COMMITTED TO COPYRIGHT'S CONSTITUTIONAL ROLE

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I. INTRODUCTION

Who is Pam Samuelson? She is many things to many people: scholar, teacher, mentor, leader, advocate, and friend, to name a few. One could easily add "force of nature" to the list. This Article suggests adding the term "loyalist" to argue that an important through-line in Pam's work has been an unwavering commitment to understanding and promoting copyright law's ability to serve its purpose in our constitutional order.

One might flinch at the term for its association with the rearguard in the nation's founding or because it implies commitment without room for reflection or independent thought. But I use the term here as a response to those who have attacked Pam's integrity and values over the years with hyperbolic rhetoric that positions the speaker as being on the side of copyright

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law and Pam, and others, as being "against" copyright law. This is, and has always been, backward.

Instead, through thick and thin, Pam has thought, written, and acted to support the founding vision of copyright law as an instrument that promotes the public interest in innovation and cultural flourishing. Loyalty in this context means something more than mere "commitment." The term also implies that a person, when faced with difficult choices or temptations, remains true to their foundational commitments. In my view, that person is Pam.

The remainder of this Article briefly elaborates on this point with respect to Pam's engagement in three areas: (1) copyright scholarship; (2) copyright institutions; and (3) public policy.

II. COPYRIGHT LAW SCHOLARSHIP

Much of Pam's copyright scholarship addresses copyright law's subject matter, scope, or its remedial provisions. Pam's work, which frequently uses case synthesis as her methodology, seeks to persuade the courts, or, at times, Congress, to align the substance of current copyright law with its constitutional purpose and thus to improve the coherence and clarity of the law. Starting early in, and carrying through, her career, Pam's interest in getting the balance right on subject matter has focused on intellectual property law's problem child, software.[1]

A. COPYRIGHTABLE SUBJECT MATTER

Promoting progress can be hard work. I have been impressed by the evolution of Pam's views on whether software should be copyrightable subject matter. It reflects her willingness to reconsider or adapt these views in light of new evidence or new developments in the world. Should computer programs in machine-readable form be copyrightable? Initially, Pam's answer was "no" because these programs fail to disclose their contents in machine-readable form.[2] But she recognized that no protection would leave software developers vulnerable, undermining their incentives to produce. A better approach, she argued, would be to tailor the law to the specific characteristics of functional

1. *See, e.g.*, *infra* note 7 and accompanying text (discussing Pam's co-authored proposal for *sui generis* protection for software because the mix of software's expressive and functional aspects make it a poor fit with existing intellectual property doctrine); *see also* Jacqueline D. Lipton, *IP's Problem Child: Shifting the Paradigms for Software Protection*, 58 HASTINGS L.J. 205 (2006).

2. *See* Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663 (1984).

expression and the industry that produces it.[3] As someone with an interest in understanding when the benefits to tailoring outweigh the costs,[4] I remain impressed by her argument for *sui generis* software protection.

In characteristic Pam fashion, she asked, why simply write about a topic when you can organize a conference around it? So, early in her career, Pam organized an important gathering at the University of Pittsburgh to consider software as copyrightable subject matter.[5] Her own perspicacious contribution to the resulting conference issue anticipated contemporary concerns raised by generative artificial intelligence, by considering the follow-on issue of whether computer-generated works should also be deemed copyrightable subject matter, and if they were, who should be deemed the author(s) of such works.[6]

Through conversation and further thought about her early proposal to tailor protection for software, Pam, in collaboration with others, decided that the topic was important and urgent enough that it did not need just another article. It needed a manifesto![7] I was in law school when the manifesto was published. I distinctly recall picking up the symposium issue featuring this weighty, lengthy piece of scholarship. I had taken copyright law and had developed a strong interest in the subject. I was so impressed by the article's originality, thoroughness, and careful, pragmatic proposal to solve such a sticky problem by creating a form of hybrid copyright-patent protection tailored to the unique characteristics of compute programs. I had already known that I wanted an academic career, and this was a model for deep legal scholarship that has informed my work from the beginning.

Another aspect of Pam's work that I admire is her ability to trace the longer arc of contemporary developments by placing them in historical context. For example, nearly two decades later, Pam returned to the subject of copyright in computer programs in *The Uneasy Case for Software Copyrights Revisited*.[8] She first

3. *See* Pamela Samuelson, *Creating a New Kind of Intellectual Property Law: Applying the Lessons of the Chip Law to Computer Programs*, 70 MINN. L. REV. 471 (1985).

4. *See, e.g.*, Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO STATE L.J. 1361 (2009).

5. *See* Pamela Samuelson, *Introduction, Symposium: The Future of Software Protection*, 47 U. PITT. L. REV. 905 (1986) (explaining that "[a]ll of the speakers . . . had been asked to address the question: Can intellectual property law evolve to provide adequate protection for computer software . . .").

6. *See* Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185 (1986); *see also* Pamela Samuelson, *Some New Kinds of Authorship Made Possible by Computers and Some Intellectual Property Questions They Raise*, 53 U. PITT. L. REV. 685 (1992).

7. *See* Pamela Samuelson, Randall Davis, Mitchell Kapor & J.H. Reichman, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994).

