. Which in its simplest form is a picture. So, What I have here, the monkey you see

is the famous monkey is a board ape. Some versions of which have traded for hundreds of thousands, maybe now millions of dollars. And What you have on the right is more like a traditional art which is the Mona Lisa, which is one of the kind, right, sits in physical form at the Louvre, and you'd have to go to Paris to be able to see it.

And The beauty and also some of the challenges with NFTs are, although the picture itself is sitting on a server somewhere, the NFT is a piece of code that's accessible anywhere. So, if you bought this NFT, you can show it to people on your phone, you can include it on a display around your house. It's available, and so that's the attraction of NFTs compared to a traditional media. We've talked about some of these, just in the interest of time, I'm not going to get super in-depth. The fact, the reason it's called non-fungible is because unlike something like Bitcoin, where every bitcoin is the same as every other Bitcoin, it's a form of currency, and so those tokens are fungible. NFTs are not fungible.

One Crypto Monkey is different than a different Crypto Monkey so you can't trade them for each other. Each of them will have independent value, essentially, based on whatever they're worth in some other currency, and that they can be traded based on that. Which most often, it is in the form of Ether, which is the cryptocurrency underlying the Ethereum network. Just a word about blockchain for anyone who hasn't had to deal with it before, it's essentially a public ledger where transactions can be recorded. The reason it gained a lot of popularity was it started from the cryptocurrency world of Bitcoin.

But the idea is I'm buying an NFT on the blockchain itself. Mehdi owned this NFT as of this minute. Then I transfer to Ron, and its public information, a bunch of computers around the world verify that Mehdi actually owned this NFT that Ron has a wallet, and then it goes to Ron. So, it’s very safe, it's publicly available, and so it's allowed for a lot of distributed applications of NFTs. So, let's talk about the legal issues. You know as with any kind of unique and new application, the last few years, it's been a bit of a wild west in terms of what people have done. Sometimes, they've had the rights to do the thing they've done. Sometimes, they haven't.

The simplest takeaway is the most obvious one which is although NFTs are new, IP rights still apply. You're not allowed to make an NFT of, for example, a piece of art that you don't own, or of someone's face to which you don't have the publicity rights. Or of a brand that you don't have the trademark rights. Now, there is some complexity here going back to the previous panel around fair use, and the First Amendment, which are limitations on copyrights and the rights of publicity which I won't get into.

There are examples or, at least, theoretical examples that one could come up with, where an NFT may be permissible under those regimes, but it's rare. A lot of the NFTs that people have tried to do without permission like Michael Jordan's face or Christopher Walken's voice, clearly violate the underlying rights. A lot of those people have gotten in trouble either in the form of actual legal claims or by notices to the platforms on which those things were posted, and have been taken down, and the user account suspended, and the like. The other area

that there's a lot of disputes and we do a lot of work in is there's a lot of important license agreements in place.

As I'm sure you can imagine, where athletes have granted rights to brands or moviemakers like Tarantino have granted rights to a studio. The license agreements do not expressly contemplate NFTs. And so, Both the rights grantors, let's just take an athlete as an example, both the athlete and the brand might take positions based on language that's in the agreement as to where NFT should fall. Some of them are easy A few licenses for shoes and apparel, that doesn't include NFTs, but some of them are a little more complicated. What if it's shoes and apparel including representations of shoes and apparel in digital form? Does that include an NFT of a shoe? Does that include an NFT of apparel?

So, there's been a lot of disputes, a few of which have spilled into litigation like the dispute between Quentin Tarantino and Miramax. A lot of which that we've dealt with are still in the pre-litigation. Parties are negotiating, parties may be settling, agreeing to amendments, money exchanging hands kind of thing. The last thing I'll mention on IP is a lot of folks who may not be as sophisticated about NFTs often make the mistake of thinking when you buy the NFT, you actually get the copyrights to the underlying monkey, to the underlying art. With a few exceptions, that's not the case.

What you get when you buy the NFT is you essentially get a non-exclusive personal-use license to the art. The artist maintains all the other bundles of rights that are included in copyright. Which means you might be surprised after you've spent hundreds of thousands on a Bored Ape to find one on a billboard that's endorsing the Nike product because that's not the kind of use you purchased as part of your NFT. It's one of the things that many of our clients who were interested in purchasing them were very surprised to find out.

Some of the NFT issuers are getting better about that, either more transparency or in some cases, actually allowing commercial exploitation. Like, in fact, the Bored Apes have terms and conditions for some of them that allow commercial exploitation. You can put it on a shoe. You can put it on merchandise. The last issue I'll mention in the interest of time, which I won't really get into. I have a few slides in here around securities, commodities, and anti-money laundering.

The basic takeaway here is there's a whole separate non-IP related regime, which is not appropriate for this panel anyway, but I wanted to mention securities laws, commodities laws that apply to NFTs which, unfortunately, we find a lot of people in the marketplace are not paying enough attention to. Particularly because sometimes the people that are advising on these projects are IP lawyers, art lawyers, music lawyers, and they're not familiar with these issues. Some NFTs, in particular, like fractional NFTs which seem to be having their hot day in the sun, raise a lot of potentially thorny and liability-inducing issues on securities and commodities.

RON LAZEBNIK: Thank you, Mehdi. I guess I'll wait to see if one of the members of the audience has a question. You guys are, of course, always welcome to ask questions or if one of the panelists wants to raise their hands. I have a question in the meantime which you know is in connecting blockchains

generally to copyright, the place that I think is the most interesting is whether artists will use blockchains generally as a royalty-based scheme you know, to do smart contracts and just do royalties. I can envision it as what you guys are seeing potentially, then you layer NFT on top of that to be who gets the royalties out of that.

