

# PREFACE: PAMELA SAMUELSON AND THE PROMOTION OF PROGRESS

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The Intellectual Property Clause of the United States Constitution authorizes Congress to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>1</sup> Pamela Samuelson, the Richard M. Sherman Distinguished Professor of Law and Professor of Information at the University of California, Berkeley, has devoted her career to pursuing this progress. As the essays in this issue vividly illustrate, she has done this not only with her extraordinary scholarship about intellectual property law, but also by promoting the progress of the people and institutions she reaches with her writing, her advocacy, her teaching, and her leadership.

This issue captures some of the spirit of an extraordinary Symposium Celebrating Pamela Samuelson that was held in Berkeley on November 3, 2023.<sup>2</sup> Hundreds of attendees gathered to celebrate Pam’s career so far. UC Berkeley Law School Dean Erwin Chemerinsky gave the opening remarks. Making clear that the event was not a retirement party, Dean Chemerinsky observed that “Pam is in the midst of a stunning career.” This sentiment was echoed by the lunchtime keynote speaker, Judge Pierre Leval, United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit, who declared Pam “a national treasure.”<sup>3</sup>

The rest of the day was devoted to panels of academics, lawyers, activists, librarians, and technologists, exploring themes inspired by Pam’s remarkable body of scholarship and by the ways she has amplified the impact of that

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1. U.S. CONST. art. I, § 8, cl. 8.

2. The symposium program, recording, and transcripts are available at <https://www.law.berkeley.edu/research/bclt/bcltevents/symposium-celebrating-pamela-samuelson/program/>.

3. Andrew Cohen, ‘A National Treasure’: Colleagues Share Heartfelt Tributes to Iconic Professor Pamela Samuelson (Nov. 14, 2023), <https://www.law.berkeley.edu/article/a-national-treasure-colleagues-share-emotional-tributes-to-iconic-professor-pamela-samuelson/>.

scholarship through activism, institution-building, and mentorship. These panels were punctuated by toasts that celebrated Pam as a scholar, teacher, community-builder, leader, and friend. Across all of these panels and toasts, the note that was sounded most frequently was one of personal gratitude for how Pam has intervened in the lives of the people gathered (and countless others) by helping us recognize that we have something interesting and valuable to say, and by inspiring us to realize our potential and to play our own roles in promoting progress.

The opening panel, on “Mapping Copyright,” was inspired by the painstaking work Pam has done to map the intricacies of many doctrines of copyright law—from *scènes à faire* to statutory damages—while also stepping back to look at the big picture of what is within and outside of copyright protection (and why).<sup>4</sup> Michael Carroll’s essay for this issue elaborates on several aspects of this mapping, focusing in part on how Pam’s scholarship on copyrightable subject matter, scope, and remedies has sought to persuade courts and Congress “to align the substance of current copyright law with its constitutional purpose and thus to improve the coherence and clarity of the law.”<sup>5</sup> Panelist Niva Elkin-Koren’s essay in this issue demonstrates how Pam’s scholarship has mapped not just copyright, but also the intersections between copyright and other bodies of law.<sup>6</sup> Contract law, for example, can both enhance and impede the progress that copyright law is intended to promote. As Elkin-Koren observes, Pam was one of the first scholars to recognize this potential and, more generally, to identify “the rise of private ordering as the single most important implication of the digital transformation.”<sup>7</sup> Elkin-Koren applies Pam’s insights about the copyright-contract interface to new contractual restrictions that could impact the development of generative AI.<sup>8</sup>

The second symposium panel, on “Copyright Reform,” was inspired by Pam’s tireless work to reform copyright for the better and, perhaps more importantly, to fend off changes that would make it worse.<sup>9</sup> Or, as Pam’s

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4. James Boyle, Niva Elkin-Koren, Wendy Gordon, Christopher Jon Sprigman, Madhavi Sunder, Participant, Julie Cohen, Erwin Chemerinsky, Molly Shaffer Van Houweling, Kristelia Garcia, Aaron Perzanowski, Berkeley Law Symposium Celebrating Pamela Samuelson: Session 1 Mapping Copyright (Jan. 16, 2024), <https://www.law.berkeley.edu/wp-content/uploads/2024/05/Pam-Samuelson-Session-01-Mapping-Copyright.pdf>.