8. Pamela Samuelson, *The Uneasy Case for Software Copyrights Revisited*, 79 GEO. WASH. L. REV. 1746 (2011).

asked whether then-Professor Breyer's skepticism about software copyright prior to enactment of the 1976 Act had been warranted: answer, yes.[9] Given the structure of the market in the 1970s, copyright law had little meaningful effect on the incentives to develop software. She then considered that the circumstances may have changed in the 1990s. But, in a thorough review of industry developments in the twenty-first century, Pam convincingly argued that, as an economic matter, the software industry relies on other sources of protection and the case for software copyright has become uneasier as an economic matter, even if we are stuck with it as a legal matter.[10]

In addition to considering what aspects of software should be protected, Pam has been equally attentive to those aspects that should not be protected. It should not be a surprise that much of Pam's thinking in this area has been informed by a deeper understanding of the Supreme Court's enigmatic opinion in *Baker v. Selden*.[11] Among other things, *Baker* designates distinct roles for copyright law, patent law, and the public domain with the constitution's purpose in mind.[12]

Pam's work has helped me better understand and teach *Baker*. Pam also has used her understanding of *Baker* to argue persuasively about the proper interpretation of the opinion's principles as reflected in section 102(b) of the Copyright Act of 1976.[13] In one of her early forays into *amicus* advocacy in *Lotus Development Corp. v. Borland International*,[14] Pam argued to the Supreme Court on behalf of fellow scholars that "*Baker* is fundamentally a case about the unprotectability of the functional content embodied in copyrighted works and the right of others to copy that content in order to make use of it."[15] The

9. *See id.* at 1746.

10. *See id.* at 1782 ("Copyright protection has, in fact, become so deeply entrenched in software protection law and in software industry's expectations that it will be with us and the software industry for decades to come, regardless of whether it really is (or is not) economically necessary.").

11. Baker v. Selden, 101 U.S. 99 (1879).

12. *See* Pamela Samuelson, *Baker v. Selden: Sharpening the Distinction Between Authorship and Invention*, *in* INTELLECTUAL PROPERTY STORIES (Rochelle C. Dreyfuss & Jane C. Ginsburg eds., 2005).

13. *See* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

14. Lotus Dev. Corp. v. Borland Int'l, Inc., 516 U.S. 233 (1996), *aff'g by an equally divided court* Lotus Dev. Corp. v. Borland Int'l. Inc., 49 F.3d 807 (1st Cir. 1995).

15. Pamela Samuelson, *Brief Amicus Curiae of Copyright Law Professors in* Lotus Development Corp. v. Borland International, Inc.*,* 3 J. INTELL. PROP. L. 103, 120–21 (1995); *see also* Pamela Samuelson, *The Nature of Copyright Analysis for Computer Programs: Copyright Law Professors' Brief Amicus Curiae in* Lotus v. Borland, 16 HASTINGS COMM/ENT L.J. 657 (1994)

legislative history about this section could have been more thorough, but with the Constitution's goals in plain sight, Pam provided a convincing account of why functional expression properly belongs in the public domain.[16]

More recently, I was pleased to sign Pam's thorough brief in *Google LLC v. Oracle America, Inc.*,[17] which argued persuasively that in the wake of the split decision in *Borland*, the industry had correctly come to understand that application programming interfaces (APIs) were not copyrightable.[18] While Justice Breyer's opinion in the case acknowledged that the case for the copyrightability of Oracle's declaring code was weaker than the general case for software copyrightability,[19] the Court chose to assume copyrightability to resolve the case on fair use grounds. So, Pam did what she often does. Undeterred, she authored an article with Mark Lemley, and argued that the fight should go on to fully establish that APIs are not copyrightable.[20]

While software copyrightability has understandably occupied most of Pam's attention on the topic of copyrightable subject matter, she has also thought about the principles that should guide decisionmakers when confronted with claims for protection outside of the eight subject matter categories enumerated in Section 102(a).[21] When the 1976 Act adopted the general category of "works of authorship," it provided little express guidance about what might be protectible beyond the enumerated categories. Pam argued that Congress need not exhaust its constitutional power to protect the

(brief to First Circuit Court of Appeals); Pamela Samuelson, *Computer Programs, User Interfaces, and Section 102(b) of the Copyright Act of 1976: A Critique of* Lotus v. Paperback, 55 LAW & CONTEMP. PROB. 311 (1992).

16. Pamela Samuelson, *Why Copyright Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921 (2007).

17. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021).

18. Pamela Samuelson, *Why 72 Intellectual Property Scholars Support Google's Copyrightability Analysis in the Oracle Case*, 36 BERKELEY TECH. L.J. 413 (2021).

19. *See* Google LLC v. Oracle Am., Inc., 141 S. Ct. at 1202 ("In our view, for the reasons just described, the declaring code is, if copyrightable at all, further than are most computer programs (such as the implementing code) from the core of copyright.").

20. Mark A. Lemley & Pamela Samuelson, *Interfaces and Interoperability After* Google v. Oracle, 100 TEXAS L. REV. 1, 3 (2021) ("Refusing to protect APIs is also good policy. Indeed, we argue that decisions not to give the developers of APIs copyright control over reimplementation three decades ago was central to the development of the interoperable ecosystem and the open internet we enjoy today."); *cf.* Pamela Samuelson, *Are Patents on Interfaces Impeding Interoperability?*, 94 MINN. L. REV. 1943 (2009) (arguing that some regulation of interface patents may be appropriate to avoid certain harms and that tailoring certain patent doctrines to promote interoperability is desirable).