MEHDI ANSARI: Yes. It's a really interesting question, Ron. One, It's an area in which there's actually quite a bit of activity. If you compare it to the regular art world, an artist would create a painting, would sell it maybe for relatively low sums because they're unknown. 10 to 20 years later, the painting's worth millions of dollars, and the artist doesn't get anything from that. The only value they would get is if they created something new, they could capture some of that fame. But What some artists or owners of art are considering are attaching NFTs to art that, say, there is a royalty on every transaction based on the amount of dollars that that transaction is.

As the price climbs, the artists keep getting royalties. And These royalties are self-executing, meaning however much consideration you paid for the NFT, as part of the operation of the blockchain, the code will just slap off a portion of it and send it to the artist. But They do raise some complexities because while it's nice that this is on a blockchain, it's still a regular contract. People may take money under the table and not report it on the blockchain, or pay a small amount for the NFT and pay a much larger amount for the physical art. So, there's still some complexities to be addressed there, but it's definitely an area that there's a lot of thought and activity in.

RON LAZEBNIK: Interesting. Ann, you had your hand up. Ann?

ANN BARTOW: Yeah yeah, somehow, I will try to be quick. Thanks. Yes. I'll try to be quick. Some of this is just clarifying because I'm struggling with this a little bit, how this all fits together. Traditionally, we have a painting and the artist sells the painting but retains the copyright. The copyright stays with them. They sell the painting. Maybe they make prints before they divorce themselves with the physical object so they can actually sell posters or prints or somebody on the line makes prints within the scope of the copyright, and then we can have special prints. We want them to be fine art, then within, we have signed and numbered prints. These are all things we already do with this kind of art.

Does the NFT substitute for like sign numbers prints or it's another thing altogether? I'm also confused. So, If I buy the painting, how do I even know if there's an NFT or not? The gallery or the artists has to communicate this to me, and then I have to, in good faith, maintain it so that the artist gets a cut of my money when I sell it.

MEHDI ANSARI: Those are excellent questions, Ann. I'll try to answer some of them. The answer to some of them are not known. The beauty and the danger of NFTs, they're essentially creatures of contract. So, you can make them sing however you'd like. Whether you issue a one-on-one and you commit that it is a one-on-one, does it mean that if you made a minor modification to it, you could reissue? Maybe. Could you expand that commitment to say, "I agree this is a one-on-one and I won't issue anything exactly like it or anything substantially

similar to it." That's better, but maybe artists wouldn't want to commit to something like that.

Instead of a one-on-one, you could do what is called a limited series NFT. It's like the numbered print concept which I'm assuming 100 NFTs tied to this particular image and that's it. And essentially, you're making a non-blockchain-based commitment, contractual old school commitment that I won't issue any new one. And if you did, someone could bring just a regular old claim based on an implied contract or some other, you know, good faith covenants, et cetera. A lot of the questions you're asking are fair ones and not the ones to which there isn't a great answer.

If you bought a painting, there was no way to really look it up. You could try to Google and see if there is an NFT that mentioned the name of the painting or the artists by name. But I think your best recourse is probably to get a representation and warranty from the artists that they've disclosed to everything they've done with it before you bought it. Those are all really good questions which, unfortunately, actually a lot of players active in the marketplace, both issuers and purchasers, are not always paying attention to and are, unfortunately, been surprised by.

RON LAZEBNIK: This is really interesting. Looking at the clock photo, we're clearly out of time. But I will point out that if we're good we will have more time at the end to answer more questions. A very quick one I'll address while I let Fiona prepare her remarks is that there was one question about whether this NFT scheme, in some ways, bringing in moral rights into the US copyright system. I guess the answer Mehdi probably gave is a solid maybe depending on what the NFT is promising.

MEHDI ANSARI: Yes. That's right and also because of by their nature they're sort of global, that's one of the complexities which is based on, for example, where is the artist? Do they have moral rights in the jurisdiction they're in because the NFT, you theoretically, can make jurisdiction-specific NFTs and prevent their trading elsewhere. But It's very difficult to do and difficult to enforce. You have to kind of think of these IP issues globally.

RON LAZEBNIK: Yes, and speaking of globally, we are now going to walk away from the US and head over to Australia. And Fiona, you have the floor.

FIONA PHILLIPS: Okay thanks, Ron. Hello, everybody. I'm not talking about NFTs or TikTok but I am coming to you from the future because it's about 4:30 on Friday morning in Sydney. And I'm assuming you can all see my screen, yes? I'm going to talk to you a little bit about the recent copyright legislative process that the government released almost on Christmas Eve last year. Just to explain some of the background to that. In Australia, our Copyright Act is based on the UK 1956 Act. We have fair dealing exceptions and then a range of specific exceptions.

We have some of our own idiosyncrasies and very detailed library and archive exceptions, and some statutory licenses for government use and education use of copyright material. So, over the last 25 years or so, there's been an increasing debate in Australia about whether we should move away from this

system and introduce a fair use exception. And despite successive inquiries by the government(it's almost like, "Oh, if you don't get the answer right, we'll just have another inquiry until you get the answer right") we have not introduced fair use and what we have instead is an increasing number of exceptions in the Act.

