ARTISTS, TECHNOLOGY & THE OWNERSHIP OF CREATIVE CONTENT

Introduction

As new digital technologies change the way that entertainment and artistic works can be made, distributed and sold, they are radically reshaping the political economy of creativity. The new technologies are changing the way that artists work and how they connect to their audiences. It is restructuring once-stable markets and extending the scope of copyright law in unprecedented ways. And it is empowering consumers and redefining how people can express themselves and communicate with each other in public venues.

In an attempt to understand the far-reaching implications of new digital technologies for the future of creativity, the Norman Lear Center at the USC Annenberg School for Communication convened a conference on March 31, 2001, at its Los Angeles campus. The event was planned and sponsored by USC Law School and the Center for Communications Law and Policy, USC School of Fine Arts, and the Artists Rights Foundation of the Directors Guild of America. Alan Sieroty and the USC Provost provided critical financial support.

As the title of the conference suggests, discussions about "artists, technology and the ownership of creative content" range across a large territory of law, politics, technology, art, history and the mysterious dynamics of creativity itself. Yet for all the complexities of this topic, one fact is inescapable: the digital revolution is provoking a wide array of novel quandaries. Answers are elusive, it seems, because the technologies are disrupting many existing economic and political relationships, as embodied in law and markets – yet forging new alignments of interests and new social consensuses is notoriously difficult work.

For example, creators in virtually all fields are finding that new digital technologies provide new tools for creativity as well as new ways to sell their works directly to audiences, bypassing intermediaries. This is fueling new struggles between creators and major media corporations over the control of creative expression – and the economic rewards and market power that such control entails. It is also provoking intense new controversies about the scope of artists' "moral rights" as their works are manipulated and altered by the owners of copyrighted works.

The circle of disruption grows wider as digital technologies facilitate upstart business models and empower consumers with new choices. Once-stable markets and commercial practices are changing dramatically. The novel capabilities of the technologies are also disrupting many venerable principles of copyright law, triggering a new array of political

struggles over how to define and control intellectual property. Copyright law is becoming a new arena for structuring markets and allocating rights among creators, content industries and the public. As a result, changes in technology and law are shaping consumers' choices in the marketplace, the prices that they pay, and the rights of access and use of creative works that they may (or may not) enjoy under the "fair use" doctrine of copyright law.

Taken together, it is no exaggeration to say that the very architecture of democratic culture is being reshaped by these various changes. After all, the new configurations of technology, law and social practice are changing the ways in which citizens can express themselves, share information and interact with others in public communications venues.

By bringing together some of the nation's leading artists, filmmakers, copyright attorneys, public policymakers, industry experts and scholars, the conference sought to elicit the most penetrating critiques of the current tumult in creativity-based markets and social milieus. If the right questions can be framed, conference organizers hypothesized, then perhaps greater progress can be made in imagining appropriate answers.

To provoke deeper thinking about the moral, legal, political and practical quandaries facing artists, conference organizers commissioned four prominent thinkers to devise fictional scenarios, many inspired by real life. The case studies are meant to illustrate the new tensions that arise in different creative arenas as artists interact with technology, law and markets. Among the issues depicted in the case studies are:

- the moral rights of artists in collaborative, networked environments;
- the proper scope of copyright law as the lines between public and private life blur;
- the new types of clashes that occur between artists and the industries that buy their works; and
- the advantages and dangers of new technologies and copyright laws.

The four case studies -- discussed in the report below and included in full in Section IV below -- were prepared by F.J. Dougherty, Associate Professor of Law, Loyola Law School; Jane Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia School of Law; Arnold Lutzker, Partner, Lutzker & Lutzker; and Sara Diamond, Artistic Director, Media and Visual Arts, and Executive Producer, Television and New Media, The Banff Center (Calgary, Canada).

These case studies had a special immediacy and emotional resonance at the conference because they did not merely exist on the printed page, but were performed. Two cases were dramatized in brief films, and two were performed as short stage plays by Comedus Interruptus, a USC improvisational student theater group. The scripts were written by Tim McKeon of the Lear Center, and the two films were directed by Jon Berkowitz of the USC School of Cinema-Television. (The performance versions of the two

filmed case studies are available on videotape from the Lear Center; the plays can be viewed on the Lear Center web site, at http://entertainment.usc.edu/ato.)