5. Michael W. Carroll, *Committed to Copyright’s Constitutional Role*, 39 BERKELEY TECH. L.J. 1199, 1200.

6. Niva Elkin-Koren, *Back to the Future: Navigating the Copyright/Contract Interface in the Generative AI Era*, 39 BERKELEY TECH. L.J. 1137, 1141.

7. *Id.* at 1139.

8. *Id.* at 1157–59.

9. Jerry Reisman, Mark Gergen, R. Anthony Reese, Bernt Hugenholtz, Molly Shaffer Van Houweling, Ruth Okediji, David Hayes, Jennifer Urban, Jessica Litman, Berkeley Law

husband Bob Glushko put it in his toast, to spot impending trainwrecks and “lie down on the tracks and stop the train.”<sup>10</sup> The second half of Carroll’s essay picks up on the theme of copyright reform (and imminent disaster) explaining how Pam has intervened to improve and rescue copyright law’s institutions—including Congress, the Copyright Office, and the courts. Carroll devotes particular attention to Pam’s efforts to improve the judicial process in connection with the Google Book Search project, and to improve the legislative process that produced the Digital Millennium Copyright Act. Carroll describes Pam’s copyright reform efforts as those of a copyright “loyalist,” with “an unwavering commitment to understanding and promoting copyright law’s ability to serve its purpose in our constitutional order.”<sup>11</sup>

The next symposium panel, on “Authors, Libraries, and Free Expression” reflected on how Pam’s scholarship and efforts to improve copyright law have focused, in particular, on people, institutions and values that have otherwise been underrepresented in copyright debates.<sup>12</sup> Several of the panelists remarked on Pam’s efforts to ensure that these debates recognize the wide variety of perspectives of authors—including authors who are primarily motivated by the desire to spread knowledge. Panelist Daniel Gervais’s essay in this issue provides a fascinating take on the question of what counts as authorship that deserves legal recognition in the age of generative AI.<sup>13</sup> Revisiting and expanding on Pam’s remarkably prescient article on this topic back in 1986,<sup>14</sup> Gervais develops a framework for assessing both copyrightable

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Symposium Celebrating Pamela Samuelson, Session 2 Copyright Reform (Jan. 16, 2024), <https://www.law.berkeley.edu/wp-content/uploads/2024/05/Pam-Samuelson-Session-02-Copyright-Reform.pdf>.

10. Pam Samuelson, Molly Shaffer Van Houweling, Robert Glushko, Berkeley Law Symposium Celebrating Pamela Samuelson, Session 7 Closing Remarks (Jan. 16, 2024), <https://www.law.berkeley.edu/wp-content/uploads/2024/05/Pam-Samuelson-Session-07-Closing-Remarks.pdf>.

11. Carroll, *supra* note 5, at 1199.

12. David Hansen, Zahr Said, Sonia Katyal, Brewster Kahle, Nicole Boucher, Molly Shaffer Van Houweling, John Mashey, Lydia Loren, Pam Samuelson, Marti Hearst, Lila Bailey, Participant, MacKenzie Smith, Daniel Gervais, Berkeley Law Symposium Celebrating Pamela Samuelson, Session 4 Authors, Libraries, and Free Expression (Jan. 16, 2024), <https://www.law.berkeley.edu/wp-content/uploads/2024/05/Pam-Samuelson-Session-04-Authors-Libraries-and-Free-Expression.pdf>.

13. Daniel J. Gervais, *Second-Degree Intellectual Property*, 39 BERKELEY TECH. L.J. 1091, 1112–15.

14. Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 PITT. L. REV. 1185 (1986). Samuelson has revisited the topic of AI more recently, with attention to questions of both ownership of AI-generated works and potential infringement by AI systems. *See, e.g.*, Pamela Samuelson, *Fair Use Defenses in Disruptive Technology Cases*, UCLA L. REV. (forthcoming 2024), available at <https://ssrn.com/abstract=4631726>; Pamela Samuelson, *Generative AI Meets Copyright*, 381 SCIENCE 158 (2023); Pamela Samuelson *Legal Challenges to*

authorship and patentable inventorship in connection with AI creations and human-AI collaborations.<sup>15</sup> He emphasizes, as Pam has done in so much of her work, that the touchstone for analyzing these questions should be how best to promote progress, which in turn requires assessing “both the costs and benefits of the outcomes for humans as users and producers of creations and inventions.”<sup>16</sup>

