
Plenary Session Transcript*

SUNDER: We are going to get started with this plenary portion. Thanks to all of you who were part of our discussions during the day. I think we are all quite excited and delighted by what has already taken place here and really looking forward to this dialogue and some debate, too, I am expecting, as we move forward. So we are here to continue and, at least, complete, for this round, our discussion of intellectual property and social justice. I want to just set a little bit of a stage for that, thinking about what is happening. As Jamie Love said earlier today, the time is now to be talking and thinking and acting on this issue, and I want to drive that home a bit. First, Brazil threatens to break U.S. patents for potent AIDS drugs to treat hundreds of thousands of its own citizens. The World Intellectual Property Organization declares the need to revise intellectual property laws to address the needs of the poor and the disabled. And on the Internet, netizens embrace the participation age of remix culture, blogs, podcasts, Wikis, fan fiction, and even machinima, in addition to peer to peer file sharing, which we hear about most often. This new generation views intellectual property as the raw materials for their own creative acts, blurring the lines which have long separated producers from consumers. On the ground, underground, and in the ether, intellectual property is spurring what the *New York Times* calls the “first new social movement of this century.” Individuals and social groups are appropriating intellectual property rights, using them now as a tool for recognition and redistribution, development, and

* The following speakers participated in the UC Davis Law Review’s 2006 Symposium’s plenary session: Keith Aoki, University of Oregon Law School; Anupam Chander, UC Davis School of Law; Margaret Chon, Seattle University School of Law; Rosemary Coombe, York University; Rochelle Cooper Dreyfuss, NYU School of Law; William Fisher, Harvard Law School; Shubha Ghosh, SMU Dedman School of Law; James Love, Director of the Consumer Project on Technology; Larisa Mann, Ph.D. Student, Jurisprudence and Social Policy, University of California at Berkeley, Boalt Hall School of Law; Robert Merges, University of California at Berkeley, Boalt Hall School of Law; Pamela Samuelson, University of California at Berkeley, Boalt Hall School of Law; Madhavi Sunder, UC Davis School of Law; Talha Syed, Harvard Law School; Siva Vaidhyanathan, NYU; and Peter Yu, Michigan State University College of Law.

human rights. You might call this the ripping, mixing, and burning of law itself.

This conference, Intellectual Property and Social Justice, brings together the most distinguished and most influential voices on the front lines of these intellectual property debates. And we are honored and delighted, truly, to welcome you all to the Martin Luther King, Jr., School of Law. This is the finest array of activists and scholars who have joined us here for this historic discussion on the social justice implications of intellectual property in the new millennium. Most of you in the audience know me. I am Madhavi Sunder, a professor of law here at UC Davis. And I and my colleague, Anupam Chander, have the pleasure of being the faculty hosts of this wonderful event. But, as all of you know, this is the UC Davis Law Review Symposium, and most of the credit — all the credit — goes to them. I want to thank the Law Review editors for all of their hard work in bringing this dialogue to our campus here today. Thanking the symposium editors, especially Irene Yang, is she . . . she is running around probably, not even able to enjoy this, but Irene Yang, Fermin Villegas, Amy Daniel, Brandy Christensen, Jocelyn Blumenthal and, of course, our Law Review Editor in Chief, Jonathan Kaplan. Thank you all very much.

And on all of our behalf, we especially want to thank Dean Rex Perschbacher, who was with us earlier today, and Associate Dean Kevin Johnson, not only for their financial support but also for their moral support, which means so much to us. And we are grateful, of course, to our generous donors as well.

It is my pleasure to just briefly introduce to you our panelists. With us here, first on my right is James Love. James Love is the Director of the Knowledge Ecology Project, formerly called the Consumer Project on Technology.

This is a nongovernmental organization with offices in Washington, D.C., London, and Geneva. He is also an advisor to a number of U.N. agencies and national governments on public health.

Next we have Rob Merges, who is the Wilson Sonsini Goodrich & Rosati Professor of Law and Technology at UC Berkeley, Boalt Hall School of Law, and also a co-director of the Berkeley Center for Law and Technology.

Next to him is his colleague and co-director of the Berkeley Center for Law and Technology, Professor Pamela Samuelson. She is the Richard M. Sherman Distinguished Professor of Information Management at the University of California at Berkeley, Boalt Hall School of Law, and she is also an advisor to the Samuelson Law, Technology and Public Policy Clinic at Boalt Hall.

Then we have Professor Siva Vaidhyanathan, who is a cultural historian and media scholar at New York University, also recently a star on Jon Stewart's *Daily Show*. You will see he is also our non-lawyer in the group and I think we will have a lot of fruitful discussion from that perspective, as well.

Professor Rochelle Dreyfuss, Pauline Newman Professor of Law at the New York University School of Law, is also with us.

An old friend, Keith Aoki, who is Philip H. Knight Professor at the University of Oregon School of Law is here. And he does inform us that that designation does not require him to walk around with a Nike swoosh on his cap at all times.

And then, finally, we have a returning guest and one of our favorite guests that we love to have back, William Fisher, who is the Hale and Dorr Professor of Intellectual Property Law and the Director of the Berkman Center for Internet and Society at Harvard Law School.

So welcome to you all. I have some questions that I would like to throw out to the panelists individually, as well as collectively, to get some discussion going to share the work that they already presented to us in a workshop setting earlier today. But really the purpose of this plenary session is to now draw even more heavily upon the audience, and to open up the discussion even more.

I am going to kind of jump around a bit, but I want to start with the Third World. There is a lot of talk now about a development agenda for intellectual property. The most riveting cases, obviously, deal with access to drugs in the Third World. And Terry, I want to start with you. You earlier today in your paper for the Symposium, along with your coauthor Talha Syed who is sitting here, argued that the West should pay for research and development for medicines to treat the diseases that predominately affect the Third World, such as malaria and tuberculosis. I would love for you to share with us: why is this the responsibility of the West to pay for this research and development?

FISHER: Well we have spoken about this some today, so I'll quickly recap — very quickly recap — a few themes, and then I want to introduce a slightly different approach. Talha and I argue in this paper that several roads lead to the Rome of the moral obligation. Some are relatively obvious, but in the long run not terribly convincing. Among them are arguments about national self-interest — that the West would reduce the threat to various of our national interests by assisting in the improvement of the health of developing countries. We then consider efforts to derive a moral obligation from the history of imperialism and colonialism, which has contributed to

the health problems that are now so in desperate need of addressing. We then offer a utilitarian argument that emphasizes the modest encroachment upon the happiness of the taxpayers who would have to fund these developments compared to the extraordinary pain being borne by the people now deprived of new drugs or access to existing drugs. And finally, we examine several theories of distributive justice in the deontological and teleological veins, all of which converge on slightly different variants of the general duty to provide assistance to the residents of developing countries. So our sense is that this issue is actually not difficult. A duty to aid, we contend, lies at the point of convergence of several different streams of moral philosophy, and none of the objections to the existence of such a duty, of which there are several in the philosophical literature, holds up. So that is the gist of the argument. Now, here is the flip — the other side — we have not talked about here. The question is, who is entitled to benefit from the development of drugs that serve predominately the interests of the residents of developed countries? The classic example here would be the development by the Eli Lilly Company of the drugs vincristine and vinblastine by distilling active ingredients from the rosy periwinkle plant, guided by knowledge supplied by indigenous communities in the Philippines and the Caribbean concerning its medicinal qualities, generating an effective treatment for childhood leukemia, patenting the derivatives, and earning from them roughly two hundred million dollars a year. Who is entitled to that flow of money? There is a significant controversy about this. Our book discusses mechanisms by which we might try to redirect some of that money to the communities from which the raw materials were originally drawn, but the prior moral question analogous to what you asked is, well, who is entitled to it anyway? Very roughly speaking, you might rely upon a variant of what social psychologists refer to as equity theory — the proposition that each person or group is entitled to a share of the portions of a collective enterprise proportional to their contribution to it — to recognize some claim on the fruits of the indigenous knowledge that generate ultimately the patented product. And we agree with that. A much trickier issue to which the answer is nowhere near so clear is: what about the raw materials, insofar as the raw materials are to some extent distributed geographically arbitrarily. Do any moral claims arise out of that geographic allocation — claims any stronger than claims that arise from the arbitrary distribution of genetic capabilities? On one hand you want to say, well, the fact that genetic material suitable for the development of drugs is concentrated in tropical countries should entitle those countries to a reward, just like the fact that oil is disproportionately found in some areas entitles

countries in which it is housed to a large share of the world's wealth. But that, plainly, is not a terribly reliable argument either. So this is problematic. Our sense is a combination of equity theory and the legacy of colonialism and imperialism probably gives enough oomph to the claims of the countries from which the genetic material is taken, but it is not a simple case.