21. *See* 17 U.S.C. § 102(a) (providing that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression" and listing eight categories of works that are included within this definition); Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. PITT. L. REV. 17 (2016).

"writings" of an author. Instead, Pam provided five helpful criteria to test claims seeking to expand copyrightable subject matter.[22]

Finally, let us not forget the public domain. Pam's work has raised the visibility and defended the boundaries of copyright's public domain. Pam has answers for questions like: does the United States need a *sui generis* database right?;[23] how should we understand the merger doctrine's role in keeping ideas in the public domain?[24] and, importantly, how should we think about and map the public domain in the digital era?[25]

B. SCOPE OF COPYRIGHT PROTECTION

Pam's commitment to finding the right balance of interests to promote progress manifests itself in her work on scope of copyright protection as well. Most of what follows discusses the scope of copyright law's exclusive rights in traditional terms. But, as a practical matter, infringement doctrines, particularly the test for substantial similarity, also define copyright's effective scope. For this reason, I would include Pam's helpful attempt to clean up what was then an even messier infringement doctrine as going to her desire to get effective scope right.[26]

22. *See* Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. PITT. L. REV. 17, 54–57 (2016) (naming criteria as economic, legal fit, new or changed circumstances, authorship, and human communication).

23. Jerome H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997) (arguing against *sui generis* protection for unoriginal databases).

24. Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COP. SOC'Y 417, 467 (2016) (demonstrating "the evolving utility of the merger doctrine in mediating conflicts between and among the interests of first and second-generation authors, of third parties affected by those disputes, and of the public who would otherwise suffer the consequences of unwarranted monopolies over information or products"); *cf.* Pamela Samuelson, *Questioning Copyright in Standards*, 48 B.C. L. REV. 193 (2007) (categorizing arguments that undermine incentive-based arguments in favor of copyright in standards).

25. *See* Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 L. & CONTEMP. PROBS. 147 (2003).

26. *See* Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. L. REV. 1821 (2013) (discussing and criticizing aspects of five different infringement tests used by courts and arguing in favor of an analytical method that uses more uniform vocabulary while remaining sensitive to differences in context). While the Ninth Circuit subsequently agreed to use the Second Circuit's basic vocabulary of "copying" and "unlawful appropriation" as the two-step test applicable once ownership of a valid copyright has been established, the Ninth Circuit continues to use its extrinsic/intrinsic test for comparing the plaintiff's and defendant's respective works as part of the "unlawful appropriation" inquiry. *See* Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018) (aligning its general terminology with that first introduced in *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946)).

With respect to the delineation of exclusive rights, Pam played a role in the Second Circuit's important course correction in *Computer Associates International v. Altai*,[27] which right-sized the scope of copyright in computer programs by adopting the abstraction-filtration-comparison methodology to compare works in cases claiming non-literal infringement.[28] As Pam has noted, Altai appended her amicus brief in *Borland* to its own appellate brief.[29] Also in the software context, Pam has been particularly strong about keeping copyright's scope in its lane despite the ebb and flow of software patenting.[30]

Pam also has shown a particular solicitude for the role of the user or follow-on creator and their needs to use or build upon existing works. This view emerged in her early work addressing the right to modify software.[31] She later took a close look at the derivative work right in general with the public's interest in mind. In a thorough exploration of the derivative work right's history, Pam and Richard Sherman first identified that among the categories of exemplary derivative works in the statutory definition, there are three clusters of derivatives that are either shorter versions, faithful renditions, or transformations of the source work.[32]

Pam and Richard then took up the question of how broadly courts should read the end of that definition, according to which a derivative work can take "any other form in which a work may be recast, transformed, or adapted."[33] Their analysis pushed back against an argument that the breadth of these terms should grant the copyright owner an expansive scope of exclusivity to build upon their existing works. I call this expansionist argument the prospect theory of copyright scope.[34] But Pam and Richard thoroughly and persuasively argued that:

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27. Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).

28. *See id.* at 706 ("As discussed herein, we think that district courts would be well-advised to undertake a three-step procedure, based on the abstractions test utilized by the district court, in order to determine whether the non-literal elements of two or more computer programs are substantially similar. ").

29. *See* Pamela Samuelson, *Staking the Boundaries of Software Copyrights in the Shadow of Patents*, 71 FLA. L. REV. 243, 265 n.118 (2019).

30. *See* Pamela Samuelson, *Strategies for Discerning the Boundaries of Copyrights and Utility Patents*, 92 NOTRE DAME L. REV. 1493 (2017); *see also* Pamela Samuelson, *Functionality and Expression in Computer Programs: Refining the Tests for Software Copyright Infringement*, 31 BERKELEY TECH. L.J. 1215 (2016).

31. Pamela Samuelson, *Modifying Copyrighted Software: Adjusting Copyright Doctrine to Accommodate a Technology*, 28 JURIM. J. 179 (1988).

32. *See* Pamela Samuelson & Richard M. Sherman, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505 (2013).

33. *See* 17 U.S.C. § 101.

34. *See* Michael W. Carroll, *Why the Supreme Court Rejected the Prospect Theory of Copyright Scope,* 42 CARDOZO ART & ENTER. L.J. (forthcoming 2024).