The conference represented a year-long planning process by Martin Kaplan, Director of The Norman Lear Center and Associate Dean of the USC Annenberg School for Communication; Erwin Chemerinksy, Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the USC Law School; Ruth Weisberg, Dean of the USC School of Fine Arts; Elliot Silverstein, President, and Kathy Garmezy, Executive Director, of The Artists Rights Foundation; Lear Center staff Johanna Blakley, Caty Borum and Tim McKeon; and Amy Brotherton of the Artists Rights Foundation.

This publication synthesizes the highlights of the conference. It consists of four parts:

Section I: "The Future of Creative Control in the Digital Age," the keynote address of the conference, presented by David Bollier, Senior Fellow at the Lear Center.

***Section II*:** "Artists, Technology and the Ownership of Creative Content," an interpretive synthesis of conference discussions prepared by Bollier.

***Section III*:** Four fictional case studies, commissioned for this conference, that portray the new moral, legal and political dilemmas that the new technologies are introducing.

Section IV: A bibliography and listing of key court rulings, which may be useful to readers wishing to investigate these issues in greater depth.

Section I
The Future of Creative Control in the Digital Age

Keynote Remarks by David Bollier

A good friend of mine is a copyright attorney, a rock-ribbed defender of intellectual property rights, a strict constructionist, in fact. He works for a large law firm and spends a great deal of his life defending the intellectual property rights of major rock star clients, lyricists, and trademark owners.

Recently, to get my goat, my friend sent me a cartoon that showed a dozen raggedy musicians on a stage under a banner that read, "Concert to Save Napster." The emcee tells the audience, "Listen up, people. The good news is we've sold out. The bad news is, nobody paid."

The cartoon is pretty funny, I must admit, but what I also thought amusing was how my friend had emailed that cartoon to me after receiving it from someone else, somewhere in cyberspace, who had scanned the original print version into a computer. Who knows how wide an electronic circuit the cartoon had traveled? Dare we call this dastardly act of sharing….*piracy*?

My point is not to revel in hypocrisy, although that can be a lot of fun, but to suggest that our legitimate concerns for protecting intellectual property must be seen in a more holistic way.

We need to start by asking some larger questions, such as: What levels of copyright protection are truly needed, as an empirical matter, to reward artists sufficiently to assure a steady supply of their work? And just *who* do we mean by "artists" anyway? Just the familiar stars who make the big money -- or the far larger cohort of talented individuals who could feasibly make a living from their creativity – or the corporations that buy, own and market this creativity?

As part of this inquiry, we also need to begin to revisit the "cultural bargain" that constitutes copyright. If the public, through its representatives in Congress, is going to be in the business of granting exclusive property rights, we should ask what it is getting in return? Historically, the public has received limited accewss and use of copyrighted works as their end of the bargain – allowing the emergence of a robust "information commons" that any democratic society needs. But increasingly, the public seems to be getting less and less in return for the copyright rights it grants.

One of the preeminent challenges in the digital age, I believe, is to address how the cultural bargain of copyright protection should be structured in our new communications environment. We need to re-think and reinvent the legal principles and social institutions that enable the market and the information commons to coexist and work together in constructive ways. We need to re-negotiate the meaning of fair use and the public domain for our digital culture. Whether we like it or not, the reckoning on this issues for the foreseeable future is going to be a highly contentious political matter.

In the old days, before the Internet, natural frictions in the physical world prevented copyright owners from exerting absolute control over their content and its subsequent uses – and the public, for its part, did not have the means to ignore copyright protection on a mass scale. This made the idea of fair use and the public domain feasible. Content was locked onto the printed page, music was embedded in a vinyl disk, and the use of content was more constrained by geography. Now that digital technologies are allowing content to be ripped from its physical vessels, translated into ones and zeros, and sent around the globe with the click of a mouse, the political economy of creative content is being blown wide open.

At the first Hackers' Conference, in 1984, Stewart Brand put his finger on a central paradox about digital information that is causing us so much trouble today. "On the one hand," Brand said, "information wants to be expensive, because it's so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cost of getting it out is getting lower and lower all the time. So you have these two fighting against each other."[1]

The phenomenal growth of the Internet has greatly intensified the force of this paradox. Copyright owners want to strictly control their creative and informational works -- in all markets, on all media platforms, and even in how people can use copyrighted products. This is propelling an unprecedented expansion in the scope and duration of intellectual property protection – as well as more intrusive kinds of enforcement and new technologies of control.