The latest iteration of this is the Copyright Amendment (Access Reform) Bill which, as I said, the Government released for consultation at the end of last year. And interestingly, this was the last part of responding to the most recent review and has also been somewhat influenced by some of the situations that have come about as a result of the pandemic. When you look at it at face value, what the Bill purports to do, it's not extreme. It's looking at dealing with orphan works, it's looking at an exception for quotation in non-commercial circumstances. It's looking at streamlining and modernizing some of the library and archive exceptions, likewise with the education and government statutory licenses. What the government also sought to do as part of the consultation process was to conduct the TPM review, which we're required to do under our free trade agreement with the United States. So, none of that seems too controversial, as I said that what the Bill actually does has been the cause of some concern. And there seems to be a large gap between the stated policy intention of the Government and the actual drafting.

There's some speculation as to whether this is intentional or whether this is just actually because of a diminished skillset within the bureaucracy. I say this referring back to the opening session today when Tony Taubman and Hugh were talking about the Australian IP mafia. Unfortunately, in the last 20 years in Australia, there's kind of been a move towards generalist skills. Sometimes that doesn't always work when you're in a technical area like copyright.

The problem with the orphan work exception that has been proposed is it talks about limiting liability, but what it actually does is if you've done a reasonably diligent search, it removes all liability for past uses. So that means that if a copyright owner comes to the fore, then they have no recourse to be remunerated for past uses of that work. Which seems problematic and also might incentivize the orphaning of material. The other thing which stands in stark contrast to what's going on in the US in terms of small claims, is that the vehicle for resolving disputes is the Copyright Tribunal, which is essentially run out of our Federal Court.It's not at all a cheap and easy mechanism and given that oftentimes orphan work issues arise for photographers, it raises some concerns.

The fair dealing for quotation for non-commercial uses is also kind of problematic in the way it's drafted. Interestingly, it's not drafted on the basis of purpose. It's drafted around the type of user. Generally, educational institutions and the like, and also query, what the actual need is for that exception given that we have fair dealing for research or study already in Australia.

What's more problematic than that is the other exceptions, which are not just idiosyncratic, but raise some real issues in terms of Australia's compliance with the 3-step test. So, the proposal is to extend all our existing library exceptions to all copyright material, not just text-based material. Then probably

the most alarming proposed amendment is proposed section 113KC, which allows material in electronic form to be made available online.

Now there are some safeguards in there about the library has to ensure that the end-user is not going to infringe copyright, but really the liability rests with the end-user the way it's proposed. Also, there is some kind of safeguard around commercial availability. Interestingly, it suggests in the discussion paper the way that would be interpreted is, say, for example, I wanted to see *Bridgerton* season one, but I could only do that by taking out a subscription to *Netflix.* On one interpretation of this provision that would be sufficient to allow the library to make *Bridgerton* available online, or indeed to send it to an individual for personal use which is proposed section 113D. As you can all tell, that is somewhat alarming.

Turning to education, there's an exception in the existing Copyright Act which allows for public performances to take place in a classroom setting where it is a closed classroom. For example, reading a poem from a book. One proposal addresses the extension of this exception to online learning (even though it has been agreed that the existing regime already allows that exception to apply to online learning situations). There's a proposal to extend that exception to copyright to not only non-remunerated uses, but to all copying and communication of lessons, which kind of undermines the statutory licenses for education. So, it’s fairly alarming in itself.

That, there’s also some provisions that would undermine the existing government licenses as well. Interestingly, when the government released this Bill for consultation, it described the legislation as being non-controversial. As you can imagine, the response of copyright owner stakeholders was far from that. In fact, the Bill was slated for introduction into Parliament this March but that didn't happen. A Federal election has now been called, so we are now in election mode. Parliament has been paroled and the government is in caretaker mode. This Bill will not be going forward. But It'll be a matter for the incoming government as to what it does.

So, I suppose my main points, for the purposes of the discussion, was to provide a snapshot of how complex legislation can become if you try to cater for every eventualityAlthough arguably the existing regime already provided for the circumstances raised by the pandemic in terms of the need for online learning and e-lending. Also, and I suppose this is a good lead into my colleague, Nick, who works for the U.S. Government, there is a need for expertise in the policy preparation and drafting of copyright legislation. So that was all I had to say on the topic.

RON LAZEBNIK: Thank you, Fiona. So, I guess Nick, you were called out so I'll give you an opportunity to comment. I will point out. What's interesting to me is Fiona framed it as a fair use versus fair dealing kind of legislative issue. But one of the topics that you covered, the online teaching. Here in the US, we actually had a separate Act, the TEACH Act, to deal with that kind of thing. It happened well before COVID. It was one of the few times Congress really did something well in advance of when it was needed. Even here under the US regime

of the grand fair use, we still had to expand certain things in similar ways. But Nick, go ahead.

NICHOLAS BARTELT: That was great. I think it raised more questions than answers with me. And I have a few questions for Fiona in the follow-up. I'm just wondering what traction she expects it to see based upon the response that it got initially, of course, from the rightsholders' side. There was, obviously, momentum for it to be drafted in the first place, maybe without the benefit of expertise, I don't know. Like you said, maybe upon reconsideration there'll be fine-tuning to be done to the bill if it moves forward at all. I'm just curious, I know it's an election year as you had mentioned, what you see as the possibility of this actually making it through– whether as a whole or maybe piecemeal.

FIONA PHILLIPS: I think it depends, obviously, the outcome of the election, but I think aspects will go forward, but some other aspects I think truly and I speak-- Some people might know, I used to work for the Australian Government [chuckles].

NICHOLAS BARTELT: [chuckles] Maybe they miss your expertise, Fiona.

FIONA PHILLIPS: Well, there really has been a change over the last 20 years in public service in Australia, that they've moved away from subject matter expertise. And I think this is what you see as a result. I think when stakeholders have gone to officials and explained some of the difficulties that this legislation and this drafting raises, they've actually been surprised. [chuckles] Maybe some of the other stakeholders on the other side have been so persuasive in their representations that they've been taken in. There was no policy debate. There's no policy basis for extending the library exceptions to all material. It was done on the premise of simplification, which [chuckles] all AV material is now available to be made online by a library.