SUNDER: All right. I think I want to follow up on that just in terms of thinking about traditional knowledge, right? So our concern about access to drugs is about saving lives now. What is your feeling? I will throw this out to the entire panel about the protection of traditional knowledge through property rights, through some kind of sui generis right or an intellectual property-like right. Is this a move that will do the very opposite of saving lives? That is, will it stifle research, stifle the distribution of remedies and knowledge that would eventually move on toward creating the proper drugs? I like the way Terry introduced some of the paradoxes here. But I would like to hear more about your feelings on this, the protection of traditional knowledge. Will lives be saved here or not?

MERGES: Well, I think the question of rewarding groups is a really hard question in intellectual property, and it is kind of the flip side of the romanticization of the author. We have sort of de-romanticized or, let us say, underconceptualized the rights of groups whose collective labor contribute to an intellectual product. And I think the Internet has opened our eyes on ways that we can reconceptualize some of those problems. But, I would say at the theoretical level it is pretty obvious even from a straight Lockean point of view, that if generations of indigenous people have contributed to, essentially, a very long history field clinical study of the effectiveness of a local treatment, they ought to have a claim. Of course, the problem is always in the transaction cost of actually implementing that. I think that even Locke talks about one of his justifications for individual rights being the difficulty of getting consensus from everybody else when you remove something from the public domain. So even he, in his primitive way, by talking about consent, was, I think, basically hip to the transaction cost problem. That just restates the problem, though, from a different theoretical point of view. If there were a reliable distribution mechanism, if there were some kind of proxy that could stand for the group's rights that would make a lot of sense. What we have done so far is we have created stand-ins, basically NGOs or governments, when we do bioprospecting agreements and we have said, well, they will stand for, they will represent, the

generations of indigenous people, and that may be the best we can do, coming up with a representative focal point on which we can concentrate the benefits and leaving the distribution after that essentially up to them. That is obviously problematic in some ways, and it is an interesting moral question how far you have to follow the distribution side when you confer the benefit of the right. The interesting thing is I think apropos of what we were saying in the other session, there seems to be an emerging norm, at least in the bioprospecting area, people are recognizing, whether there is a formal legal obligation or not, there seems to be an informal norm that you ought to try to figure out some way to compensate for what you are getting. Whether that is public pressure, that would be the cynical view, or whether it is people's gut sense that that is the right thing to do, that is an interesting question. But it seems to be kind of the emerging practice, and maybe we are converging on a norm. What it represents, I think, is a move forward, because the best we have been able to say in the past about group rights is that we will leave you alone, right? If you are somebody doing something useful, we will not let someone else assert a right against you as a group, and that is . . . we talked about that with respect to libraries and public TV, so we have created a negative privilege space around certain groups. And what we are working on now is moving forward and creating a more affirmative, positive space by which we confer something that looks like more an affirmative right on a group, and that is a very interesting problem. I think the way the Internet comes into it is it helps us conceptualize projects that require large groups of people to create the value. And we have not really had a way to conceive of that before, even though in a sense in various ways in IP law we have seen bits and pieces, in a way, when a trademark goes generic we the consumers have in a sense contributed collectively to a snuffing out of the property rights. That is an example of the negative space where over time the trademark has become so effective, right, that we kill it. We collectively, because we incorporate it into our language and we eliminate its effectiveness as a trademark. A more affirmative set of rights, where a group of people collectively contributes to something, is a harder problem. But I think there are various ways we can kind of conceive of it, and again the Internet gives us a way to explore that, at least in the digital realm. We can imagine a more of a kind of microconsent or some kind of online group consensus building that allows us to interact with the group more effectively. That does not help the indigenous case until they get the hundred dollar windup laptops, but conceptually it might help us model how we confer a positive right on groups. And it seems to me that is a very interesting

project looking forward. And what I think is exciting is that again this new technology, the Internet, is helping us reconceive some interesting aspects of property rights, and that is one of the most I think fun things about looking at new technology because they stir up our expectations and they help us learn things not only about the technology but about old practices. They help us reconceive things, so that is always fun.

VAIDHYANATHAN: I have a couple of conceptual problems with the traditional knowledge arguments and the group rights idea and they have real consequences. First of all, I am not sure what makes knowledge traditional. I have never been able to hear a good definition of that. Secondly, I notice that Robert outlined the problem very well, but the actors in almost every sentence were “we” and “the groups.” I am not sure what “we” are necessarily in that debate, but I know that the groups exist in a very different context and they have to deal intimately with the nation-state, which did not come up in your description. I think the state is a big problem, and almost all of these discussions about traditional knowledge, whether it is cultural rights or other sorts of resources, because the state is rarely innocent, the state is an important source of authority and power in these debates. UNESCO only answers to its member states. States are more often than not illiberal and uninterested in preserving cultural diversity within them. At least historically we have seen that problem in Egypt with the Nubians. We have seen that problem throughout Indonesia with dozens, if not hundreds, of ethnic groups where the nation-state has a very strong interest to make sure that cultural diversity gets wiped out. And so, I think I worry about the naiveté of many of the debates about traditional knowledge because the state does not seem to enter into the discussion at all. I am struck by one rather innocent nation-state, relatively innocent, Ghana, which has essentially taken control of the property rights in Kente weaving, and that has presented a whole lot of headaches for people in the weaving community and they have not been able to really figure out where they stand in relation to the state and why they have to get some sort of license to do what they have been doing for centuries. That is a minor problem — no one is dying in that problem. People have died over language battles in Indonesia. Those are the sorts of the questions that we have not really thought through.

AOKI: I have two points to make. To use Madhavi’s phrase, the traditional farmer knowledge of landraces and wild and weedy relatives of cultivated crops is largely “poor peoples’ knowledge.”

Expanding on Terry's example, one example I can give you is occurring with the changing legal treatment of plant genetic resources. Currently, the countries that we historically think of as being the sources of genetic diversity — the equatorial nations of the global South — have become net *importers* of germplasm. This has been accompanied by the demise of "common heritage" treatment of plant genetic resources, or germplasm. This hurts the countries and regions of the world where these genetic resources originated. A country like the U.S., which historically has been one of the world's centers of crop origination, is today one of the main germplasm *exporters*. The irony is that countries like the U.S. established seed banks and have avidly collected germplasm sample over the past three decades. This is a complex question. How do you draw the lines that say because this particular crop originated within the geographical boundaries of a particular country, that country therefore possesses a right to some form of royalties or reparations from parties or nations that engaged in uncompensated expropriation of its genetic resources. The first step is, as Madhavi and Anupam have suggested, is critiquing the way existing lines have been drawn. One of the relevant lines in the plant genetic resources area is the "raw/worked" distinction, this distinguishes what may be subject to intellectual property protection and what is not. What is "raw" is characterized as being in the so-called "state of nature" and what is "worked" in terms of having been the object of individuated human agency. Considering anonymous generation of farmers around the world farming and selecting crops for over 10,000 years that has produced our major staple crops begs the questions of exactly what is "raw" and what is "worked." The U.S. benefited from open access under a "common heritage" approach to collecting "raw" germplasm for its national seed banks, but now pushes for IP in "worked" germplasm. The "raw-worked" distinction needs to be rethought from the ground up. My second point relates to points that Terry and Jamie Boyle have both made. They point to Robert Nozick's critique of the Lockean labor theory of property. Nozick asks if he takes a glass of tomato juice and pours it into the Pacific Ocean, does he gain a property right in the Pacific Ocean? Or alternately, he asks have I just lost my glass of tomato juice? There is a problem of proportionality when you look at the contributions of our farming ancestors over the past 10,000 years as well as the contribution of farmers from Japan or Russia or Illinois or Iowa who cumulatively are able to produce a dwarf strain of winter wheat that grows well in Kansas. How do you decide who did what, let alone who is entitled to compensation? Even if you could work out the nettling problem of proportionality of contribution, there is the issue

of who does one make royalty payments to? Or might royalties be seen as reparations? In the Japanese American internment context, Mari Matsuda has pointed out the disparate treatment the U.S. legal system has given claims for reparations by the Black community and the Japanese American community. Part of the difference may be legal “group-phobia.” Black claims for reparations may have too much “group-ness” to be legally cognizable, whereas [Japanese American] claims, Matsuda said were crafted to resemble a “tort” action — the Japanese Americans who received redress were alive at the time of their and redress claims, a harm was inflicted and they sought a remedy — the legal system constructed Japanese Americans as a group *qua* individual. A related phenomenon is the way U.S. law treats corporations as “persons.” Black claims for reparations may be based on a group *qua* group, and so, at least in the U.S. legal imagination, there is a failure, or troubling blind spot where there is a real reluctance to legally recognize the collective rights of farmers, let alone collective rights of farmers to reparations/compensation for 10,000 years of crop innovations.

SUNDER: Actually, let us . . . Rosemary, go ahead. Feel free to jump in here.