> To be consistent with the text of the statute, the legislative history, and the constitutional purpose of copyright, derivative work liability should only be imposed under the last clause of the definition if the plaintiff's claim is analogous to one or more of the exemplary derivatives in the statutory definition.[35]

Recently, Pam has brought together her deep knowledge of derivative works as both a subject matter category and as an exclusive right to prepare such subject matter. Under section 103(a), a person may not claim authorship of part, or, sometimes all, of a derivative work if it incorporates preexisting works that were used unlawfully.[36] Pam argued that in *Andy Warhol Foundation for the Visual Arts, Inc, v. Goldsmith*, the Solicitor General hijacked the case to limit its scope to a single act of licensing.[37] Doing so enabled the Court to sidestep the thorny issues under section 103(a) that it would have had to address had it engaged with the full scope of Goldsmith's initial claims.[38]

One other area of Pam's work branches from her initial concerns about the right to modify software. Software is functional, and users want to be able to make changes to the tools they use to have them better perform their functions. Sometimes they don't need to modify the copyrighted work as such, but in a software-rich environment, they do need to be able to access and run the software to repair the functional articles in which it is embedded. Pam's interest in the growing movement for a "right to repair"[39] spans these two forms of user interest, including their interest in having freedom to tinker with what they use.[40]

Pam has also shown a keen interest in another important other scope doctrine, fair use. In the software context, Pam viewed the *Altai* court's decision to resize the scope of the reproduction right as complimentary with the courts' determination that most forms of reverse engineering are fair use.[41] She later developed her thinking about reverse engineering more broadly in

35. Samuelson & Sherman, *supra* note 32, at 1511.

36. *See* 17 U.S.C. § 103(a).

37. *See* Pamela Samuelson, *Did the Solicitor General Hijack the Warhol v. Goldsmith Case?*, COLUM. J.L. & ARTS (forthcoming 2024); *see also* Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

38. Samuelson, *supra* note 37.

39. *See, e.g.*, Thorin Klosowski, *What You Should Know About Right to Repair*, N.Y. TIMES WIRECUTTER BLOG (Apr. 15, 2021), https://www.nytimes.com/wirecutter/blog/what-is-right-to-repair/ (describing principal policy goals of those who seek legislation guaranteeing consumers a right to repair their own software-enabled devices).

40. *See* Pamela Samuelson, *Freedom to Tinker*, 17 THEOR'L INQUIR. L. 563 (2016).

41. *See* Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of* Sony, Galoob and Sega, 1 J. INTELL. PROP. L. 49 (1993) (discussing three foundational cases in this line of precedent).

the deep and careful analysis in the brilliant *Law and Economics of Reverse Engineering* with Suzanne Scotchmer.[42]

However, technology in the form of protective measures threatens fair use's ability to regulate copyright scope because digital locks can extend effective exclusivity beyond what is granted by the law. Pam and others responded with a proposal to create a reverse notice-and-takedown regime to maintain fair use's effectiveness in this context.[43]

Pam's strength as a categorizer and synthesizer of doctrine was on full display in her terrific article *Unbundling Fair Uses*.[44] She first organized the case law to demonstrate that the courts have found uses to be fair when they fall into certain policy-relevant clusters, including promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and the privacy and autonomy interests of users.[45] Her well-reasoned and persuasive normative conclusion that fair use is an essential and integral part of copyright law was an overdue recognition of this point. Always looking ahead, Pam later mapped the possible futures of the doctrine in 2015.[46] But, why map the future when you can save it?[47]

C. REMEDIES FOR COPYRIGHT INFRINGEMENT

If a right without a remedy is no right at all, what is a right with too large a remedy? At times, that can be copyright. The Constitution grants Congress power to grant authors exclusive rights in their writings, but, as one might expect, it leaves the question of remedies to Congress and the courts. Over time, the expansive remedies that Congress has provided in the 1976 Act have increased the threat value of copyright to extend the effective reach of exclusive rights beyond their intended range.

Attentive to this concern, Pam has identified certain facets of copyright's remedial regime in need of reform. When the Recording Industry Association of America (RIAA) launched its enforcement initiative against its users,[48] the

42. Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575 (2002).

43. Jerome H. Reichman, Graeme Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Fair Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981 (2007).

44. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

45. *See id.*

46. *See* Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815 (2015).

47. *See* Clark D. Asay & Pamela Samuelson, *Saving Software's Fair Use Future*, 31 HARV. J. L. & TECH. 535 (2018).

48. From 2003 to 2008, the RIAA sued approximately 35,000 individuals for file sharing. *See, e.g.*, Erika Morphy, *RIAA Abandons Mass Lawsuit Strategy in File-Sharing War*, ECOMMERCE

outsized threat of statutory damages came to the fore.[49] Pam took a deep look and proposed a solution.[50] She set forth a creative proposal to fine-tune the disgorgement remedy in intellectual property cases.[51]

The prospect of injunctive relief also carried too much weight because courts were willing to presume irreparable harm upon a showing of copying. Pam rightly argued that this presumption was inconsistent with the Supreme Court's reasoning in *eBay v. MercExchange*.[52] The Second Circuit and other courts accepted this point and returned real equitable discretion to the district courts.[53] Have these decisions made a difference?

Pam went to look, and answered yes, and that is a salutary development. Conducting characteristic doctrinal synthesis, Pam found that courts withheld injunctive relief:

> (1) [W]hen copyright owners failed to offer persuasive evidence of irreparable harm and/or inadequacy of legal remedies, (2) when a balance of hardships favored defendants, (3) when public interests would be better served by denying the requested injunctions, and (4) when the plaintiff was seeking to vindicate non-copyright interests. While injunctions are still quite common in simple piracy cases, eBay

TIMES (Dec. 19, 2008), https://www.ecommercetimes.com/story/RIAA-Abandons-Mass-Lawsuit-Strategy-in-File-Sharing-War-65590.html (describing the RIAA's strategy and why it eventually abandoned it).