NICHOLAS BARTELT: I had another question too about this extension of where they're extending fair dealing exception based on the user not the use. I'm just curious about what was motivating–as you said, there was already a fair dealing exception but, obviously, as even Ron had mentioned, we have fair use here, but we also have the TEACH Act. I'm wondering who's left out or feels like that fair dealing is inadequate to cover their interests.

FIONA PHILLIPS: That's really interesting. We had the basic fair dealings that came from the UK, criticism or review, research or study. I'm forgetting some things. But then in 2006, we added parody or satire which followed the FTA with the United States in which was like a proxy for fair use to deal with some of those famous decisions. And then following Marrakesh, we've got fair dealing for people with disabilities. It was broader than just people with a vision impairment.

Now there is quotation - The argument goes that for libraries or relates to doctoral thesis and so on, which haven't been quotations from those. I don't quite understand why fair dealing for research or study does not work because my way of thinking about or advising in relation to that, is that the thesis candidate can rely on fair dealing for research or study in writing the basis. If, for example, the

thesis is then published as a monograph, then you would seek a license at that stage.

I'm not quite sure but it seems to be the argument has been that the existing fair dealing is not adequate for those kind of thesis like academic archival issues. There's also been some discussion that it should be extended to unpublished material. Which clearly, is in breach of Article 10 of BERNE, which is the provision that provides for quotation.

RON LAZEBNIK: On that, the clock once again is yelling at me that we've run out of time. So, Nick, you have the floor, and then hopefully, since we started late, I'm assuming that means we can end late as well, and we'll have time for discussion.

NICHOLAS BARTELT: Sure. Thanks, Ron. People see my screen here?

RON LAZEBNIK: Yes.

NICHOLAS BARTELT: The presentation, right?

RON LAZEBNIK: Yeah.

NICHOLAS BARTELT: Thanks to Hugh, thanks to Ron. Great to see some familiar faces on this panel and throughout the day. Nice to be back at Fordham. Wish it were in New York but here we are. So, this is a look back at Thin Copyright at 30 years. It came from *Feist*. You know it is something, I'll admit, I haven't given a lot of thought to until the past few years. We started to see some decisions popping up at the circuit court level that we thought maybe we should give a little bit more attention–myself, maybe a few colleagues at the Copyright Office. And it's something I'll say that also the Copyright Office and its Review Board will look to sometimes in its determinations. I just wanted give an overview of where we've been, where we're going, maybe raise some questions, and see what others have to say or think about it. As I said, thin copyright, this concept goes back to the *Feist* decision back in 1991 which was about phone books. It came out of the Tenth Circuit. We don't see a lot of cases come out of the Tenth Circuit that go to the Supreme Court in general. This involved the factual compilation of phone book information, and in that case, the court held--besides setting out the main standard for originality that we still look to that is having a modicum of creativity–they also had a discussion of, well, in certain types of compilations you, of course, can't copyright the facts themselves; however, you can receive a copyright in the compilation, that is, the selection and arrangement of those facts. But when you do so, that copyright or the protection is necessarily very thin. It would only protect against maybe what comes to be virtually identical copying or that's what some of the subsequent courts have interpreted. So after *Feist*-- I'll just give a brief segue from where we were 30 years ago, a couple of decisions interpreting it, and then go to some of the recent cases that we've seen cases picking this up.

There were a few cases, one in the Second Circuit building on the same idea, also involving phone books. It was classified telephone directory. In that case, they said, of course, that although [the copyright may be] “thin” it's not “anorexic” that you can still have--there's still something there, but it may only protect again against the identical copying, which is a concept that actually predates *Feist* and I think was first introduced as a concept in a case involving

merger. There are sort of flavors of merger and *scènes à faire* that overlap with this concept and in a sense, you might even consider thin copyright to be "almost-but-not-quite-merger." Maybe there's more than one way of expressing it, but they're so limited in nature that they only want to protect against the exact copying of the copyrighted work.

A few other cases that considered this early on were in the Ninth Circuit, *Apple v. Microsoft*, where [the court held the copyright was] thin and only virtually identical copying of the Apple graphical user interface would constitute infringement. And likewise, in the audiovisual work/video game context in *Atari Games v. Oman*, this video game BREAKOUT, they remanded to consider that, even though it might be a thin copyright, that that should be considered--whether there's [copyright] in this compilation of the video game.

Moving forward about a decade, one of the cases that often is cited for this is *Satava v. Lowry* which involves a jellyfish sculpture. Here, the Ninth Circuit said that the physiology of this jellyfish, of course, is not copyrightable. That's something that's found in nature. However, the author of this work, the creator of the sculpture, could have a thin copyright but only on those arrangement or selection arrangement of those unique elements. And they said that Satava may prevent others from copying those original features but not any of the other elements that are found in nature or just this glass-in-glass medium.

So, bringing us to today, these are some of the cases that attracted my attention and some of the others is that we saw there were some other cases in intervening years. I'll say, there was one involving the Bratz dolls which you know were doll sculptures that the Ninth Circuit looked at saying that there's potentially a thin copyright in the sculptural aspects of these exaggerated or enhanced doll features.

There are some other ones in the Eleventh and Second Circuit involving architectural plans and architectural design, and then again like I say recently what we saw was [that] the Seventh Circuit had called out one plaintiff, in particular, Design Basics, which has registered a number of different architectural floor plans for single-family homes and pursues litigation pretty actively, so much so that the Seventh Circuit has called them out as a "copyright troll" in a few of their decisions and all in the three that I mentioned here.