We're seeing attempts to make Internet Service Providers serve as copyright police. We're seeing bold attempts by everyone from Microsoft, the Scientologists and the *Washington Post* to use copyright law to thwart criticism, parody and other fair uses of creative work on the Internet. The Better Business Bureau, among others, is trying to prohibit unauthorized hyperlinks to its web site, and companies are using trademark law to shut down sites like "walmartsucks.com." Content-owners are inventing alarming new kinds of corporate surveillance of people's web-surfing and reading habits. Film studios trying to shut down web sites that openly talk about

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[1] See transcript of conference in *Whole Earth Review*, May 1985, p. 49. Also, "Information Wants to Be Free" website, http://www.anu.edu.au/people/Roger.Clarke/II/IwtbF.html.

DVD encryption technologies, prompting computer programmers to post the code on t-shirts as a symbol of their endangered free speech rights.

At the same time that copyright law is reaching into new nooks and crannies of the information commons, a powerful force in the opposite direction is gaining momentum. Millions of individuals are learning that you don't necessarily *need* the market or copyright to create valuable kinds of economic and social value. You don't necessarily *need* the "Big Content" industries – the leading book, film, music, news and information corporations -- to find an audience for your great song or insightful essay or to engage in collaborative creativity. In fact, it may well be more convenient and cost-efficient to bypass the traditional market gatekeepers entirely…or avoid them for the time being in order to amass name-recognition and an audience…or find innovative *indirect* ways for getting paid for one's creativity.

It is a heretical thought, and perhaps the greatest open secret of the Internet, but the Internet can be seen as a massive "existence proof" that some fundamental premises of neoclassical economics and copyright theory are *wrong*. That is to say, they are operationally inaccurate in many circumstances.[2]

For example, economists assert that nothing of real value will be created without strong financial rewards and copyright protection. On the Internet, this simply is not true. Sure, there's lots of junk out there, but one person's garbage is another person's treasure. The real point is that concentrated markets sometimes choose not to facilitate certain kinds of value-creating transactions that the "gift economy" of the Internet – and the open, easy-access markets of the Internet – are ready, able and willing to serve.

A gift economy (and I'm *not* talking about Napster here) is a community of people who share among themselves without any monetary *quid pro quos*, a social arrangement that allows needs to be met without a marketplace.[3] I'm thinking about scientific disciplines that share research, online communities that freely exchange information, self-governed web sites for fans, and blood donation systems, for example. Gift economies are so fascinating because on the Internet they are sometimes eclipsing the market as the ultimate arbiter of what kinds of creative material can reach large audiences, and what audiences create and demand themselves.

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[2] See, e.g., James Boyle, *Shamans, Software and Spleens: Law and the Construction of Information Society* (Cambridge, Mass.: Harvard University Press, 1996).

[3] David Bollier, *Public Assets, Private Profits: Reclaiming the Information Commons in an Age of Market Enclosure* (Washington, D.C.: New America Foundation, 2001), Chapter 2.

Meanwhile, dozens of businesses with valuable brand franchises have straight-out capitulated to the topsy-turvy economic logic – or perceived logic -- of the Internet. Prestigious medical journals, MIT's OpenCourseWare initiative,[4] and scores of the nation's daily newspapers are voluntarily putting their content online, *for free*, choosing to reap value from branding, advertising, customer goodwill and web site traffic rather than from direct consumer payments. (In some instances, too, organizations are finding that the Internet now enables them to reap new market value from previously "worthless" material, such as archives of newspaper articles and university instruction made available through "distance learning.")

The new peer-to-peer file-sharing software is another intriguing experiment in harnessing the power of information-sharing. This innovation goes far beyond the illicit uses of copyrighted works, and has enormous implications for libraries, classroom learning, and the auctioning and exchange of goods. Lest we get too squeamish about Napster, we would do well to remember that the first adopters and popularizers of some of the most important new electronic technologies – the VCR, the Web, video-streaming, and more -- were pornographers.