COOMBE: I actually have problems with the way we are discussing this; we need to address the issue through a more comparative geopolitical lens. I agree with Siva that a lot of the issues have to do with the positioning of the state and its attitudes toward development, the nature of its recognition of minority peoples, and their capacities to represent themselves. I think we are being a little bit naive here and rather positivist in our orientation to this issue. We are behaving as if the law is something in our hands to forge and there are all these groups already existing out there on whom rights may or may not be bestowed, as if we are standing here on high and saying, “Let us identify who the groups are that developed this stuff and give them rights.” Our own traditions of critical inquiry (from the legal realists to Critical Legal Studies) as well as scholarship in law and society and legal anthropology, however, have clearly illustrated that identities do not exist before the law, they are constructed in relation to law, and law involves processes of interpellation and identification; it creates new subject positions through the rights it acknowledges. Moreover, it is a well-established doctrine in international law that indigenous peoples self-identify and increasingly they do so by reference to international legal norms and the political leverage they afford. Questions of traditional knowledge are bound up in political struggle

and these involve NGOs and states as well as “communities” whose “recognition” is contested and contingent. It is not at all surprising that we find NGOs who have vested interests in locating such communities and in some of the more repressive states they feel themselves duty-bound to jump in and find the “local community” that best embodies a “traditional lifestyle” to meet donor requirements forged by international legal conventions. Now, the irony here is that NGOs (particularly environmental ones) are more likely to want to work with communities they have worked with before, that are easy to reach, and have leaders who speak global languages, and histories of contact with European institutions. In many parts of the world, and I am thinking here of Indonesia, Malaysia, and Thailand, the groups that are best able to represent their “traditions” as distinctive are the groups that have had the longest history of Christian contact, because the missionaries wanted to know what their traditions were; in other words, they have been habituated to maintain a possessive relationship to “traditions” they have been encouraged to reify. It is important, however, to understand that environmental NGOs may have more power in regions where indigenous rights are not widely recognized or they are denied by the state. In Latin America, however, where international indigenous movements have made the greatest inroads and from which many of its most influential leaders hale, peoples at the village-level have articulated relationships with regional, national, transnational, and international networks and movements. In places like Ecuador and Columbia, where rural struggles with long histories have transformed themselves into transnationally networked indigenous rights movements (these include Afro-American peoples and are self-consciously pluri-ethnic), you don’t have these problems because peoples have long histories of identifying with communities and, more recently, as indigenous or “traditional” peoples. They have also been more successful in obtaining state constitutional recognition of distinct rights and in securing funding from international institutions such as the World Bank, which further entrenches a history of community development, which is ultimately what the protection of traditional knowledge is all about. So we need to be aware of the forces shaping the self-representations that people can assert, and the field of political agencies at work. If TEK [traditional environmental knowledge] rights hold promise for rural development, people will be encouraged to shape their self-understandings to take advantage of these opportunities. Those that represent themselves as [guarding] traditional lifestyles are not necessarily the most marginalized, nor necessarily the people who engage in developing the plant genetic resources that we most want to protect. These objectives

may have to be met in entirely different ways.

The global conversation about protecting or compensating for the use of traditional environmental knowledge with regard to plant genetic resources would not have begun if there had not been a widespread recognition that we (all those who rely upon modern agriculture and the various other industries that utilize plant genetic resources) are dependent upon the activities of those whose creative practices contribute new plant genetic resources. It is not a matter of whether we are going to be nice enough to recognize their work. We need this work to be done and we will all suffer if it ceases to be done. Plant genetic resources are crucial to the future of modern agriculture. Most food crops require that new land race qualities be produced on a regular basis because modern crops have short shelf lives and require constant supplementation. The most valuable plant genetic resources have been developed by people in extremely harsh and volatile climates as forms of insurance against diverse insecurities. This raises the question of whether we seek to protect a body of data (knowledge of genetic resources) or a practice (the ongoing development of plant genetic resources). Because if we are going to “protect” (or better, maintain and support) the practice of creating diversity in plant genetic material, particularly in food crops, this is going to require sequestering fields of social production and exchange while providing incentives for people to continue to engage in activities that have provided security but have not yielded economic benefits in the past while protecting certain agricultural areas from the introduction of genetically modified and hybrid crops that have been shown to disrupt the development of the traditional landraces upon which modern agriculture is dependent. In Chiapas and Oaxaca, where native varieties of corn and traditional practices of corn-breeding are endangered, local people look to indigenous movements as the best forms of protection that law has to offer them.

Protecting traditional environmental knowledge must involve support for people to maintain traditional languages and to learn from their ancestors about the ecosystems in which they have traditionally lived, through a form of compensation that might actually preserve traditional social and ecological practices. This may have precious little to do with intellectual property, except to the extent that, through the auspices of WIPO, intellectual property fora afford an attractive venue for the debate and ensure a wider audience than this issue would otherwise have received. With the exception of geographical indicators, however, I doubt that conventional intellectual property protections have much to offer. Nonetheless the efforts of WIPO in this area have been tremendous and sensitive to the

equities, which gives me great hope for intellectual property negotiations of all kinds, but also suggests that it is only one strand in bundles of rights being designed to achieve greater social justice.

SUNDER: I want to broaden this discussion out. WIPO has said that it wants to incorporate this development agenda into its being, and I want to hear from all of you, what does that mean to you? What is your development agenda that you would assert with the folks at WIPO? I am going to start with you, Jamie, since you have WIPO's ear more perhaps than most of us, but I would like to hear from everybody, what should we do, how should intellectual property reform itself to improve conditions in the Third World?

LOVE: I think it would be shocking for some people that describe me as having WIPO's ear, but in some ways it is true that people that were identified very much as critics of WIPO in recent years have increasingly become more part of the process at WIPO. WIPO's actually going through . . . although I think it has a long ways to go, but I think that WIPO today is different than WIPO was two years ago, and I think that is a very positive thing. Not everybody is happy with that. But historically I think, well, I am sure as many of you know, WIPO was sort of renamed I think around fairly recently, and it did not join the U.N. system until around 1971, I think or something like that. And its previous charter was to maximize, not maximize, but just to promote the protection of intellectual property. And then it had this new mission in 1971 when it joined the U.N. system; it was supposed to address issues of development. But when it joined the U.N. family, a lot of developing countries joined in looking at WIPO differently, because it was a specialized U.N. agency dealing with intellectual property issues. They more or less trusted, I mean, there was a fair amount of deferring to WIPO and all sorts of things, and WIPO began to just write and run patent offices and copyright offices more or less throughout a lot of countries. I mean, it is amazing how much of statutory development in developing countries is done right with WIPO staff. And the technical assistance they were given, I mean, if you look at the copyright laws in a lot of Southeast Asian countries, they have almost . . . in very few exceptions, for example in the copyright areas, West Africa, the Banga region, it is an area where there are about fourteen countries that all have exactly the same patent and copyright law. It is an unusual situation, they have a treaty and they have . . . And their compulsory licensing laws do not allow you to import a product under a compulsory license, you have to have local manufacturing. Given the economies in most of those countries

it means it is just impossible and impractical to benefit from a compulsory license, because that would include even the active ingredients to the products, which were also under patent. So I mean there is . . . these are products I think of a lot of the areas that WIPO technical assistance has been criticized quite a bit, and in their norm setting activities too. So as WIPO really I think increasingly . . . and I believe we have got a million important issues, but what sort of . . . after 2001 when the [WTO] passed this [DOHA] Declaration of [TRIPS] and public health, the issue of intellectual property raised the political profile of the ministers in Geneva, and at that point, they began to look at WIPO, which was setting norms and very powerful in setting policy. They began to question and many of us began to question whether or not it was possible to change the culture of WIPO. And since then, in 2004, this idea of development agenda was tabled primarily as a response to a Japan-E.U.-United States proposal for patent harmonization, which was considered to be kind of a high handed way to circumvent the committees that were working on it, and the response was they . . . first just Brazil and Argentina tabled this idea that they wanted to amend the charter of WIPO, they wanted to completely relook at the thing, look at issues of open source, they mentioned creative commons, it was just a kitchen sink, the access to knowledge tree, everything was thrown in there in 2004. And within a short amount of time, a thing that coalesced around this . . . Terry I know was at a meeting, a quite important meeting in Geneva right before the General Health Assembly, and I think there was a sense that WIPO had sort of gone astray, and countries began sort of jumping on the bandwagon and becoming organized. I think the main characteristics of the development agenda is rejecting the idea that harmonization for the sake of harmonization is necessarily a legitimate objective of WIPO. That promoting high standards everywhere, that is beneficially rejected by a lot of delegations now as the legitimate objective. People introducing more and more the ideas that intellectual property rights are not an end to themselves, they are supposed to serve these other objectives. People have talked quite explicitly about the problems of access to medicine and access to knowledge and the term access to knowledge now has now become more common in some of the standing committees, to the term piracy, which I think is quite welcome culture change within WIPO. Some of it is very bureaucratic but important stuff. They want to make some changes in how technical assistance is delivered, they want to introduce processes which would evaluate new norm-setting initiatives to look at their specific impact on development. One is sort of build more economics capacity within WIPO. The documents are

incredible. Right now the development agenda has 1,111 proposals, including proposals from the United States and everywhere else, and it is amazing that the delegates from developing countries have gotten as far as they have, but they are doing a pretty good job, I guess they know how to work in this world with modalities and things that are beyond the understanding of most of us, but it is pretty much about making WIPO more objective and balanced in terms of its intellectual property right, and beginning to take seriously those concerns about access and innovation and sort of go away from the really hard ideological, religious sort of orientation that WIPO had about just promoting really IP everywhere, all the time, cannot get enough of it. It is now much more critical. And I think some people on the WIPO staff actually are . . . they were afraid of it at first, but I think some people have welcomed the debate, because they see it is increasing their stature and credibility in the academic community for example, because people no longer think of WIPO as completely captured by right owner interest, but they are beginning to see the beginnings of a bit of a debate, and so I think that is a very positive thing.