This is building on this idea that I think that was put forward a few years earlier in the Second Circuit about architectural copyright or design being somewhat necessarily limited because you're not going to put your kitchen maybe on the second floor or the bedroom off of the front door. They were scoping the copyright in a way that limited [the scope of copyright] to what one would expect to be the creative elements and only that unique compilation of elements.

In these cases, I think the courts also looked at that the definition for architectural works already excludes from protection individual standard features, so the idea of having a bedroom, of course, in a single-family home and some of these other concepts are things that would be excluded just by–definitionally. On top of that, of course, they said that some of this may be merged. They said, scènes à faire and that, even to the extent that any originality existed in this work, that the copyright in that would be thin.

In a different context, we see in this *Enchant Christmas* case involving animal sculptures. This is over in the Sixth Circuit. The court there said it was-- not to say that realistic reproductions of live animals can never enjoy copyright protection, but that a collection of unprotected elements such as the animal's pose, attitude, gesture, muscle sculpture, facial expression, coat texture, as well as the background lighting and perspective, may earn a thin copyright protection. Which sounds a bit like what we see sometimes in the photography cases where what creativity you can credit to the author, or the photographer, in those cases comes up here too in this context of designing an animal sculpture for a Christmas jamboree.

And I'll mention one more here from the Eleventh Circuit before I move on to some music, involving a 2D artwork. This was a billboard where the issue was about, I think, they were claiming copyright and business-related phrases on there. The court there it said, "Look, you can only--you may have a copyright in the design of your billboard, but it's really just that specific arrangement of those unique phrases, that design, those images, that compilation, and even the defendant here would have needed to copy all of those in order for the plaintiff to prevail."

More interesting cases and probably what piqued our interest here, which harkens a little bit back to what Sean was discussing earlier with musical *scènes à faire*, [are] these cases in the Ninth Circuit considering musical works, namely, *Skidmore v. Led Zeppelin* and the more recent *Gray v. Hudson*, the Katy Perry case. Although there were a lot of different things covered in *Skidmore*, I'll focus on the thin copyright aspects here.

The majority, basically, didn't take those up saying that the plaintiff had failed to present this compilation theory. That they had failed to-- so that the district court did not err by declining to instruct the jury on the selection and arrangement. At the same time, they decided to put into a footnote that, at least in the majority's view, there's not a heightened standard for determining infringement where there's only thin copyright in the work, but rather that it would necessarily have to be virtually identical. I think this goes back to what some people have called this a “super substantial similarity standard” that would apply in cases where the copyright is thin.

Again, here the majority seems reluctant to sanction that even if previous cases may have applied that. And, of course, this is an *en banc* determination– there were a few other opinions that disagreed with that view. The concurrence here said that they would have considered whether Skidmore would have had a thin copyright in this “Taurus” work, but in any event, because comparing the two, on these facts, they were not virtually identical, it wasn't worth remanding on.

However, the dissent said that by failing to instruct [on selection and arrangement], this really cut the heart out of Skidmore's potential case here. And by doing so, [the district court] foreclosed the possibility that this combination of musical elements, which might be individually unprotectable, could have had some sufficient originality that Led Zeppelin’s *Stairway to Heaven* could have infringed, or the jury could have found that had they been properly inspired

instructed. As I mentioned, you see the disagreement here in the *en banc* court about whether thin copyright should apply, whether it exists, whether there's a heightened standard.

In *Gray v. Hudson*, this involves Katy Perry's song *Dark Horse*. At the district court in that case, [the court] found that there's an alternative basis– they granted judgment as a matter of law that it was not infringing–but used thin copyright as an alternative basis. But when it got up to the Ninth Circuit, the panel there declined to adopt that alternative basis,maybe avoiding some of the tension here that we saw among the judges in the *Skidmore* case. Instead that panel in *Gray v. Hudson* concluded that, this combination of basic musical features was "unoriginal" and noted that "allowing a copyright over this material would essentially amount to an improper monopoly over two-note pitch sequences of even the minor scale itself." With that said, I'm just going to turn quickly to some of what-- the Copyright Office is also called upon to apply this.

Of course, the courts are often looking at this in the context of an infringement action. The Copyright Office, when we're making copyrightability determinations of whether to register a work at all, may look at a submission, an application, and say that what someone is submitting to us essentially is just common musical building blocks, common shapes, common design elements, and those alone are not sufficiently original to be copyrightable. However, in combination, sometimes they may be and where we've seen that is, to give one example, there was a case involving a four-second sound recording that was five notes on the marimba. This was, I think, basically a jingle or a sound mnemonic for TD Ameritrade. And the Copyright Review Board, which is essentially an appellate body within the Copyright Office that considers– if a registration is denied there's requests for reconsideration and on the second opportunity, it goes before this board– and in the board's determination, they found that there was at least perceptible production authorship of two seconds in this four-second sound recording such that it was registerable.

However, at the same time, in this determination, the board cautioned that although it met this low standard, it only relates to the whole work, it doesn't relate to the underlying musical work, but only to the sound recording and that production authorship in the sound recording.

Giving you one more example of a visual work or an animation, these are emojis from, that are available on the Apple watch. Look on the right, there's a heart that animates in a variety of different ways. I think maybe there were 10 to 15 altogether that were initially rejected, but after multiple requests for reconsideration, the board said that some of these were sufficiently original. Again, had a thin copyright because even though the animations were relatively simple and brief, that different types of hearts and pieces are notable in their animation, but that ultimately, the copyright was thin in these works, and that Apple would only be able to protect against the virtually identical copying of these works.