With each passing week, the tension between strict proprietary control of content through copyright and information-sharing through the Internet commons is intensifying. New technologies and business models are plunging us further into unknown territory. The unresolved conflicts are making the intellectual foundations of copyright law feel like an M.C. Escher drawing. You follow one line of reasoning along one perspective only to find it turn back on itself and morph into a radically contradictory perspective. Sort of like my Napster-hating friend who couldn't help sharing someone else's copyrighted editorial cartoon. Sort of like cyber-libertarians who declare that property rights are bourgeois anachronisms while enjoying the fruits of intellectual property regimes in so many other areas of their lives.

We seem to be locked into a polarizing war between Information-Wants-to-be-Free advocates who traffic in a gift economy of digital content, and Copyright Maximalists who want to lock up every nugget of marketable creativity and information.

I believe neither side can prevail as much as they'd like. The problem is, at this point it is hard to imagine a sustainable and feasible middle ground. Online social practices are still in great flux. The viability of new business models remain highly uncertain, especially since the dot-com crash. The technology is being advanced by both proprietarians trying to perfect digital watermarks, encryption and other mechanisms to lock up all creative content to within an inch of its life, and by

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[4] Carey Goldberg, "Auditing Classes at M.I.T., on the Web and Free," *The New York Times*, April 4, 2001, p. A1.

the open-source guerillas and irregulars in the hardware and software business determined to liberate all content and thwart the rise of a copyright police state.

To make matters even more confusing, no one really knows how the general public will ultimately check in. Now that Napster has educated at least 62 million people that intellectual property law actually affects them personally, it's clear that public sentiment is on the move. IP will no longer be an obscure backwater of the law. It's fast-becoming a populist battleground. Indeed, is may be one of the preeminent political arenas in the emerging Knowledge Economy.

No wonder a new political consensus on how to treat creative content has not been forged! The politics and philosophies of creative production are in turmoil. Each faction thinks it can win the war on its own terms. And who's to say it can't? So everyone fights on, plotting new strategies for securing their "fair advantage" through stronger copyright laws, or court litigation, or ingenious digital rights management schemes, or new open source software programs, or novel business models that disintermediate the major industry players to empower the little guy. It resembles a massive rugby scrum.

The fairly stable consensus that once kept copyright law in the shadows -- with inter-industry disputes quietly brokered with little public input and then ratified by Congress – is no longer possible. There are too many industries with conflicting interests, too many new technologies roiling the marketplace, and too many consumer and creative constituencies with a vital stake in intellectual property policies.

It is useful, amidst this confusion, to focus on artists because it helps us re-connect with first principles. After all, copyright, as originally set forth in the U.S. Constitution, is intended as a tool to reward individual *authors* and so to advance the public interest. "The constitutional purpose of copyright," declared Congress in implementing the Berne Convention, "is to facilitate the flow of ideas in the interest of learning….The primary objective of our copyright laws is not to reward the author, but rather *to secure for the public* the benefits from the creations of authors."[5]

Copyright, in short, is not a plenary, absolute right of authors and their assignees – media corporations -- to control a creative work in every future market and circumstance. It is an instrumental mechanism that aims to generate a diverse, plentiful supply of creative and informational works for the public. Copyright has historically been considered a *limited right* counterbalanced with public responsibilities, such as stipulated rights of access, use and reproduction for the public.

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[5] House report on the Berne Convention Implementation Act of 1988, H.R. Report 609, 100 Cong., 2d Session, 23, cited in L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens, Ga.: University of Georgia Press, 1991), p. 49.

The trick is finding an equitable, sustainable balance to this important cultural bargain – a challenge made much harder by today's technology explosion, volatile markets and political free-for-all. The economic interests of various copyright industries are quite relevant, of course. But we should remember that they are not authors or the public, the intended beneficiaries of copyright protection. They are intermediaries – gatekeepers – marketing and distribution systems.