SUNDER: I have noticed throughout the day that it is easier to talk about social justice elsewhere in the Third World than it is to talk about social justice here at home. Keith's research, though, I think has made a really important intervention in terms of thinking about the history of intellectual property at home: who has it rewarded as creators and who has it ignored? I think it would be great to hear about some of your research in terms of the impacts of intellectual property on social justice here in the U.S.

AOKI: First I would like to express my thanks to Terry Fisher, who in the legal history class I had as a first year law student, provided a superbly selected and edited selection of cases on the American law of slavery, making students acutely aware of slavery and its problematic relationship with property law in general. Was slavery the pure embodiment of property — the absolute dominion of one person over another? Or was slavery an anomaly or blip in an otherwise rationally ordered legal system that we got over, learning our lessons? Terry, the same kind of sophisticated, yet grounded analysis that you managed to communicate to first year students is invaluable. I think of intellectual property's relation to slavery as similar to the relation between property law. I don't think either property law or intellectual property was responsible for slavery. I do think that like other institutions, property law and intellectual property law may work to amplify racial subordination and the associated problems with subordination, such

as inequities of access and resources, education, etc. When researching links between U.S. patent law and slavery in the antebellum era, I found three books particularly helpful: but Angela LaKwete, *Inventing the Cotton Gin, Machine and Myth in Antebellum America* was very helpful in terms of giving lots more examples. I focused more on Eli Whitney in my Symposium paper because he is iconic and being an iconoclast, I couldn't resist. I remember seeing a poster from Franklin Pierce when I first started teaching, that had some ad copy that said something like "Eli Whitney's cotton gin embodies the heroic tradition of American invention." And I started thinking, "Hold on. Heroic? This was 1793 and didn't the increased productivity spurred by the cotton gin allow chattel slavery to exist until the civil war?" I was irritated that Eli Whitney was being made into an a-contextual paragon of American invention. Portia James, *The Real McCoy: African-American Invention and Innovation 1619-1930* is another interesting book with lots of detailed examples, and both books give close critical examinations to their subjects. And there is a woman who wrote some excellent articles in the *Journal of Negro History* in the 1980s, Dorothy Yancy, who I found very helpful. She documented this man named Oscar Stuart who received patents on different inventions dealing with the cotton industry, inventions like the double scraper or the double plow that he appropriated from his slaves. Yancy has the goods on this guy. Stuart was so flagrant that the patent office turned down one of his patent applications on the grounds that everybody knew that he was not the originator of the idea. Oscar Stuart wrote that "[t]he patent laws were passed to encourage inventions of a useful character to the exclusion of the servile race, who by reason of the general stupidity are concerned without the range of both the letter and spirit of the law." In the context of patents and slavery, I see how the granting or non-recognition of intellectual property rights amplifies already existing inequality. The irony is that in the 1790s, many said that slavery on cotton plantations was near expiration because of the intense labor that was required; however, because mechanizing the cotton gin made slavery economically feasible until the Civil War. Other examples of legal regimes that have nothing to do with race, but that amplified extant inequality might be the Chinese Exclusion Act, the treatment of Asians from China or Japan prior to say World War II in terms of being prohibited from owning land, or family laws in former Mexican territories after the Treaty of Guadalupe Hidalgo would be exhibits of legal institutions that tried using seemingly neutral criteria, but that in reality, amplified the effects of inequality. I remember Harold Koh writing an article with pictures of a Chinaman, the degraded nasty

clichéd stereotype, Chinaman with a pillbox hat, long queue, kind of profile, holding up a rat with his mouth open that was used on the label of a box of rat poison in the 1880s. The name of the rat poison was “Rough on Rats.” At the time, there was a lot of illiteracy so having a good picture on your product was essential to success in the marketplace. The visual message said that this product kills rats like the way a Chinaman eats rats. Rosemary has done some superb examples of work on how the appropriation of images of Indians in the nineteenth century by tobacco companies was paralleled and mirrored by appropriation of Indian lands and destruction of their culture. Trademark law giving protection to drugstore Indians didn’t cause these tragic event, but intellectual property amplified the effects. I think there are lots of other examples — Aunt Jemima, the Cream of Wheat Porter, the Frito Bandito, the Sambo’s restaurant chain — that show ways that the intellectual property system may work to amplify extant inequalities. I definitely would not say that patent and trademark law causes slavery or racism, but I would say that in a society with drastically unequal conditions arising from past or present racism, I think it could definitely work to exacerbate those conditions.

SUNDER: Terry, do you have an answer to that?

FISHER: I had one tiny anecdote that may be relevant here. Many years ago, I worked in a cannery in Alaska where relatively crude machines were used to process fish. The first and biggest machine, which it was my job was to run and maintain, grabbed each fish by the tail and dragged it around a giant wheel (roughly eight feet high), which cut it open, cut off its fins, and finally scooped out its guts. Embedded in the cast-iron frame of this machine was a trademark: “The Iron Chink.” Evidently, the machine was a replacement for the Chinese workers that used to perform this set of tasks.

COOMBE: I hope we can keep a focus on cultural heritage and distinguish this from stereotypical representations which are rarely [stolen] from people, but rather imposed upon them. There are stereotypes which do damage or effect social injuries — and these were well documented during the Civil Rights Movement — for which forms of liability might be found. Prohibiting the granting of a state privilege such as a trademark to these representations and thus controlling the way they are used in commerce is not particularly controversial; we have long had prohibitions on scandalous and disparaging marks. The more pressing issue attracting global attention

is the appropriation of intangible cultural heritage, which is attracting a lot of WIPO's research energies; alongside traditional knowledge we are seeing renewed attention to traditional cultural expressions no longer denigrated as "folklore." Their lawyers have developed a number of different provisions, sort of model guidelines, for dealing with these cultural forms. These are much closer to consumer protection laws which traditionally protected against a wide range of misrepresentations. One of the things that I am concerned about is a form of misuse of intellectual property that I have recently begun to notice and that I think we are going to see more of. Maggie Chon was talking about all the stuff you see in the Southwest. Well, one of the things I see in the Southwest is Navajo rug patterns being used to market mouse pads for example. What is really interesting is the way that these things are marked. They include a "traditional" name for the pattern (if that is the same as the name the Navajo themselves have historically called that pattern, I don't know). But those marketing these "rugs" claim to the pattern is copyrighted by marking it with the circled "c" and they attribute the copyright to the museum that holds the physical rug in its collection. As traditional designs, these are probably in the public domain, by virtue either of a lack of individual authorship or simply by virtue of the passage of time. Nonetheless, it appears that a company is claiming the symbolic value of offering something authentically Navajo, and claiming to hold properly licensed rights bestowed by someone who doesn't have these rights to assign in the first place. Rights in the intangible cultural heritage of others are being asserted by those who merely hold the tangible objects in which they are embedded or to which they are affixed (many of which were acquired under conditions of coercion and duress, but that is another conversation). By claiming a trademark in the design's name as well, they may also be commercially appropriating traditional cultural heritage and preventing Navajo from using their own names for their designs in legitimate commerce. For me, this is no longer just a question of freedom of expression versus control over culture. It involves a consideration of the capacities some peoples and institutions have to misrepresent others and their cultural heritage and to market these as their own intellectual properties. This is the kind of activity that the WIPO guidelines with respect to traditional cultural heritage are designed to address. In the absence of legislation on this front, a revival of "misuse" of intellectual property doctrines would be welcome.