The fourth symposium panel, entitled “Copyright and Internet Activism” was inspired by Pam’s early recognition of the transformative potential of the internet and the many ways in which her work as a scholar, advocate, and supporter of clinical education has helped shape the digital landscape.<sup>17</sup> The panel was moderated by Jason Schultz, whose essay in this issue focuses on Pam’s pioneering work as a founder of the very first technology law and policy (TLP) clinic, and as the global TLP Clinic movement’s “intellectual architect.”<sup>18</sup> As Schultz explains, Pam’s writing, teaching, and public speaking have provided this movement with “the road map for what was needed in a given area, highlighting gaps and key voices and positions missing from the debate.”<sup>19</sup> Pam’s work has also inspired TLP clinics’ engagement with technologists.<sup>20</sup> Pam has long recognized that technologists’ insights are essential to understanding the relationship between law and innovation—and that their engagement with the law is essential to ensuring that this relationship is a healthy one. Throughout her career she has facilitated this engagement by targeting some of her scholarship, non-academic writing, collaborations, public speaking, teaching, and mentorship toward a technical audience. Joseph Lorenzo Hall’s contribution to this issue is a testament to that engagement—highlighting, in particular, Pam’s powerful public speaking to technical

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*Generative AI, Part II*, 66 COMMC’NS OF THE ACM 16 (2023); Pamela Samuelson *Legal Challenges to Generative AI, Part I*, 66 COMMC’NS OF THE ACM 20 (2023); Pamela Samuelson, *AI Authorship?*, 63 COMMC’NS OF THE ACM 20 (2000), <https://cacm.acm.org/opinion/ai-authorship/>.

15. Gervais, *supra* note 13.

16. *Id.* at 1095.

17. Eric von Hippel, Andrew Gass, Cindy Cohn, Jason Schultz, Carl Malamud, Joseph Lorenzo Hall, Participant, Molly Shaffer Van Houweling, Corynne McSherry, Blake Reed, Berkeley Law Symposium Celebrating Pamela Samuelson, Session 5 Copyright and Internet Activism (Jan. 16, 2024), <https://www.law.berkeley.edu/wp-content/uploads/2024/05/Pam-Samuelson-Session-05-Copyright-and-Internet-Activism.pdf>.

18. Jason M. Schultz, *Pam Samuelson and the Emergence of the Technology Law and Policy Clinical Movement*, 39 BERKELEY TECH. L.J. 1117, 1136.

19. *Id.* at 1122.

20. *See, e.g., id.* at n. 23 (documenting TLP clinics’ work on behalf of security researchers, among others).

audiences, her interdisciplinary scholarly collaborations, and her devotion to writing that communicates clearly to experts and non-experts alike.<sup>21</sup>

Pam is a scholar of innovation, a champion of innovation, and an innovator in how to construct a scholarly life that has an impact on the real world. So it was fitting that the topic of the last panel of the symposium was “Innovation,”<sup>22</sup> and that panelist Margaret Chon’s essay in this issue offers such a capacious and humane perspective on that topic.<sup>23</sup> Chon develops a novel theory of “relational innovation” and explains why and how copyright law should better foster it. As she powerfully argues, “creativity and innovation depend upon human relationships within specific innovation communities—and these relationships must be recognized, nurtured, and protected in important part because of the deeply human and fundamental need to connect and communicate with others, within and across borders.”<sup>24</sup> Chon credits Samuelson for doing that nurturing within our own community of intellectual property scholars: “Pam’s support of so many in the IP community has resulted in an enormous amount of creative generativity characterized by two touchstones of relational innovation: a sense of collective belonging and freely shared (albeit frequently contested) understandings.”<sup>25</sup> This observation resonates with Claudia Polsky’s symposium toast,<sup>26</sup> a tribute to Pam’s compassion that ended with a recitation of Naomi Shihab Nye’s poem “Kindness,”<sup>27</sup> and with student Nicole Boucher’s toast describing the kindness Pam shows to students.<sup>28</sup> And it echoes James Boyle’s toast, thanking Pam for making “our own niche of the professions such a rewarding and humane field to work in, for all of us.”<sup>29</sup> Or, as Wendy Gordon put it in her toast: “She likes us!”<sup>30</sup>

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21. Joseph Lorenzo Hall, *Pam and Inspiring Technologists*, 39 BERKELEY TECH. L.J. 1085, 1086.