Meanwhile, the interests of these intermediaries and authors – or at least significant percentages of authors – are diverging sharply. In January, the newly organized Future of Music Coalition held its first conference on behalf of independent recording artists. Shortly thereafter, Courtney Love filed her potentially explosive lawsuit against her record company, trying to strike down standard contract terms she considers "unconscionable" and tantamount to "sharecropping."[6] The fissures between artists and the industry are also growing after the industry quietly tried to slip a four-word copyright amendment through Congress, without hearings. The industry's power play, which provoked great resentment among many artists, would have given the industry copyrights to songs that would otherwise revert to artists after 35 years.[7]

Freelance writers, meanwhile, have their own beefs against Big Media, which they have now taken to the U.S. Supreme Court. The *Tasini v. The New York Times* case, argued on March 28, 2001, alleges that publishers are re-selling freelancers' articles to electronic database owners and CD-ROM publishers without permission or payment.[8] [The Supreme Court on June 25, 2001, agreed with Tasini, ruling that publishers had infringed the copyrights of freelance writers by making their articles available in electronic databases without their permission.]

In one sense, these cases present novel controversies, but in another sense they merely exemplify a recurring problem in the history of copyright law: *how to reward authors without giving content-distributors exploitative control of the market.* This problem lies at the heart of so many copyright battles today. And it is a theme that animates a number of the case studies we will discuss today.

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[6] Chuck Philips, "Courtney Love Seeks to Rock Record Labels' Contract Policy," *Los Angeles Times*, February 28, 2001, p. 1. See also Courtney Love, "Courtney Love Does the Math," *Salon*, June 14, 2000, at http://www.salon.com/tech/feature/2000/06/14/love.

[7] Eric Boehlert, "Four Little Words," *Salon*, August 28, 2000, at http://www.salon.com/ent/music/feature/2000/08/28/work_for_hire.

[8] Felicity Barringer and Ralph Blumenthal, "Big Media v. Freelancers: The Justices at the Digital Divide," *The New York Times*, March 19, 2001, p. C1.

The expansion of new copyright protection in the new Internet environment should give us pause because the "network effects" of the Internet can amplify monopoly rights far more quickly and completely than in the pre-Internet economy. Think Microsoft. In an economy that often exhibits winner-take-all dynamics, to lavish expansive IP rights on a single company or oligopoly is more likely to promote monopoly behavior.[9] This is why many critics see the Digital Millennium Copyright Act as a key tool for the Big Guys to control new technologies and markets. It's why Amazon.com sought (and won) a patent for "one-click shopping," and why Priceline.com sought (and won) a patent for "name your own price" online auctions. Patenting of knowledge and basic functions, especially in software, is allowing the "first mover" to corner the market and monopolize any future creativity in that field.[10]

One reason that Big Content feels so beleaguered, I would suggest, is that both artists and the public are starting to rebel against leviathan market structures and inflexible business practices that are often bolstered through copyright law. Their gatekeeper prerogatives are being challenged. Suddenly, the Internet gives people attractive alternatives to closed, unresponsive markets and artificially limited choices. *Of course* we're going to hear a lot of howls of protest and pain!

But why shouldn't music lovers be able to use the Internet for sampling, acquiring and yes, even buying, recorded music? Why should a fan be forced to buy a $17 CD bundled with other, unwanted songs when he or she only wants to buy a single song? Without spending a fortune, how else can a fan listen to old songs, obscure artists and niche market styles that radio stations just don't play? Consumers gravitated to Napster not just because it was free – a big attraction, to be sure -- but also because it offered a more convenient, interesting listening experience than the five major record labels were prepared to offer.

Napster may yet prove to be a boon to the music industry, if a fair economic model for the service can be negotiated.[11] It is quite possible, as Professor Larry Lessig has pointed out with respect to Napster, that "this model of distribution could well facilitate a greater diversity in copyrighted content and musical sources. It could also, in the view of many, facilitate a greater return to authors – the intended

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[9] Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society* (New York: The Free Press, 1995).

[10] See John Gilmore, "What's Wrong With Copyright Protection?" at http://www.toad.com/gnu/whatswrong.html.

[11] Jon Pareles, "Envisaging the Industry as the Loser on Napster," *The New York Times*, February 14, 2001, p. B1. See also Eben Moglen, "Liberation Musicology," *The Nation*, March 12, 2001.

beneficiaries of the Constitution's Copyright Clause."[12] File-sharing technology may help develop new, more intimate and enduring relationships between artists and their audiences, and thereby invigorate the music industry. Jenny Toomey, the organizer of the recent Future of Music Coalition conference in Washington, D.C., explains: "The relationship between artists and fans has been intermediated for so long by promotion outlets and marketing companies that there's a disconnect [with audiences]."[13]

My point is that the Internet is facilitating many new *kinds* of artist-audience relationships. Artists and audiences in all fields are learning that they can connect with each other directly, to each other's mutual benefit. The expensive overhead of the star-making machinery – or the elite academic journals, or the TV networks, or the national press -- can be bypassed, or disintermediated. Fans can get cheaper, faster access to a more diverse roster of content. Citizens can choose from a richer variety of news sources. Scholars can share their research findings with a larger community of peers rapidly and cheaply.