AOKI: I'd like to make an observation about the legal scholarship that's arisen about the *Wind Done Gone* case, the Eleventh Circuit case

dealing with Alice Randall's parody of Margaret Mitchell's *Gone with the Wind*, a book that sold more copies than the Bible. This is the case that says that at least on one level: "Hey folks, the intellectual property system is not really all that bad on issues of race, if there is legal space in for someone like Alice Randall, on an explicitly racial basis, to say that she wants to repair some of the damage that *Gone with the Wind* has done in the popular imagination to African Americans via degraded depictions of African Americans and romanticized notions of the Antebellum era." I'm less sanguine. I've been somewhat surprised how little intellectual property scholars looked at the racial dimension of the case. Scholarly accounts tended toward the abstract and deracinated as "Let's put this case in the legal flask and distill the one sentence parenthetical and put it up there with *2 Live Crew*. For that matter the scholarship surrounding the *2 Live Crew* case seems to be deracinated on many levels. My question is: what roles does race play (or has played) in intellectual property law? Maybe it is still not as oppressive as denying slaves' proprietorship in inventions they came up with but there is a subtle, more complex role that race plays in intellectual property law and it seems in legal scholarship, and in courts and cases that may have explicit racial dimensions that there are either suppressed or bracketed as if to say, "Well, we are legal analysts, and, furthermore, we don't really talk about that because it makes us uncomfortable."

SUNDER: Jamie, and then we are going to jump to Larisa for a comment, and I have a follow up question on this dialogue, so go ahead.

LOVE: I think the debate over traditional knowledge access to genetic resources and folklore within WIPO is, well, one characteristic, the way it is organized is they, within WIPO's agenda, and this is not really . . . it is interesting, the original development agenda did not mention the word at all of traditional knowledge, for example, was not even part of it. And I think it is quite interesting that a lot of proposals did not really focus on that. Now there was this committee on access to traditional knowledge, genetic resources, and folklore, and the problem with that committee is, I mean I think there is a lot of good meaning people at WIPO, it is not their conscious effort to kind of develop these things, people are very uptight about a lot of . . . I mean, mistrust is quite high. One of the sort of criticisms is that WIPO is sort of saying to people in developing countries: "Well, you know this IP system, it is great, you probably do not have enough IP,

so let us just make more IP and then everybody will be fine and you can trade and” . . . it is just sort of overselling the benefits in some ways. And some people think that the dangers are huge in terms of creating proprietary rights and their perpetual “do-not-require-any” standards and things like that, and the potential damage of things being licensed to giant corporations which maintain these perpetual monopolies on very broad and anticompetitive swaths of things that is potentially quite problematic. But there are other takes on it and other approaches that people are quite sympathetic to in terms of as very legitimate, bona fide ways of thinking about doing things. I think procedurally by confining these three things in the work program, they have almost guaranteed to make no progress on anything, because the solutions for the folklore issue and the access to genetic resources and traditional knowledge kind of differed each group to the other and it is conceivable they could make more progress if they . . . in our opinion, this is one of the recommendations we have made is if they work toward separate work programs that did different things. In terms of Western IP systems, we do not put the copyright committee and the patent committee and the trademark committees and have them meet together and talk about all three topics for a week, which is what they do in this other committee. I mean, they would drive everybody nuts if they did that . . . It is sort of confusing sometimes because sometimes the arguments, the rhetoric people have used them with . . . are kind of inconvenient when they sort of move to the next issue. That is where one problem . . . one thing we proposed in the area of . . . incidentally, politically the thing that has really become the realest problem is in terms of big corporations is they are the access genetic researchers fighting this closure thing like crazy. We thought that was not even that controversial, Switzerland was supporting it, and all of a sudden it is like massive investment, Susan Finston now is running this big effort, trying to . . . it is amazing how much energy. In fact a lot of people did not realize it was that important until they saw the [Matthew Logging] campaign by these corporations against it and they thought, “Wow, maybe there is more money there than everybody thought.” But there are efforts to learn from the free software movement. Now what is the free software movement? It is a TK movement. It is basically a community, it is a collective good. What they are concerned about is misappropriation. They use a form of intellectual property that is pretty much a defensive mechanism. They are using it to try to get away from this embrace and extend problem that they have, and that is what is going on here. You have got these technologies and the guy with the white coat and the petri dish, these people come to him with a notebook and he comes back

and he files ten thousands of dollars and they work the PCT system, they have patents on everything, and they are going like, "Well, why the hell are these guys making millions of dollars on something that basically came from us. Why are not we getting it?" And that is what generates the sense of it is an unfair thing. Just like Richard Stallman did not like Emax being copyrighted by somebody else and him not getting access to the source code anymore. So he said, "You know what? You really should think about instruments that sort of work more like . . ." The other thing that I think we have pushed, in Europe they have the Biotechnology Directive as a mandatory, compulsory license thing that you have with modified seeds. It was done primarily to benefit plant breeders in Europe, because Monsanto and DuPont control most of the patents in the area and they wanted the plant breeders to be able to get access to the patent technology and do work on it. So it creates this cross license between a [sui generis] right on the one hand, which is the plant breeder rights, and the patent under almost infinite [barred] from the dependent patent model in the [TRIPS] and also there is a little patent side of it too. But we said, "Okay, get your TK rights in place, provide free access for people that . . . to use the TK . . ." they were still putting impediments for people to use it for the purpose as it is currently done, but say that if you developed a patented technology, which relies upon the genetic resource or the traditional knowledge, at that point you require license with the [sui generis] right. But it is mandatory cross-licensing, not like European Biotech Directive, so that the patent owner get a license to the TK resource, but the owners of the TK resource also get a license to the patent and it goes back and forth. Then what happens is that the community that has the TK all of a sudden has the license to the patented technology and they can compete against the person with the license to the technology or draw royalties from it and it weakens the patent, because it actually is more than one party that has access to the patented technology. It creates a good framework if you think about the benefit-sharing obligations of the conventional biodiversity. And so that is kind of what we have been kind of pitching. It is a little different than . . . but if you . . . then if you say, can we solve all the problems of the shaman or the groups, the identity of the things and the cultural things, the privacy issues and all the regulatory issues? No. And not everything is best resolved through intellectual property rights. It is like privacy people want to use intellectual property rights because it is a powerful paradigm and has a big legal mechanism. And a lot of people used intellectual property rights because it seems to have more power than their thing does. But I think it is a mistake to turn everything into an intellectual property dispute. And so in some

sense it is a big puzzle, but I think breaking them into individual pieces a bit, making sure what the real grievances typically are and I think there are reasonable solutions in different things that get at some of the issues of fairness and issues of misappropriation. And I think some of the issues about dignity and things like that are probably best solved with non-IPR mechanisms, actually.

SUNDER: Larisa.

MANN: I want to apologize for speaking twice, I am sure I am violating some norm, but I am just struck by an example of something that happened to me that kind of draws on something that Professor Vaidhyathan mentioned and I think draws something on Professor Sunder's work is on, which is that a few years ago I did an [SMU] Ecology Conference, which by the way for people who were talking about folk music, ethnomusicologists have a lot to say about what it means when you talk about folk music as a contested category, and this kind of speaks to that. But there was a panel that I attended where one of the presenters was from Serbia and had been sent from the National University of Serbia to give presentations, and this is 1999, and she spoke about the . . . she told the story and she described some traditional Serbian folk music, which she sang herself, which is unusual for an academic presenter. And she said . . . the story that she told was about . . . there was spontaneous resurgence of folk . . . of traditional Serbian folk music among ethnic Serbians in the former Yugoslavia. And when pushed on it by ethnomusicologists who were asking her what she meant by traditional and what she meant by ethnic, it basically came down to that there was something in Serbian blood that called out for a resurgence of the Serbian identity, and in fact that the spontaneous resurgence of these Serbian youth groups singing Serbian ethnic national songs, they had to learn the songs from the Serbian government's compilation of appropriate Serbian ethnic music. [Laughter] And so, I think it does connect to life and death very clearly if you look at the history of that region. So I think I want to highlight this issue about identity in folk culture and what traditional knowledge means and say that these are all extremely dangerous terms in a lot of ways and that people use very powerfully I think to mobilize people and wanted to hear if other folks have other ideas about that.

VAIDHYANATHAN: I think that that is really important. There are a lot of parties in these debates that are not innocent. I happen to have roots with an ethnic group that basically invented the traditional

knowledge of suicide bombing and I am not really one to claim connection with that sort of practice, but you know, that among a million other cultural elements creates actually a pretty frightening sense of ethnic nationalism and that is not always something we want to reward. I have a lot of allergies to ethnic nationalism and cultural nationalism. I think that we have seen some really bad results from those sorts of passions and any time that you are messing around with the rights regime, you risk unintended consequences and that is one of those examples.

CHON: I just want to make a very short comment that we should not think that intellectual property can solve everything and that maybe in some of these situations it might be better for some of the groups to remain down low, so to speak and under the radar screen even when IP is supposedly being implemented and enforced [on their behalf] by member states of say TRIPS or bilateral agreements, because of the vulnerability of particular populations. But I wanted us to think a little bit about the link between groups, which I think are undertheorized generally across all categories of law in the United States for obvious reasons. Even though I do not think that IP law can solve questions of dignity necessarily, it can contribute to that. I do think that we haven't really thought about the link between IP and its role in perhaps reparations. I know that Terry and Talha talked a little but about that as a justification and kind of pooh-poohed it. And I think it is actually a very plausible justification at least from the point of view of those groups which have historically been harmed. I know reparations talk is quite rampant say globally and the idea that there have been harms from a historical perspective, and perhaps this is a way of redistributing current wealth to atone for those wrongs in a material sense, I think, has a lot of power, so I just want to suggest that.