49. *See* 17 U.S.C. § 504(c)(2) (giving court discretion to award a maximum of $150,000 in statutory damages for each work shown to have been infringed willfully); *see also, e.g.*, J. Cam Baker, Note, *Grossly Excessive Penalties in the Battle against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004) (describing the effects of RIAA using § 504(c)'s per-work standard for statutory damages to aggregate claims for infringement of multiple songs by individual file-sharers).

50. *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages in U.S. Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009); Pamela Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53 (2009); *see also* Phil Hill, Pamela Samuelson & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally—But for How Long?*, 60 J. COP. SOC'Y 529 (2013).

51. *See* Pamela Samuelson, John Golden & Mark Gergen, *Recalibrating the Disgorgement Remedy in Intellectual Property Cases*, 100 B.U. L. Rev. 1999 (2020).

52. *See* Krzysztof Bebenek & Pamela Samuelson, *Why Plaintiffs Should Have To Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 5 I/S: J. L. & POLICY FOR INFO. SOC'Y 67 (2009).

53. *See, e.g.*, Salinger v. Colting, 607 F.3d 68, 77–83 (2d Cir. 2010); Perfect10, Inc. v. Google, Inc., 653 F.3d 976, 979–81 (9th Cir. 2011) (recognizing that *eBay* had implicitly overruled Circuit's precedent accepting presumption of irreparable harm in place of evidence); Christopher Phelps & Assocs., LLC v. Galloway, 492 F.3d 532, 543 (4th Cir. 2007) (relying on *eBay* to deny preliminary injunction).

> has radically changed the injunctive relief calculus for copyright plaintiffs.[54]

But that is not the answer that some in the copyright field wanted. Some scholars instead continue to insist that *eBay* has had little or no effect on equitable remedies in copyright cases.[55] Characteristically, Pam has pushed back—with data. Working with Matthew Sag, she again proved the point that *eBay*, reinforced by *Winter v. Natural Resources Defense Council, Inc.*,[56] had a substantial effect on the availability of injunctive relief in copyright cases.[57]

III. COPYRIGHT LAW'S INSTITUTIONS

A. CONGRESS AND THE COPYRIGHT OFFICE

The Constitution provides the structure of government along with its protections of individual liberty. Substantively, copyright law divides liberties between copyright owners, through exclusive rights, and users, through fair use and other limitations coupled with the First Amendment. Pam's thoroughgoing commitment to working to make copyright perform its intended function necessarily requires attention to the structure of government and to the institutions that create and administer this law.

Pam has opined on the future of the Copyright Office: will it be obsolete in the twenty-first century? Pam's answer was, possibly, but not likely.[58] When Congress considered a proposal to add what is now the Copyright Claims Board to the Office's responsibilities, Pam did what she often does when something significant is happening in the world of copyright law—she organized a scholarly workshop to vet the new development. Her report of that meeting identified a number of concerns that should continue to guide

54. Pamela Samuelson, *Withholding Injunctions in Copyright Cases: The Impact of eBay*, 63 WM. & MARY L. REV. 773, 773–74 (2022).

55. *See, e.g.*, Paul Goldstein, Goldstein on Copyright, §§ 13.1.2.2, 13.2.1.1 (3rd ed. 2020) (relying on Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215 (2012)); Alfred C. Yen, *Rethinking Copyright's Relationship to the First Amendment*, 100 B.U. L. Rev. 1215, 1225 (2020) (same).

56. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 32 (2008) (making clear that standards for preliminary and permanent injunctions are aligned except as to whether success on the merits is likely (for preliminary injunctions) or has been proven (for permanent injunctions)).

57. *See* Matthew Sag & Pamela Samuelson, *Discovering eBay's Impact on Copyright Injunctions Through Empirical Evidence*, 64 WM. & MARY L. REV. 1447 (2023).

58. *See* Pamela Samuelson, *Will the Copyright Office Be Obsolete in the Twenty-First Century . . .*, 13 CARDOZO ARTS & ENT. L.J. 55 (1994).

assessment of the Board's performance.[59] More generally, as interest in copyright reform has waxed and waned, Pam's views of Congress's capabilities exhibited some hope but also necessary caution.[60] Her institutional concerns were not limited to those in the United States; she has also identified challenges that the international system would have to confront.[61]

B. CONGRESS AND THE COURTS: *GOOGLE BOOKS*

Google wanted to make public domain and in-copyright books searchable. After Google made agreements with primarily academic libraries, it digitized about twelve million books to create its Google Book Search (GBS) service. About ten million of these books were in-copyright.[62] Publishers and some professional authors were outraged. How could this be a fair use? This was a moment of real culture clash between twentieth century and twenty-first century copyright law.[63]

1. *Pre-Settlement*

Prior to the October 28, 2008 settlement, the case was primarily a fair use case. Pam convened another scholarly meeting to vet the arguments. While we did not discuss it at the time, I would have fully expected Pam to lead or participate in amicus support for Google's fair use position. The courts already had agreed that copying billions of files to create an image search and to display thumbnail images to the user was fair use.[64] Functionally, Google Book Search was sufficiently analogous, and the publishers' and Authors Guild arguments about a potential licensing market were unpersuasive.