If copyright law is chiefly about promoting the flow of ideas and content, and so advancing creativity and public knowledge, it's hard to argue with any of these outcomes.

An urgent question, however, is whether intellectual property law will be used by dominant industry players to thwart this renaissance of artist-audience relationships and innovative, competitive markets. That is to say, will copyright be used as an instrument of market protectionism rather than as an instrument to invigorate the information commons? My hope, of course, is that copyright will instead be used to help structure more open, equitable marketplace structures and practices, which are far more likely to produce more copious and diversified supplies of creative content.

These issues are very much on the mind of Senator Orrin Hatch, himself a songwriter and no enemy of the market. Hatch has said:

> I do not think it is any benefit for artists or fans to have all the new wide distribution channels controlled by those who have controlled the old, narrower ones…This is especially true if they achieve that control by leveraging their dominance in content or conduit space in an

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[12] Lawrence Lessig, *Expert Report of Professor Lawrence Lessig Pursuant to Federal Rule of Civil Procedure 26(a)(2)(B),* in *A&M Records Inc. v. Napster, Inc.,* and *Jerry Leiber v. Napster, Inc.*, U.S. District Court, Northern District of California, San Francisco Division.

[13] Ann Powers, "Artists Take a Serious Look at the Business of Music," *New York Times*, January 16, 2001, p. B1.

> anticompetitive way to control the new, independent music services that are attempting to enhance the consumer's experience of music.[14]

There is affirmative value in allowing experimentation with new digital technologies before shutting them down or allowing existing media industries to dominate them. But it is also important, as this experimentation proceeds, that artists acquire greater control over their creativity, both through copyright and in their contractual relationships with industry gatekeepers. This conference offers us a wonderful opportunity to explore these complicated issues with a 360-degree perspective, with a diverse spectrum of participants.

Last year, the National Research Council issued a landmark study, *The Digital Dilemma: Intellectual Property in the Information Age*, that intelligently outlined the key challenges in adapting intellectual property law for our times. Many members of the committee urged that a task force on "the status of the author" be established to examine how technological change is affecting the individual creator.[15] None has been created yet, but I like to think that today's gathering just might be a valuable dry run for that larger, more complicated and very necessary endeavor.

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[14] See Orrin Hatch remarks to the Future of Music Coalition conference, Washington, D.C., January 11, 2001, http://www.senate.gov/~hatch.

[15] National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (Washington, D.C.: National Academy Press, 2000), p. 233.

Section II
Artists, Technology & the Ownership of Creative Content

Ever since the Napster controversy, it has been abundantly clear that contemporary artists in virtually all fields of creativity are facing some novel quandaries. The proliferation of new digital technologies, the Internet and shifting market structures resemble a continuously exploding bomb. All sorts of finely wrought, long-honored legal principles, market practices, social values and moral norms in art and commerce are suddenly being called into question, if not battered into radically new forms.

Understanding the full meaning of the changes occurring is difficult because the issues tend to be so tremendously technical, complicated, cross-disciplinary and dynamic. Our very powers of observation seem crippled by a lack of intellectual categories and cultural consensus when attempting to explain the changes. No institutions or disciplines really exist for studying the new phenomena in all their richness.

This conference sought to address this problem in its own modest way by assembling a distinguished panel of commentators from diverse fields of endeavor. While no one was under the illusion that a new consensus or "answer" would emerge from the conference, the disparate perspectives helped tease out complexities that often go ignored in discussions about the digital future. Panelists included:

John Perry Barlow, the former lyricist for The Grateful Dead who co-founded the Electronic Frontier Foundation and is a Fellow at the Harvard Law School's Berkman Center for Internet and Society.

Marilyn Bergman, the award-winning lyricist ("The Way We Were," "Wind Mills of Your Mind") and President and Chairman of the Board of the American Society of Composers, Authors and Publishers (ASCAP).