SUNDER: I want to keep the reparations issue on the table, but I also want to throw in a question to Pam that I think might tie some of this in here, which is . . . I am wondering do we have a new class of uncompensated creators here in the form of Generation Remix. We have nineteen-year-old DJ Danger Mouse who creates a phenomenal album by mashing up the Beatles' *White Album* with hip hop artist Jay-Z's *Black Album*, called the *Gray Album*, but he operates in a legal gray zone, not having any rights, really, aside from attribution because people know who he is. But he has no right to recompense for the work. He is not really considered an owner in his own right because of the creation being a derivation of others' works. I interject this at

this point when we are talking about reparations because I think again perhaps it is easier for us to think about social justice elsewhere or social justice to rectify problems created by past actors and past generations. But what about now? Are we as intellectual property scholars and activists, are we witnessing this disenfranchisement currently in the new generation with respect to IP rights? Pam.

SAMUELSON: What I think is really wonderful is that so many people are using technology to create new works. And that is intrinsically satisfying for a lot of people for a lot of reasons and because of the Internet and because of private networks that people have, they are sharing things and lots of things are getting disseminated. And so the sort of concern about them being compensated, there are lots of creators over time that did not get compensated and there is some intrinsic reward for creation and I do not know that we have to measure whether or not sort of this mash-up culture is being squelched because it cannot make as much money as some of the labels that people have done in the past. Personally, I would repeal the provision of U.S. copyright law that denies copyright in works that incorporate infringing material. I think that is wrong. I think it is morally wrong, actually, but so I can imagine doing various things with U.S. copyright laws that are a part of a reform agenda and I think that is part of what at least some of the people at this meeting are interested in, is a new reform agenda, because we do not like the model of the high protection of copyright system that we have then it is incumbent on us to say, "Well, what would some alternative look like?" And I think that is certainly an enterprise that Julia's involved in and I have been trying to engage with them. I think others of us here are sympathetic to that. Now would that make Danger Mouse in better shape? Yeah, it would. I think that having a poster child like that example helps mobilize some popular support and energy behind it, and I think it has been really good that energetic people like Siva and Larry [Lessig] have been willing to try to raise that so that you are not just within the intellectual property scholar community but in a kind of a broader array of venues to try to reach out to more people. Will that model change tomorrow? No. Will that model change over time? I think it does. Intellectual property right and copyright have had ebbs and flows. There are times in the past you can say, "Do you know copyright was a lot thinner before and maybe thinner was better in certain respects," and if we can try to articulate that in a way that will persuade a larger community, I think we can actually then move forward on a reform agenda. That is certainly something I am interested in but the fact that some of these people do not get

compensated, well it is like, welcome to life. It is like most of the things I do, I work very, very hard, I work really, really, really hard and many of the other people in this room did too. I get paid for teaching, I write my brains out, and most of that I do not get compensated for. Do like I weep like a bathtub because I do not get compensated? No, because some of my rewards are psychic and I think that is really true for a lot of people who are creators. So I do not think compensation is the only way to measure whether we have got a good innovation culture happening.

SUNDER: Siva.

VAIDHYANATHAN: Yeah, but the Danger Mouse example is great. It fits so many of our concerns today, especially the stuff that was in Julia's paper. I mean, the *Gray Album* was, if you count the total number of downloads, the biggest hit album of 2004. No album was distributed more than that album. Now the biggest album of 2004 made nobody any money. There were three potential parties which could have made some money, EMI, which controls the Beatles' licensing, Jay-Z's people and his licensing company or Jay-Z himself, that group could have made some money off of it, and Danger Mouse could have made some money off of it. But we have a rather ridiculous system that made sure that nobody made any money off of it. Even though we all got the album. Well, this speaks directly to Terry's last bit of work, his book, it is the idea that you have a system that makes it impossible for anyone to make a nickel, everyone makes zero instead of a nickel, and no one who looks at that fairly should say that is the situation we want, but that is the situation we have built. Now Danger Mouse did not. What he lacked in economic capital for that particular project, he gained in social and cultural capital which he later was able to cash in on and he ended up producing the Gorillaz' last album which was the best album, not the biggest seller, of 2005. So, he is doing okay. And he is doing okay because, as with so many other creators, he gave away something for free and was able to charge later for his services. He is paid as a producer, too, which does not always mean you get a piece of the back end, it means that you are often paid for a service, but either way, he is a really well regarded producer right now and certainly benefited. So that is a great example and I use it when I teach undergrads all the time about the fact that we are not talking about zero sums here except in the case of the selling of music, which they've decided to create and emphasize the zero in the zero sum, but the culture itself and cultural markets need not be zero sum, and there are ways that deferred compensation

works or other forms of compensation.

SUNDER: I do not want to be accused of having a deracinated discussion of *The Gray Album*, so I want to ask Keith and Terry too, is there a critical race analysis here as well, with respect to thinking about the hip hop artists? Are mash-ups the new blues?

AOKI: From a musicological perspective, I think U.S. copyright law from its inception, in its very beginnings to give copyright protection to notated music has had a distinct bias towards protecting or respecting certain types of European-derived musical forms. I say that as an aging baby-boomer, garage-band musician who discovered the “beat” in the 1960s. I’m thinking how many times I’ve heard the boom, dah, boom — *BOOM* beat of the Ronettes’ “Be My Baby” in other songs — does Phil Spector get royalties? Maybe he does. If so, the question really is: *should* Phil Spector get royalties? [Raps out a rhythm] Or for that matter, the dah, *boom*, dah, *boom* — *BOOM DAH DAH DAH BOOM* in “Whole Lotta Love” — the Estate of Willie Dixon successfully went after Led Zeppelin for that one. Before the 1976 Copyright Act, U.S. copyright law was not about giving recognitions to rhythms and polyrhythmic traditions or music that might come out of alternate rhythms coming out of communities of color, unless they were fixed. Here I am thinking of the partial way that the blues surfaced in U.S. copyright law — Scott Joplin or Duke Ellington could avail themselves of copyright, but Mississippi Delta Blues musicians like Charlie Patton or Robert Johnson didn’t notate their songs and created in an atmosphere where motifs, lyrics and form were simple and shared — the twelve-bar blues chord form — and whatever originality was brought was brought by nuance, inflection and individual persona. The important point is that the twelve-bar blues form was there for everyone’s use. I think hip hop or video-music mash-ups share a lot of those same characteristics and that is why sampling has been so difficult. If you think of the *Grand Upright* case, where the judge began his opinion with the words, “Thou shalt not steal,” as a failure of highly educated, middle-aged, upper middle-class, generally white, male judges to recognize the kinds of appropriationist and multi-vocal kinds of traditions arising from the streets. However, rapper Biz Markie gets in trouble once he goes into a recording studio. Multiply these problems for DJ Danger Mouse. I go back to the idea that our intellectual property law’s focus should be about protecting innovative and creative practices rather than the merely protecting the things that these practices produce. Take the

Grateful Dead up until 1995 when Jerry Garcia died. The Dead were the world's largest grossing touring band, and they were not really into pushing vinyl. In fact, the record sales, with the exception of a couple of tracks on *Touch of Gray*, were respectable, but not their main source of income. The Grateful Dead in the 1980s and 1990s were about fans coming to participate in a weird *fin-de-siècle* techno-hippie-acid trip kind of experience and fans would follow them around to participate in the experience. A corner bar cover band doing Dead tunes wasn't the same and neither was listening to a record. For fans seeking the Dead experience, seeing the Grateful Dead live was the only way to scratch that itch. On top of it, the Dead, allowing fans to plug their recorders into the main mixing board so fans could take away high-quality recordings of the live Dead. Allowing and encouraging fan taping runs counter to the vinyl-pushing model, but the Grateful Dead model shows a band can make a lot of money by offering something other than a commodity-widget, i.e., a record, for sale. I agree with Jamie, even though pharmaceuticals and the Grateful Dead are very different contexts, in that there are many different ways for innovators-creators to make money, even though intellectual property per se is *not* involved. The Grateful Dead were selling unique services only they could supply. Forget techno-hippie Deadheads, but think about the more prosaic and traditional business model of professional services. Jamie Boyle has made the point that lawyers don't sell paper, they don't charge by the number of words in a document, they charge for their services. And, importantly, legal documents are seen as possessing a thin copyright, if they possess copyright at all. My point is that are other business models for distributing and disseminating works, whether briefs or "Bertha," than the traditional IP model. The current copyright merchandising system that tries to protect the distribution of the big five, or is it the big three now, record companies could be manageable along different models. As Terry makes clear in "Promises to Keep," it's a shame our copyright laws are preventing us from realizing the technological potential of the Internet as an interactive delivery network for all sorts of intellectual works. It is almost as if at the turn of the twentieth century, horse and buggy manufacturers were able to sue auto manufacturers to keep their technology from ever getting to market.