22. Rob Merges, James Grimmelman, Erik Stallman, Mary Hewitt, Sharon Sandeen, Rochelle Dreyfuss, Felix, Mark Lemley, Margaret Chon, Rebecca, Claudia Polsky, Michael Geist, Molly Shaffer Van Houweling, Chuck Weisselberg, Participant, Thomas Vinje, Berkeley Law Symposium Celebrating Pamela Samuelson, Session 6 Innovation (Jan. 16, 2024), <https://www.law.berkeley.edu/wp-content/uploads/2024/05/Pam-Samuelson-Session-06-Innovation.pdf>.

23. Margaret Chon, *Relational Innovation and the Public Benefits of Copying*, 39 BERKELEY TECH. L.J. 1169, 1173.

24. *Id.* at 1196.

25. *Id.* at 1197.

26. Merges, *supra* note 22.

27. Naomi Shihab Nye, *Kindness* (1995), <https://poets.org/poem/kindness>.

28. von Hippel et al., *supra* note 17.

29. Boyle et al., *supra* note 4.

30. *Id.*

Chon's focus on the nexus between innovation and human connection captures a sentiment that infused the 2023 symposium and every contribution to this issue: for all of her extraordinary professional accomplishments, the most powerful and enduring way in which Pam has promoted progress has been by promoting *people*—her students, her colleagues, the recipients of the Dovie Samuelson scholarship named in honor of her grandmother,<sup>31</sup> the technologists who read her columns in *Communications of the Association for Computing Machinery*,<sup>32</sup> the participants in Samuelson-Glushko Technology Law and Policy clinics around the world,<sup>33</sup> and more. As Zahr Said put it in her symposium toast: “Nobody has invested more in the people in our community than Pam.”<sup>34</sup> And, as Mark Gergen pointed out in his toast, that community extends beyond IP scholars to include faculty from every discipline whose careers Pam has nurtured through her campus leadership.<sup>35</sup> Again and again during the symposium, participants expressed amazement that someone who has had such a singular impact on their careers and lives has had the same extraordinary impact on so many others. As panelist and former student Andrew Gass put it, “I don’t know how Pam does that for everyone. It seems impossible. Pam seems impossible . . . Pam shouldn’t scale. But she does.”<sup>36</sup> In his symposium toast, Erik Von Hippel followed up with a quip that echoed this sentiment and brought down the house: “Until today, I thought I was Pam’s only friend. Apparently, this is not the case.”<sup>37</sup>

Indeed, the Symposium Celebrating Pamela Samuelson was a celebration of how friendship and human connection can magnify the impact of an individual scholar across institutions, disciplines, borders, and generations. Pam’s career demonstrates how the promotion of progress requires promoting people. It should perhaps come as no surprise, but is remarkable nonetheless, that our foremost scholar of human progress is among its foremost practitioners as well.

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31. See Chon, *supra* note 23, at 1170 (discussing scholarship established by Pam and her husband Bob Glushko).

32. See Communications of the ACM, Pamela Samuelson, <https://cacm.acm.org/author/pamela-samuelson/> (collecting Pam’s contributions to the publication); see also Carroll, *supra* note 5, at 1214 (discussing Pam’s regular contributions to *Communications of the ACM*).

33. See Schultz, *supra* note 18, at n. 12 and accompanying text (discussing establishment and work of clinics at Colorado, Fordham, Ottawa, Amsterdam, and American University in Washington D.C., in addition to the first Samuelson Law, Technology & Public Policy clinic at Berkeley).

34. Hansen et al., *supra* note 12.

35. Reisman et al., *supra* note 9.

36. von Hippel et al., *supra* note 17.

37. *Id.*