The Honorable Edward J. Damich, a Judge with the United States Court of Federal Claims. Damich was a former Commissioner of the Copyright Royalty Tribunal and former Chief Intellectual Property Counsel for the Senate Judiciary Committee.

Jared Jussim, Executive Vice President, Intellectual Property Department, Sony Pictures Entertainment.

I. Fred Koenigsberg, Counsel to the American Society of Composers, Authors and Publishers (ASCAP), as well as legal representative for the Walt Disney Company, BMG Music, Inc., Demart Pro Arte B.V., and Henry Holt & Co.

Paul Mazursky, the film director of *Bob & Carol & Ted & Alice*, *Down and Out in Beverly Hills*, and *Enemies, A Love Story*, among other films.

Nicholas Meyer, the film director of *Time After Time*, *Star Trek II*, *The Day After*, and *Vendetta*.

Marybeth Peters, Register of Copyrights, Library of Congress, U.S. Copyright Office.

John D. Podesta, former Chief of Staff to President Clinton (1998-2001), Assistant to the President, and Staff Secretary (1993-1995). Podesta also held a number of top staff positions on Capitol Hill in the 1980s and 1990s. He is currently Visiting Professor of Law at Georgetown Law Center.

Rev. Madison Shockley, a former United Church of Christ minister for ten years, is an educator, community leader, television consultant and feature writer. Reverend Shockley is currently a Writer-in-Residence at the USC Annenberg School for Communication.

Gigi B. Sohn, Executive Director of Public Knowledge; former Project Specialist at the Ford Foundation's Media Arts and Culture unit; and former Executive Director of Media Access Project.

Harold Vogel, the head of Vogel Capital Management, a venture capital firm that deals in media/entertainment and aviation, and Adjunct Professor of Media Economics at Columbia University's Graduate School of Management.

Full biographies of the panelists, presenters and convenors appear at the conclusion of this report. This report consists of the following sections:

I. Defining Authorship in the Digital Age

One of the most striking realities of our time is how new computer and electronic technologies are opening up so many new frontiers for creativity, generating significant artistic and economic benefits. Yet paradoxically, the new technologies are also undermining conventional notions of authorship. Therein lies a colossal quandary.

First, consider the new varieties of creativity. Many musicians are excited about the new types of creativity made possible by "sampling" portions of other artists' works. Studios are pleased that the technologies enable them to perform new feats of digital manipulation in film, to "colorize" black-and-white movies, and to use streaming video to explore potential Internet markets. Publishers are thrilled that they can earn new revenues by putting stale newspaper archives online and by transferring other content to e-books, CDs and new electronic appliances. Advertisers are intrigued by the possibilities of resurrecting the actual moving images and voices of celebrities for film roles and licensing in advertisements.

An even more bewildering phenomenon is the rise of an entirely new sort of Internet-based "gift economy" of creativity that does not rely primarily on market or copyright incentives. Hundreds of thousands of computer users now work together in cyberspace to collectively create interactive games. The Internet-mediated collaborations of a global community of open-source software programmers have made Linux one of the most popular server operating systems. Dozens of other open-source software projects and thousands of affinity-group websites are products of a socially based "gift economy" that flourishes without direct financial rewards or copyright protection.

These new genres of creativity, alas, are exacting some hidden costs. They challenge many existing social and legal understandings of what it means to be an author. Just as networking technologies have eroded the boundaries that define nation-states, corporations and other institutions, so they are changing the familiar definitions of authorship. In a networked environment based on digital technologies, the nature of authorship is becoming more multifarious – and controversial.

Some of these dynamics are illustrated by *3 Dead Rats,* the case study about a fictional rock music group created by Professor Jane Ginsburg of Columbia University School of Law. The case study describes how a competing rock group, The Brutish Boys, made extensive and provocative use of "samples" of music made by 3 Dead Rats. The members of 3 Dead Rats are "very unhappy with the Brutish recording, which they contend distorts and demeans their music."

While artists have always relied upon other artists' work, the pervasive use of verbatim excerpts of other people's music is something new. The rise of digital sampling among certain communities of musicians raises new questions about the legitimacy of such practices.