SUNDER: Jamie and then Terry.

LOVE: We spent actually a fair amount of time on this issue of music. We were invited by some musicians at this workshop in New York called Blur Workshop. The artists came up with some ideas about

how to get money to artists and in this conversation and then Terry wrote about it in his book, which was . . . I thought he was maybe the only person that ever read the article, and he did not like our idea, but at least he publicized it, which was good. The basis model was the following: If you think about . . . we are interested in a situation where peer to peer distribution of music would be completely legal and you would have really innovative, because we thought it was just by far and away the best way to distribute music, to learn about music from people that love music and have them develop their own systems freely to share music. But we also . . . the title of this project was Artists Want to be Paid. So it was about how do you get money . . . how do you create a livelihood in that kind of circumstances? So the first take was I think the very traditional thing, it is the one Terry liked, which is you sort of have a compulsory licensing model in that you distribute the money based upon a sampling, very much like elevator music or other kinds of compulsory licensure, and a lot of the artists really hated that. They first described something called the “Britney effect,” and the idea was that a handful of very famous artists that do covers and kind of rip off everybody’s culture and stuff and they make like huge amounts of money. And the bulk of the people in the creative community really do not do much. They came up with a variety of different schemes like one of them is just huge amounts of money that you would just give lotteries to people that were starving musicians, kind of a random thing. You had kind of this hope that you would maybe do well or something like that. Or there was other kinds of . . . or logarithmic cutting off of the distribution of people because they felt at a certain point you have enough Cadillacs, that is enough, okay. So and sort of a flattening the distribution. But then came this idea of intermediaries like the equivalent of a collection society. But once it would distribute money with non-market mechanisms. So it eventually came out as three models. You had the elites that sort of they fund like the experts kind of know who you can give money to like opera and things like that. And then you have like the market model which is like what you observe in Tower Records and stuff. Then you had this third category which was competitive intermediaries. And the idea would be people that run the equivalent of collection societies, and you would be required to give money, but you got to choose which one to give to. And they were under no obligation to have any rational relationship between what you listen to and who they gave the money to. So they could give the money to nothing but Irish bluegrass players or backup musicians that never got paid, or hip hop artists, or Ku Klux Klan singers or whatever they wanted to do, and if you gave them the money, fine, that is what they

did. In a sense, they would support our . . . like a philanthropist would except it would be from a lot of small contributors aggregating their income up in a way they thought was interesting. Now, we sort of posited it so there would be a three-tier system so some slice would go for the elite, some would sort of go to the elevator sampling model which Terry likes quite a bit, and then the competitive intermediaries would be a third thing. The idea is there would be competition between these three categories. Maybe one would get 20%, one would get 30%, one would get 40%, and over time people would decide which of these three methods is the best thing for supporting the arts. And we felt quite keen that the commercial model “ka-ching, ka-ching,” you know the cash register model, was not really necessarily better or optimal, but people would defend it almost for . . . just sort of deep seated emotional attachments to the market. It is like if people listened to more Rolling Stones versus this song or anybody else, it would be immoral not for . . . Britney to get all the money or whatever. So I throw that out because I think that there are a lot of areas where the market really is incredibly unjust in terms of how it distributes the money. The problems that people and the key resources with the traditional knowledge is very similar to what happens in cultural things where Madonna is ripping off this and that club scene and stuff like that. And I think if it was me and I had some group that had a good reputation from fans that is like giving the money to the right people, I know I would not know how to do it myself, I would like the opportunity and flexibility for at least some of my money to go to that thing, that other kind of thing. So the idea of . . . you create these intermediaries, and the government does not choose them, elites do not choose them, but you choose them, but lots . . . it is from the bottom up, you vote . . . it does not have to be the whole thing, but the fact that it is even a part of it was unbelievably controversial in Berlin. I remember people were really mad about it. It would give zero to the competitor that you intermediary and they just love the [model] that cash register at Tower Records or the elevator music model. And I just have to wonder why we are so fixated on a system which gives us such crap culture, which is the commercial record sales and the MTV culture.

AOKI: One thing I'd like to invoke comes from Anupam's and Madhavi's article, *Romance of the Public Domain*, and that is the idea that “open access does *not* presume equal ability to develop or use the resources.” Once you create tiered access, its feels okay, its open access and then we do away with IP laws and live happily ever after. But in an important way, a hierarchy becomes frozen in and

necessarily there will be haves and have-nots. I'm reminded of when Duncan Kennedy was asked to define what an illegitimate hierarchy was. He said: an illegitimate hierarchy is when you have one person's foot on another person's neck. It sounds like that is one possible direction a tiered Internet access system may be heading toward. It may not be on racial lines, but on economic class — an illegitimate hierarchy hardwired in by infrastructure.

SUNDER: Shubha.

GHOSH: I wanted to follow up on the idea that intellectual property law can not do everything. I am trying to sort out where it fails. It seems like it is going back to the WIPO development point. It seems we try to do with IP-law things that we may have failed to do with just creating political institutions. So a lot of the issues you are talking about, nation state not recognizing certain indigenous groups are really questions of how do you get that representative . . . how do you get that democratic [institution] both in representation in the political sphere and the economic sphere? We sort of think about the project with traditional knowledge which will create these rights and they can then do with them what they will. The project can be understood within a broader rule of law agenda. So I think that is why we are a little bit skeptical about IP doing the work where we really need very good political institutions. To go back to at least the U.S. history with IP law, there is a very close affinity between IP and some notions of a free press and freedom of speech, but you have to have both in the right mix. It was not like you had one without the other. So I am concerned about that. I am also concerned about using IP as some form of cultural politics. This one is a little bit trickier for me, but clearly IP has some effect on culture. And the earlier discussion about stereotyping was interesting because I think about the [*Nichols v. Universal Pictures Corp.*] case, where the Learned Hand opinion about, the Jewish and the Irish cross-marriage case, and the interesting conclusion that the stereotype of the Jew and the stereotype of the Irishman are in the public domain but if it is more of an authentic or original representation of the Jew or the Irishman, then that somehow gets protected. I am not implying any bias on the part of Judge Hand, but clearly his analysis, the abstraction test, subsumed a lot of stereotypes. So I am not quite sure what I am going to do with all that, am I going to say the stereotypes should actually be protected because that mean it is less likely to be copied? I am not sure that IP law for that matter can do anything about those, what you might think of as, cultural aspects. Where I think it might have some play,

however, in terms of remedying some of these distributive issues is, what judges do, what courts do, and that is a remedial measure so that I see at some level the use of IP is a device of [reparations] that Margaret talks a little bit about. One example is the controversial one with the Native American trademarks, the offensive one, like the *Harjo* case, and there is sort of a tension there, again, like the Nichols case with that being in the public domain so that anybody can copy it or it being proprietary. Well, I think there is a case there to say that it is proprietary but let us give the rights to the tribes. And that seems fairly controversial, but if it is a stereotype that they can profit from it in some way or they can repress it. That is one way where you have IP rights trying to not so much do with cultural policy, as have some effects on cultural policy than have some effects on politics but it is a traditional approach. We want to remedy a particular situation, let us try to define rights in a way to do that. So in terms of what IP can or cannot do: I am concerned about using IP to substitute for the creation of political institutions, especially in developing countries and I am really kind of skeptical about IP really changing the cultural attitudes as they may be reflected in existing law and institutions. But I have some hope that maybe IP can be used as some sort of remedial tool, like any other set of legal rights and obligations can be used.

VAIDHYANATHAN: Well I think it is important that we just concede that copyright and trademarks are elements and instruments of cultural policy. The real question is what are the ramifications going to be. The moment you stop pretending that they are not instruments of cultural policy, then you get all sorts of surprises. Keith brought this up in detail earlier that they are often instruments for the amplification of both desirable and undesirable cultural ramifications. It is also important to remember that in the United States . . .

GHOSH: The real problem is that you cannot separate law and culture since they influence each other in unpredictable ways.

VAIDHYANATHAN: No, no, you cannot, but that is my point. In the United States we do not think about cultural policy. We think that our IP system is economic policy and that cultural policy is what the Parks Service does and the NEH does. But the fact is that it is the most pervasive instrument of cultural policy that we have. It is a cultural policy designed to support liberalism and republicanism in different ways. It is an explicit . . . it is copyrighted, an explicit decision it says we will support the kind of cultural policy that limits the amount of state licensing that has to go on, but immediately

embedded all sorts of cultural policy decisions within it. So Perfect 10 never would have been able to sue Google thirty years ago. It just does not get any more clear than that that there is cultural policy at work at every level of it.