With that, I'll just say that I'd like to hear what others on the panel, the audience think about this concept, whether they see there's any traction, any movement, if they expect courts to deploy thin copyright maybe where merger or

scènes à faire are not quite on point as limiting doctrines, but the alleged protectable expression is somewhat minimally creative. One thing we've noticed is that maybe it depends on the nature of the copyrightable subject matter and how factual the underlying elements are.

I think this has come a long way since a phone book to being applied in the context of musical works and animated gifs, but in the same sense that maybe we can consider them "facts" of a different kind. With that, I might think I'm probably out of time. Let me turn it back to you, Ron.

RON LAZEBNIK: So, Ann's hand shot straight up as soon as you welcomed comments, so she gets to speak. I will open the floor for the audience. Please feel free to ask questions about any of the presentations because we don't have too much time left, so I want to give everybody an opportunity to ask about anything. But Ann, take it away.

ANN BARTOW: Thank you. I teach copyright sometimes three times a year or more and Baker v. Selden the mystery is always of the forms was the Supreme Court saying that there was thin copyright that wasn't infringed or no copyright. This problem has been around for a really long time. The court was very unclear about that. The difference between thin copyright and no copyright, of course, is tiny in a sense because it's in copyright but it's enormous in fear factor, you know.

I just think this [unintelligible 01:06:20] got thin copyright, that was so harmless because it's really thin and you can practically take the same picture and not have to worry about as long as you can prove it's your picture and you just didn't copy somebody else's. I just think the fear factor may not justify-- I just think the better approach is to start actually just saying things are just not covered by copyright and the merger reduction is a powerful thing and that copyright needs to back off in favor of creativity.

RON LAZEBNIK: I thought maybe you could go the other way when it comes to international copyrights. It could be that we obviously under TRIPS and BERNE have to recognize copyrights from other countries about certain things. So, you know, I see thin copyright is a potential way for courts to kind of subvert that international obligation potential and just say, "Yes, we recognize it," but we're only going to recognize it for a very narrow field. I don't know that that's ever happened because I don't think thin copyright comes up that frequently, but yes, I also agree this is like a fear factor. Sean, you've now raised your hand.

SEAN M. O'CONNOR: I have. I think to Ann, really great point by the way for the international angle, but I do think that it's going to vary as to the subject matter. Take Feist itself and you have unprotectable facts, so there a thin copyright maybe not even bother. Maybe you know it's not. I don't even want to argue that one either way. I'd be happy for that to go away. On the music stuff, I feel kind of strongly because it's a little bit like combination patents and I've done sometimes of the patent side of things where there really is a lot of innovation in the taking together in the music side, scène à faire element putting together an unusual way.

You could take for example a very standard blues pattern, but then put a very odd like Gypsy scale over the top. Both of those may be kind of scenes a

fairish but the combination is I think quite innovative and sort of just say thin copyright and then maybe that's not so, we shouldn't protect that so much. I would reject that a bit, but I'd be interested to hear what Ann and others have to say about that.

RON LAZEBNIK: [crosstalk] Go in and then Fiona, or maybe Fiona, go ahead.

FIONA PHILLIPS: I was just going to add that obviously in Australia we don't have a registration system, so it's generally accepted in our law that all kinds of rubbish is protected by copyright, but as part of that what you're getting as the copyright is kind of thin, you know. That it's limited, so query how successful an infringement suit would be, what is the level of protection? That's part and parcel of the law here. It's very rare where something will be held not to be protected by copyright because there's such a low bar of originality.

RON LAZEBNIK: Ann did you want to respond?

ANN BARTOW: Yes. With the cases, I was actually particularly struck and I haven't read them, the cases by the housing, the architecture cases, has that heated up again? Because my sense of architecture cases is just that all the three-bedroom ranch developers were just trying to leverage copyright in an anti-competitive way and it became so obvious that's all they were doing that people stopped litigating those cases because when people were making statement houses, they weren't copying each other. That there are reasons other than copyright where you don't want to copy. You want to make your own statement. So, I was just curious, was this just one-off company that just is honest or was it a trend?

FIONA PHILLIPS: Correct, there was a state of litigation about 5, 10 years ago, a company called Henley Arch, which is a project home company. Those kind of architecture cases are quite common. I say that being married to an architect. Those cases are quite common, although, what the kind of architects tend to rely on more here is moral rights in terms of protecting the integrity of their work and so on. But those architecture cases are not uncommon at all. It's not a one-off.

RON LAZEBNIK: We've been suddenly granted 15 more minutes. I just want to make sure, Courtney, is that true or is that your subtle way of saying we wrap it up?

COURTNEY M. SOLIDAY: Yes.

RON LAZEBNIK: Oh, okay. We have 15 more minutes. Lovely.

NICHOLAS BARTELT: Wonderful. Apologies for running over. Just to answer Ann's question, the only one I've seen is these *Design Basics*, but maybe there's some other ones percolating in the district court level. So, it might be a one-off and just that the Second or the Seventh Circuit has smacked them down three times over the last few years.

ANN BARTOW: The courts just have no idea what to do with it because the discourse always winds up being a compilation discourse. It doesn't wind up being a 102 discourse. It winds up being a 103 discourse. These elements when we have this roof and we have this round window and plug and chug. Then Feist says, "So It's got a copyright." I think that's what it sense like. I thought that at

least in the US that was really not a sense of anything positive happening for anybody, just in terms of spring creativity and architecture.