2. *The Settlement: Advocacy*

Under this sweeping settlement, which took thirty months to negotiate, Google would have paid $125 million to be administered by a new non-profit

59. *See* Kathryn Hashimoto & Pamela Samuelson, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689 (2018).

60. *See* Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551 (2007); *see also* Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740 (2013) (book review); Jessica Litman & Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2011) (with Members of the Copyright Principles Project).

61. *See, e.g.*, Pamela Samuelson, *Challenges for the World Intellectual Property Organization and the Trade-Related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age*, 21 EUR. INTELL. PROP. REV. 578 (Nov. 1999).

62. *See* Pamela Samuelson, *Academic Author Objections to the Google Book Settlement*, 8 J. TELECOM. & HIGH TECH. L. 217 (2010) (summarizing history of GBS and the settlement).

63. *See* Michael W. Carroll, *Copyright and the Progress of Science: Why Text and Data Mining is Lawful*, 53 U.C. DAVIS L. REV. 893, 899–901 (2019).

64. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

Book Rights Registry.[65] The settlement would have bound all class members who had not opted out, giving Google the equivalent of a private statutory license to use orphan works within the scope of the settlement.[66] The settlement provided financial incentives for authors and publishers to add works to the Book Search service, giving Google a uniquely powerful position in the book market.

The settlement, shall we say, *energized* Pam. It was audacious. Most of the scanned books were written by academic authors, many of whose primary interest was in wide dissemination of their work. Yet, here were three individual plaintiff-authors and the Authors Guild, none of whom had much to do with academic scholarship, purporting to represent a class of *all* authors. The orphan works problem was under legislative consideration at the time, and here was Google gaining a substantial first-mover advantage with a private compulsory license.

To be fair, the settlement was creative and had features that would have greatly improved access to the scanned works. As Pam's second letter to Judge Chin, United States District Court for the Southern District of New York, explained, the settlement could have been modified to address many of the concerns she had identified.[67] But, from where I sat, it seemed clear that Pam's energy to engage was driven by how deeply problematic the settlement was from an institutional perspective.[68]

The courts' power to bind non-parties to a dispute under Rule 23 of the Federal Rules of Civil Procedure is an exceptional one, and it should be used when justified by the underlying merits. Here, on the merits, there were really two closely-related legal questions in dispute: did the fair use doctrine cover the copying done during Google's book-scanning process and did fair use also cover Google's snippet displays of the books? These legal questions required discovery of only a comparatively modest amount of facts necessary for the analysis.

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65. After objections discussed immediately *infra* note 66, the agreement was amended in geographic scope and certain other respects. *See* Authors Guild, Inc. v. Google, Inc., Proposed Amended Settlement Agreement, 05-CV-8136-DC, (S.D.N.Y. Nov. 13, 2009), https://authorsguild.org/app/uploads/2012/08/Amended-Settlement-Agreement.pdf.

66. *See* Pamela Samuelson & Elizabeth T. Gard, *Pamela Samuelson's Letters to the Court: Concerns on the Proposed Google Book Settlement*, 12 TULANE J. TECH. & INTELL. PROP. L. 185 (2009).

67. *See id.* at 194–207 (Disclosure: I was one of the signatories to the second letter.)

68. *See* Jason Schultz, *Pam Samuelson and the Emergence of the Technology Law and Policy Clinical Movement*, 39 BERKELEY TECH. L.J. 1117 (providing additional details about Pam's response to the proposed settlement, including the role of law school clinics).

The "settlement" went remarkably far beyond resolving this straightforward dispute. It asked the court to issue a judgment that, among other things, would have: (1) bound a large class of authors with heterogenous interests, (2) created a new collective rights management organization, (3) created a new digital book market, and (4) granted a single private entity special privileges under copyright law.[69]

Pam's letter, written in advance of the court's fairness hearing, eloquently closed with this:

> Whatever the outcome of the fairness hearing, we believe strongly that the public good is served by the existence of digital repositories of books, such as the GBS corpus. We feel equally strongly that it would be better for Google not to have a monopoly on a digital database of books. The future of public access to the cultural heritage of mankind embodied in books is too important to leave in the hands of one company and one registry that will have a de facto monopoly over a huge corpus of books and rights in them.[70]

On this analysis, the orphan works problem needed a solution, but the institution that was best-placed to solve this problem and to provide for the other elements of the settlement was Congress, not the courts. Responding to the institutional problem arising from the unrepresentativeness of the Authors Guild, Pam responded institutionally. Having gathered support from a wide range of academic authors to formally object to the settlement, Pam realized that this otherwise unrepresented group was likely to need a voice in other copyright developments going forward. She invited these authors to exercise their freedom of association to form the Authors Alliance, a then-new non-profit organization that promotes authors' interests in wide dissemination of their works and which celebrated its tenth anniversary in May 2024.[71]

On March 22, 2011, Judge Chin rejected the proposed settlement agreement, finding that it was "not fair, adequate, and reasonable."[72] His opinion tracks closely with many of the points that Pam had initially raised and had repeated through the course of the settlement litigation. She was not alone in finding problems with the settlement. The U.S. Department of Justice

69. *See* Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WISC. L. REV. 479, 514–36 (detailing the full range of the settlement's proposed changes to existing law).