GHOSH: I am just not sure how you can target intellectual property to obtain the culture you want. Intellectual property is not all that predictable a lever for shaping culture.

VAIDHYANATHAN: Well it is not. It is a clumsy instrument for cultural policy, but you cannot get away from it.

LOVE: Why couldn't a Perfect 10 sue . . . ?

VAIDHYANATHAN: Well because before, was it 1976 . . . ? No, before 1976 indecent works did not have the same status.

FEMALE VOICE: [inaudible question].

VAIDHYANATHAN: Well, no, there was . . . what is the case? Anyway, there was a case in 1976 that . . . [Mitchell], yeah, exactly. So before that it was very unclear whether indecent material would actually be copyrightable. In fact, I think generally it was not copyrightable.

GHOSH: The world before *Mitchell Bros.* was one in which the Copyright Office would refuse registration, and hence copyright protection, for pornographic materials.

VAIDHYANATHAN: Right, exactly.

LOVE: Well, this is a little off topic from Perfect 10 but one thing I wanted to bring up which was discussed a lot in the meeting before here is this idea that . . . because this is a conference about social justice, is why I think intellectual property is really an important topic for social justice and that is that it involves, particularly in the area of information goods and inventions, it is about trying to restrict access to things that can be replicated freely. Intellectual property in the area of patents and copyrights and in some rights on [data], is intervention by the government to stop people from using things without whatever commercial terms are imposed on. Not everybody has the same amount of income. Not everybody is a law professor. Not everybody is an economist, you know none of it was in the United States. It was very different all over the world. And so the decision to push policies

in that area is really harsh for some people in some circumstances. It is not like some natural rights that Moses came down from the mountains and just kind of imposed on us and we are not allowed to deviate at all because that would be an unnatural act like a perversion or something like that. It is something we deliberately choose to meet certain social ends. But we cannot really be, I think, disconnected from the consequence. So in terms of the topic of this meeting, I think the interesting question is can we think about ways of supporting inventive work, creative work, and development of these products, which sometimes just is a question of investment in a way. It does not impose this false scarcity. And if you have an entire legal regime and [training] system that its main objective is to create false scarcity in goods that can be freely copied, I mean you have got to be like the least creative people on the planet to think it's the only way to do it. It is a lack of imagination. It is a failure of the heart and it is a failure of imagination to say that is the only way that it can be done. And I think . . . I encourage people to redouble their efforts to revisit the question whether these kind of outcomes are inevitable. This always seems to happen with open access. Publishing right now and their own business models to pursuing and it is different thinking about how to incentivize drug development in your music and a lot of other things, but I put more on the essential goods side than some other things, but in general I think these are really important social justice issues about access to these things and the systems that use to incentivize things, how compatible they are with access. And I think that is what people should think a lot about.

SUNDER: We have 10 minutes. I want to field the questions now from the audience.

AUDIENCE: You spoke about how cultural . . . my comment refers to traditional knowledge and how we kind of assume almost that law does not cover everything, does not help everything. But I was thinking about it, and we make all sorts of value judgments about who is an innovator, and we separate the innovator from the culture that they exist in to innovate. And if we can make judgments like that, then why can we not make judgments on which group most deserves the credit for a certain piece of traditional knowledge. I know it does not fit within the copyright, patent, etc. rubric, but outside of that, along with Mr. Love's comments about thinking creatively, I think it is important to . . . because for me the same moral arguments exist when it comes to social groups. I agree with Siva that not everybody is blameless and there are groups within those social groups that

definitely did stuff to help things along, but at the same time I am sure there are groups where they are blameless and sometimes they deserve the same amount of rights as an innovator would have when they made some sort of invention. Because not every invention, in fact, most inventions, most creative acts, obviously are not done in a vacuum. And yet we pull that person out and give them the right. I do not see why we cannot do that with a group. I mean, a corporation is essentially a group of people.

VAIDHYANATHAN: There are textbook reasons why it is not so easy. Groups are not discrete like individuals are discrete. Groups have shared membership, individuals have multiple memberships in different groups. Groups often have different, multiple representatives to bring to the bargaining table. All sorts of governing challenges. None of these are the end of the discussion of group rights, but they are complications. But then you also have the question of what inventions will count as traditional: that is my first question. Are we to pay a licensing fee to Arabs for the use of their number system? Are we supposed to pay a licensing fee to Italians for the use of their alphabet? I mean, these are the questions: how far back are we going to go? Which things are going to be considered common? Are we just going to go forward from that? I mean, none of these are easy governance questions. That is the problem.

AUDIENCE: Well, my only . . . sorry, one last comment. My only idea behind this traditional knowledge kind of idea was more towards [sui generis] and individualized forms of protection and just not opposing them just for the sake of they being hard to administer. Maybe listening to claims and opening our ears. So that was just a comment.

SUNDER: Peter.

YU: This is a question for the entire panel, and you and Anupam as well. Based on the discussions we have on this panel and in the workshop earlier today, there seems to be a considerable disconnect between the domestic discourse and the international discourse. When we talk about social justice issues at the international level, we raise questions about access to medicines, access to knowledge and information, the TRIPS Agreement, and protection of traditional knowledge. When we discuss domestic issues, however, there seems to be much less for us to talk about. So my question is: how can we bridge the disconnect between the domestic discourse and the international discourse? Are there lessons we can draw from the

international experience? And also, do we have any distinct messages for the domestic social justice discourse?

CHANDER: I think the issue is distributive justice. Distributive justice must be considered not only in the international realm but also in the domestic realm. Intellectual property helps incentivize production, but it bears the cost of creating monopoly rents along the way which must be paid by someone. So the question for distributive justice purposes is: who has to pay those rents? And who gets the benefits from the products that are incentivized, created, etc. because they exist in the system? That, of course, is a question that can be asked both domestically and internationally. So, in the domestic state you might frame the question as the question about how much poor people have to pay extra because of the way they live their lives. The basket of goods consumed by poor people in the United States — what percentage of it reflects the monopoly rents that the intellectual property system imposes. Asking this question leads us to the issue of what kinds of goods, then, become available to poor people in the United States or in a Western country, or *not* available because of the existence of the intellectual property system. The costs of copyrights and patent monopolies are fairly obvious. But take the more difficult case of trademarks. The argument would be that poor people are not necessarily paying an extra rent for these goods because they can get the generic variant of that trademarked good, right? The trademark itself is not imposing that extra cost on poor families. But that is not, I think, exactly accurate because it misunderstands how culture works, namely, how poor people, like rich people, want the popular cultural icons of the day. Most kids, at least most girls, sometime while growing up desire some Dora item or some Disney items. So there is not a non-trademarked alternative to the Dora item or the Disney item? But consider Wal-Mart, which is the archetype of both generic goods but also branded goods. So if you want mass-production dedicated to consumption by all classes, I think Wal-Mart's the best example. Wal-Mart sells a massive amount of Dora or Disney-branded products for kids. So along the way we have created a system where certain strata of society struggle to obtain items that are far more expensive than the generic variant. So you create a system which imposes these extra costs, felt most severely by poor people. The kid without the Dora light-up shoes might have a different social status than the kid with the Dora light-up shoes, or whatever it might be. One might think that distributive justice might be less relevant in trademark. But it turns out that it is relevant, even domestically. We have to think about the costs that intellectual property law imposes on

poor people in the First World as well as the Third.

SUNDER: I actually first want to apologize for reifying First World and Third World as discrete categories. In fact, all of these examples really describe how much interaction there is within and between these worlds, as we see quite clearly in the consideration of traditional knowledge. The debate there is really about sharing knowledge across communities, across generations, across cultures. I really like Molly's helpful phrase about bumping around in our culture. Jamie said, "Let us think creatively," and I guess my response to thinking creatively is maybe we need to get away from the traditional conception of creativity and think more about how do we go about our lives living in cultures and with other cultures, within our own culture, working through culture and thinking about intellectual property more as the great regulator of culture. Siva is absolutely right. In this country we do not think enough about cultural policy in our cultural lives, what is shaping it, aside from knowing there is this great media and there is Wal-Mart and we are somehow living our lives between the two. But thinking about it from a legal perspective, and a governance perspective — well, we fear that because the countries that do have culture regulators are anathema to us. But, in fact, we are heavily regulated already by our intellectual property laws. It is easier for us to see regulation abroad than for us to see it at home. But how can we use law to facilitate particular kinds of cultural relationships, as opposed to the ossified community that does not want to share knowledge? How can we allow for growth and dialogue through property rights, through thinking about intellectual property as a socially structuring vehicle?

AOKI: I was just wondering, is there a Jerry Springer-type homily that's appropriate here?

SUNDER: Yeah, go ahead.

AOKI: No, I don't have one. Do you have a Jerry Springer homily?

SUNDER: No, no. Any other questions? I just want to thank everybody, audience, the panelists, the producer, consumers, all of us, for this great discussion. I am looking forward to future iterations.