NICHOLAS BARTELT: Maybe they were successful in extracting settlements or negotiating some type of license until recently. That's the only thing I could speculate.

RON LAZEBNIK: Mitch, I see your hand up.

MITCH GLAZIER: Hey, folks forget that Congress tried to grapple a little bit with this in the late '90s. Title V of the DMCA was actually on collections of information. Congress had drafted a new chapter of the copyright law that would've offered industrial property type protection with a much shorter term to collections of information. I think they tried maybe three or four Congresses after that, and they could never get enough consensus to move forward. One has to wonder, if that had occurred, would the court decisions today be different? What would've qualified? What wouldn't have qualified? Will these court cases spur Congress to try and take this up again in some form?

Because it was a very hot topic, if you remember, when LexisNexis was trying to protect their compilations of arrangements of legal cases at the time. But it could have had far-reaching effects. By the way, Mehdi, while you were talking, I got an email. And the email said, "How to make $20,000 in music NFTs with a small following." I just want you to know it's a big deal in the DIY and Indie world. I also had to do my very first bigfoot letter against, not really an exchange, but a producer called HitPiece, where artists had come to us because their name, image, and likeness was being used on avatars in the Metaverse and on NFTs. And this is going to get more common and more difficult.

We were asked to enforce their rights and their rights of publicity to their images and likeness. So, I had to go to, I actually conferred with the players unions of the major sports teams to get a read on what they had done in their enforcement actions. Some of it involves copyright like a little bit of album art sometimes if it's the sound recording. A lot of times, it's the artist rights to name, image, and likeness. So, in the enforcement world, it's also stirring up a lot as you can imagine. Very interesting.

RON LAZEBNIK: Mehdi, I'll point out there's another question for you in the Q&A if you click on that to look at, related to royalties. But I guess I want to circle back to something that was in Fiona's presentation and get everybody's opinion. Fiona talked about how the legislation was trying to deal with orphan works and removing liability for an orphan work, and how that might create more orphans.

Actually, when I first started, I thought, "Oh, that might actually incentivize fewer orphans because if you know you're going to lose everything, you're going to try your best not to be lost to everybody. Although I will point out, Nick, something for the copyright office to think about is the fee associated with updating your registration is greater than I believe the fee for registering. Which might also induce some orphan works in being created here in the US. But Any reactions, from Sean, Mitch, Mehdi? Have you encountered orphan works and you know thoughts on Fiona's presentation with that regard?

SEAN M. O'CONNOR: I haven't really, in my own areas, run into many orphan works issues. More of what's happening is there's enough action going on when someone's infringing and there's a composer or sound recording holder who really wants to go after it. It is a fascinating topic. I'm sorry I just haven't run into it much of my own area.

MITCH GLAZIER: Sort of the same thing is maybe the point that was made earlier on fair use, which is these topics that used to be so hot, like orphan works and fair use, the marketplace, and internet technology has done an awful lot to work out a lot of those problems.

It's a lot easier to find people now, and it's a lot easier for people to discover what's being used by them. If you want, all you have to do is put an image or your name into Google and it will actually track the entire internet for you and show you what's being used that you've done. That's excellent. We want orphan works to be less of a problem. We don't want to focus on areas of copyright just for the purpose of the fact that we focused on them for 20 years, and not acknowledge that the good news is that they're becoming less problematic.

RON LAZEBNIK: Any further-- Oh, go ahead.

MEHDI ANSARI: Ron, I was just going to add a comment. It's related to the question that was posed by Sandra in the Q&A, about royalty sharing for music in the world of NFTs. You know we have experts who I think much more expert than me in the world of music royalties. Forget NFTs. Just music royalties in general always break my brain. It's one of those areas that I wish we could simplify. It seems like unduly complicated and difficult to track. And We've done some work on music royalty securitization, so you have to figure out what piece of the pie somebody owns. It's always so difficult to track between the songwriters, and the lyricists, the performing artists, the labels, and the variety of deals they have.

Once you multiply all of that complexity by NFTs, I think it's going to be really difficult to track. My personal sense is, NFTs can solve some of the issue, which is the issue of just getting money automatically transferred to someone, but they're not going to solve the issue of actually figuring out who has how much of the rights. Those things will still have to be handled contractually.

RON LAZEBNIK: Yeah, it's a very, I think the copyright office has a nice flow chart illustrating how complex the royalty scheme related to music is. You know it's not just like there's the songwriter and the recorder. There's also like, where is this ultimately being played changes who you have to go speak with. Yes, a lot of complexity that I guess, if Congress can't improve things, then we're shifting it from copyright law over to private law to contract law to make up the difference.

It's just a question of how easy is it for somebody not in the industry to participate in that industry at that point to some extent. There's a new question. Board Ape versus Monkey Selfie battle of copyright conundrums, which one can generate more law review articles? You know, I haven't heard about the Monkey Selfie in a while. The Monkey Selfie is maybe battling more with the AI author now.

That's what happened to the Monkey Selfie. The Board Ape, you know it's an interesting question of how much of it is really on the copyright side versus just what would I like to refer to as intangible property rather than intellectual property, the property that's generated by contract like a debt instrument, you know, as another example of it where it's slightly out of copyright law, but it's certainly hints at it.

MEHDI ANSARI: Right. In my experience, a lot of these NFT arts are real arts. You know it's actually hard to argue that there's a lot of creativity in fact, you look at. There's a famous artist named Beeple who I think has still has the record. He sold one for $69 million. It's phenomenal. If it were a painting, it would be a wonderful painting, I think. It's hard to argue with that. But The complexity is not necessarily as to whether the work is copyrightable or not, but who owns the copyright, and when you buy the NFT what rights do you get to exploit the copyright, which is where I think the complexity lies. When people have licensed these rights to each other, who has the right to create an NFT, which is I think a fertile ground for a lot of disputes for years to come.