70. Samuelson, *supra* note 66, at 205.

71. *See* Authors Alliance, *Authors Alliance 10th Anniversary Event: Authorship in an Age of Monopoly and Moral Panics*, https://www.authorsalliance.org/2024/03/15/authors-alliance-10th-anniversary-event-authorship-in-an-age-of-monopoly-and-moral-panics/ (Disclosure: I am one of the authors invited to be a founding member of Authors Alliance).

72. *See* Authors Guild v. Google, Inc., 770 F. Supp 2d 666, 686 (S.D.N.Y. 2011).

(DOJ) and certain European governments also had raised objections.[73] Pam also highlighted the role that the Register of Copyrights, Marybeth Peters, played.[74] But it was the arguments that Pam and her fellow objectors raised that went to the core of why this was an inappropriate use of the Rule 23 mechanism.

3. *The Settlement*: *Scholarship*

I admire how Pam was able to write extensively about the fairness of the settlement during and after the litigation. Demonstrating her remarkable ability to be both a participant and an observer in the process, Pam reflected on the ways in which this attempted use of a class-action settlement would have been a partial form of copyright reform.[75] As an institutionalist, she turned attention to how Congress could address the problems covered by the settlement.[76] She reflected on the antitrust problems identified by DOJ.[77] She also offered her perspective on how to solve the orphan works problem,[78] and how not to.[79]

IV. POLICY ADVOCACY IN COPYRIGHT LAW

Pam's commitment to progress has led her to actively participate in policy discussion in the United States and in Europe. She has been an intellectual engaged with the general public on the issues of the day. Most recently, for example, when *Science* needed a copyright scholar to explain the copyright issues raised by generative artificial intelligence, it should surprise no one that they sought out Pam.[80] Her early interest in software copyright led to her continued engagement with the computer science and software development

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73. *See* Authors Guild v. Google, Inc., Statement of Interest of the United States of America Regarding Proposed Amended Settlement, No. 05-Civ.-8136 (DC) (S.D.N.Y. Feb. 4, 2010), https://www.justice.gov/atr/case-document/file/488166/dl; Daniel Gervais, *The Google Book Settlement and International Intellectual Property Law*, 15 INSIGHTS, AM. SOC'Y OF INT'L L., (Apr. 11, 2011), https://www.asil.org/sites/default/files/insight110411.pdf (describing positions taken by the German and French governments in filings before the court in publication of the American Society of International Law).

74. *See* Pamela Samuelson, *Tribute to Marybeth Peters: Standing Up for Copyright: Marybeth Peters and the Google Book Settlement*, 58 J. COP. SOC'Y 75 (2011).

75. *See* Samuelson, *supra* note 68.

76. *See* Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J. L. & ARTS 697 (2011).

77. *See* Pamela Samuelson, *A Perspective on the Merits of the Antitrust Objections to the Failed Google Book Settlement*, Harv. J. L. & TECH. OCCAS'L PAPERS (July 2013).

78. *See* Pamela Samuelson, David Hansen, Gwen Hinze, Kathryn Hashimoto & Jennifer Urban, *Solving the Orphan Works Problem for the United States*, 37 COLUM. J. L. & ARTS 1 (2013).

79. *See* Pamela Samuelson, *Extended Collective Licensing to Enable Mass Digitization: A Critique of the U.S. Copyright Office Proposal*, 38 EUR. INTELL. PROP. REV. 75 (Feb. 2016).

80. *See* Pamela Samuelson, *Generative AI Meets Copyright*, 381 Science 158 (2023).

communities by regularly contributing to *Communications of the Association for Computing Machinery*.[81]

Without describing all of the policy debates Pam has engaged in, I want to recall an early and important one—the debate about the Clinton White House's White Paper on Intellectual Property and the National Information Infrastructure in the run-up to what eventually became the Digital Millennium Copyright Act of 1998.[82] The White Paper represented another kind of audacity, treating open questions as answered in favor of enlarged copyright scope and proposing a range of legislative changes that would have further enlarged copyright's subject matter, scope, and duration. The policy process was moving quickly—bipartisan bills that would implement much of the White Paper's recommendation had been introduced in both the House and Senate in September 1995. I was in my final year of law school, following this debate with interest.

Pam was among a number of public-interest-minded legal scholars who joined with libraries and other organizations to push back. One important initiative in this regard was the Digital Future Coalition.[83] Related to that initiative, in January 1996, in this contentious environment, Pam published *The Copyright Grab* in *Wired*.[84]

The piece was a momentous *cri de coeur* and call to action. Pam identified eight flaws with the White Paper's proposals, including a significant scaling back of fair use and first sale. The White Paper also imagined that the "Information Superhighway" could be made "safe" for content through rules about copyright management information and technological protection measures. Online service providers would have been subject to liability for their users' infringing conduct, giving them strong incentives to monitor and police their users' online interactions. As Pam wrote:

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81. *See* Communications of the ACM, Pamela Samuelson, https://cacm.acm.org/author/pamela-samuelson/ (collecting Pam's contributions to the publication).

82. *See* UNITED STATES DEPARTMENT OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (Sept. 1995); The Digital Millennium Copyright Act, Pub. L. No. 105-304 (1998).