ANN BARTOW: Remember the Lawrence Lessig code is law days and everybody's talking about code is law and now NFTs has law. I think it's probably already here because they will. They'll function like contracts and not unlike law. So, it's an interesting time to watch it and the developmental. Anyone have any interesting predictions or scandalous ones?

RON LAZEBNIK: For NFTs or in general?

ANN BARTOW: Oh, either at this point.

MEHDI ANSARI: My personal predictions are I think there's a lot of for the lack of a better word, silly NFTs that grab a lot of headlines and a lot of silver folks' kind of make fun of. But I actually think NFTs as a concept are very powerful and my guess is they'll be around forever, but just more sophisticated, more interesting versions. And you know they're being deployed in lots of interesting ways. You know for example, as replacement for deeds of title for real estate instead of having them recorded in a governmental office which means it's subject to you can't find it, or it's flooded, or lots of costs in retrieval. If titles to land could be kept on a blockchain that's easily transferred when you sell the land. So, I think NFTs will be around for the rest of our lives.

SEAN M. O'CONNOR: I'd like to chime in for a second. Many of you identified it with the securities law aspect too. I think that really has not been focused on enough. The SEC is stepping in, it has to step in a lot more. I mean This stuff was curated purely on investment contract right in the square zone of definition of securities and it has to be regulated at least as much as any other securities are. It will only get more complex and derivatives of nature. That's I think where the action is going to be in NFTs in the very near future.

MEHDI ANSARI: We've seen several—Oh Sorry just going to say we've seen several companies, not all of it has become public yet because they're all still in the confidential investigation stage that have received letters and investigation requests from the SEC. I think you'll see a lot more noise in that sphere.

FIONA PHILLIPS: Just two observations about NFTs. I would say one, even though the idea is that it empowers the creator, it doesn't actually remove the

problem of unscrupulous people trying to exploit creators by essentially getting an assignment of copyright in order to create an NFT and market that. I've seen a bit of that happening. The other thing which is interesting in jurisdictions which have resale royalty systems is work being done around the use of NFTs and blockchain to streamline that process.

RON LAZEBNIK: Your comment, Mehdi, about connecting NFTs to real property in terms of deeds made me think about the divisibility. In theory you could take a deed and split the territory in half. An NFT would make that a little more difficult, which brought me back to copyright because this is a copyright panel. I was thinking in terms of inheritance also, who owns an NFT related to a copyrighted work it can also be slightly problematic.

I don't know if people have thought about how to deal with NFTs. When you split property normally, you say you get 50%, you get 50%, but an NFT is supposed to point to a single owner. Is that something that you guys have been thinking about? What is the solution there?

MEHDI ANSARI: Yes. Absolutely. It's really complicated and I think we haven't found a one fits all solution. Especially there are these creatures that are called fractional NFTs, which is essentially there's an NFT but it's too expensive we think for the average market. It's like issuing shares in an NFT so more people could participate. It's like when a company with an expensive stock split their shares.

To Sean's point, I think significant securities issues those in particular. But They raise all the issues you've raised, Ron. Interestingly enough even in the world of real property, if you think about selling an NFT to people and let's say you tell them this actually comes with some semblance of actual property rights, like a time share almost tied to an NFT, then you actually can really have real estate subdivision law issues.

Which again we've advised them quite we're thinking about doing this or really not think of it. You could invoke old school property law that does not allow you to subdivide your land, which you may not be doing in a physical sense and the laws don't match perfectly but are you essentially achieving the same outcome by giving someone fractional access to the property with equivalent to sectioning it off.

SEAN M. O'CONNOR: Yes. Can I add to that a little bit?

RON LAZEBNIK: Yes. [crosstalk] Sean.

SEAN M. O'CONNOR: Wear another hat of teaching corporate and securities law and contracts law. So, Mehdi is already saying this and what we're agreeing on is that remember that a legal person can own it. It points to one property owner but that property will be a corporation, or an LLC, or a limited partnership. Think about real estate investment trust REITs. Think about anything that holds assets.

Think about things sometimes with the music and movie for more the movie industry. That single entry will own it and then exactly as Mehdi was saying, that's how you can fractionalize the shares right there. It's like bowie bonds or it's like anything like that. Where now once you have the corporate entity, then any number of people can have an interest and can share the royalty

streams or whatever the revenue streams are coming out of that even as there's one single legal person owner of the NFT.

RON LAZEBNIK: I guess I'll say my one comment to that, is that assumes that when you sold the NFT, the person purchasing it knew to put it into that the owner should be like a legal entity rather than an individual.

SEAN M. O'CONNOR: Oh, no absolutely. I'm saying that this game is getting sophisticated very quickly. I think Mehdi knows more about how it's getting sophisticated than I do on the ground. You're actually right, Ron. People have to think this through. And In fact, the person minting and selling the NFT will have to think who they want to sell it to. If they're thinking they're selling it to a natural person individual and that's what they want and some day it turns out it's some corporate entity that's going to use it a different way, you're going to have unsettled expectations.

RON LAZEBNIK: I'm trying to remember what the phrase is, new song same old dancer, old song new dance thing going on.

ANN BARTOW: [crosstalk] second verse, a little bit louder, a little bit worse.

RON LAZEBNIK: [laughs] All right. On that, thank you everybody. This has been a very interesting panel. It certainly sounds like we can return to some of these topics next year and see where we are. This has been a wonderful discussion.