83. *See Digital Future Coalition*, WIKIPEDIA, https://en.wikipedia.org/wiki/Digital_Future_Coalition, (explaining the role my colleague Peter Jaszi played in coordinating it); *see also* Bryan Bello & Patricia Aufderheide, *Information Activism in the First Digital Copyright Decade: A Case Study of the Digital Future Coalition, 1996–2002 and the Internet that Nearly Was*, (21st Annual Conference of the Association of Internet Researchers, 2020), https://spir.aoir.org/ojs/index.php/spir/article/download/11169/9792.

84. Pamela Samuelson, *The Copyright Grab*, 4.01 WIRED 134 (Jan. 1996), https://www.wired.com/1996/01/white-paper/.

> It's hard to fully appreciate how substantial a change the white paper would wreak upon copyright law until you grasp the negative synergies among its eight interrelated parts. The diminishment of fair-use rights, for example, might seem less threatening when viewed in isolation than when viewed in conjunction with the white paper's call for an expansion of copyright owner control over browsing and transmissions.[85]

To convey a sense of the urgency of the time and the scale of provocation that the White Paper was, consider Pam's closing rhetoric:

> [T]he copyright maximalists and their lobbyists are not thinking about how to promote real public respect for copyright law or about what's in the public interest. Their strategy is to rush the white paper's legislation through Congress today and force it down the public's throat tomorrow. You are the public whose throat this policy is about to be forced down. If you don't want it to happen, you'd better do something, and quickly.[86]

Sadly, Pam has been vilified time and again for standing up against these extraordinary changes to the law.[87] I raise this only to provide some context for my argument about Pam's loyalty to the Constitution's vision for copyright law. Pam already had raised the ire of some corporate copyright owners for her work on software copyright. For those who know her, consider the image of Pam as the "Darth Vader of the software industry."[88] For her public advocacy during the run-up to the DMCA, Pam was said in multiple different ways to be "against copyright" or "anti-copyright." Some of this rhetoric had decidedly gendered valence. These memes continue to be repeated about her to this day.[89]

I recognize that this rhetoric is hyperbolic and over-the-top. Still, it is so deeply wrong! As Parts I and II *supra* demonstrate, Pam's approach to

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85. *Id.*

86. *Id.*

87. *See, e.g.*, David Newhoff, *Copyright Principles & Consensus?*, ILLUSION OF MORE (May 17, 2013), https://illusionofmore.com/copyright-principles-consensus/ (using hyperbolic language to criticize Pam's congressional testimony about the Copyright Principles Project for downplaying the effects of the difficulties for enforcing copyrights on the internet).

88. *See* Matt Richtel, *Cyberlaw's Deep Thinker Wins Big*, WIRED (June 18, 1997), https://www.wired.com/1997/06/cyberlaws-deep-thinker-wins-big/.

89. *See 5 Reasons the EFF's New Board Chair is Terrifyingly Anti-Copyright*, CREATIVEFUTURE (Oct. 30, 2019) (accusing Pam of being "bent on destroying copyright protection."), https://www.creativefuture.org/pamela-samuelson/; *see also Is the EFF's New Board Chair Anti-Copyright? We Stand By Our Facts*, CREATIVEFUTURE (Nov. 18, 2019) (claiming that its goal was not to write "snarky prose" and then asserting "We don't know Prof. Samuelson. But if she is as fair, kind, and generous as her supporters say, we'd like to see her rethink her positions, and the harm she and her followers are doing to creativity in America.").

copyright has been balanced, careful, thorough, and focused on its North Star, promoting the progress of science. It is for these reasons that I consider her work to exhibit the kind of principled commitment to copyright law's role in society that we should emulate. If she is "anti" anything, she is against proposals, arguments, and developments that would bend copyright law to serve powerful private interests at the expense of the public interest. She has stayed true to that role throughout her career.

Nevertheless, unlike some of her opponents, Pam can separate policy differences from *ad personam* incivility. For younger scholars who also want to play a role in public policy debates, Pam has been a role model in her ability to forge ahead notwithstanding the slings and arrows she has encountered in the public forum.

V. CONCLUSION

I want to close on a more personal note. Pam has been a generous mentor, colleague, and friend throughout my academic career. Along with the other founders of the Intellectual Property Scholars Conference, she helped grow that meeting into the large community gathering that it has become. As one of the "founding mothers" of our community, she has set a tone for curious, collegial, and warm engagement with the full range of issues and ideas that inspire our collective work.

In addition to conference participation, I have been fortunate enough to participate in some of the meetings Pam and Bob have hosted in St. Helena. Pam also invited me to join the Copyright Principles Project.[90] The latter effort was a substantial undertaking that was deeply rewarding. Pam led the group through wide-ranging, and sometimes intense, discussions that canvassed the whole landscape of copyright law. I formed professional and personal bonds with the other members of the group that I greatly value to this day.

I have learned over the years how unique our community is within the legal academy. Its most prominent members are approachable and are invested in nurturing the professional growth of all. While the size of our general works-in-progress meetings can be daunting at times, that scale also speaks to the open-door philosophy that characterizes the community. Those in my cohort give Pam and the other founders of this community credit for setting the tone and leading by example. It is on us to pay it forward and keep this culture vibrant and healthy.

90. *See* Jessica Litman & Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2011) (with Members of the Copyright Principles Project).

Pam is not done, and I look forward to our future encounters, engagement and collaboration. The entire copyright field has to respond to a particularly dynamic period as the challenges and opportunities posed by generative artificial intelligence and other developments come into view. Pam will be where she always has been—right in the thick of it!