What sorts of "borrowing" should be regarded as acceptable and even necessary, and what sorts of re-uses of work amount to plagiarism?

The new technologies do not just expand the creative palette, however. They also enable "content industries" to exploit new markets by making novel alterations to a work. Naturally, this raises serious concerns about the moral rights of creators. Arnold Lutzker of the law firm Lutzker & Lutzker in Washington, D.C., explored this issue in his case study, *A Little Cut, A Splash of Color, A Change of Mood – It's Only a Movie!*

In Lutzker's story, an Italian director Federico Bellini makes a brilliant film, *Hidden,* about a war resistance family that protects persecuted gypsies from the abuses of Italian fascism. Bellini was able to make the film only because he gained the trust of gypsies, who are notoriously suspicious of outsiders. In the scenario, a fictitious American film company, FOXXY Films, acquires *Hidden*, and decides to revamp it for the Internet and DVD markets by adding color, changing the "dreary" music of the original film, and adding new stock footage of World War II scenes. To make the film palatable to German audiences, FOXXY deletes scenes of the gypsies being shipped off to Nazi prisoner camps. Despite these changes, the film credits at the end read, "A Federico Bellini Film," and Bellini is credited as Director.

Both the Lutzker and Ginsburg scenarios illustrate how digital technologies and market forces are affecting the artistic integrity of works. The clash between creativity and commerce is a familiar story, of course. What makes these particular scenarios noteworthy is their disruption of settled social and legal norms. Many of the new artistic and commercial practices – sampling, digital alterations of films, altering works for international markets, collaborative creativity via the Internet – are novel enough that no consensus about their proper legal status has yet crystallized. They are essentially contested issues, which means that any resolutions will probably have to be forged through the crucibles of social practice, politics and law.

A. Two Contradictory Aspects of Authorship

One of the biggest conceptual problems is how to establish the balance between authorship and ownership in the new digital environment. In the analog era, before computer networking and the digitization of everything, two contradictory aspects of authorship were held in abeyance. It was impossible for creators to simultaneously use previous artistic works freely while also asserting strict ownership and control over their own works. After all, if artists could have perfect control over their works, they could prevent others from using their works in making new creations. The notion of fair use and the public domain would cease to exist.

In the analog era, practical circumstances made it difficult for authors to assert both claims at the same time. That's because works were largely confined to their physical containers (vinyl records, sheets of paper) and were used in local settings, and consequently

could not be easily copied, distributed and manipulated. Artworks could be used in a limited fashion – "fair use" – while copyright owners could still reap needed compensation. But today, of course, digital works are far more protean. The technologies enable authors to readily appropriate other people's works *while also* allowing authors (and copyright owners) to strictly control their own works far more rigorously than ever before. In this way, digital technologies are bringing to the fore, and intensifying, a latent paradox of authorship.

History has shown how authors have always drawn upon the plotlines, themes, images and musical traditions used by previous artists. Tom Stoppard blatantly "stole" from Shakespeare in writing *Rosenkrantz and Gilderstern Are Dead*, as did Leonard Bernstein in writing *West Side Story,* and Shakespeare himself retold stories that had been circulating for centuries. Creativity does not arise from nothing; it is necessarily a part of ongoing artistic traditions and cultural contexts.

This does not mean that there is no such thing as the inspired individual artist. "Authors are people who are there when the pages are empty," said Marilyn Bergman, the lyricist and President and Chairman of ASCAP. It is a premise of copyright law that by granting creators certain exclusive rights to control their works, they will be encouraged to create. The incentive derives in large measure from the economic gains that are possible through market exploitation of a work.

As we will see in Section III below, the terms of this debate are utterly altered by the new types of collaborative creativity in Internet contexts. Sara Diamond's case study, *Secret Mergers and Acquisitions*, describes how an international team of online game designers collaborate to create a popular server-based gaming platform. One of the issues raised by the scenario is how to assign ownership to a software program that has been assembled in an informal manner, without advance legal arrangements, by artists and developers living in many different nations. As in so many genres of Internet creativity, this software has no identifiable single author and the boundaries of the creative community are blurry. Who, then, should be regarded as the "author"?

The vexing challenge of the digital age is how to develop a new social consensus about the terms and scope of creative ownership that can take account of the special capabilities of the new technologies.

B. Creativity and Control: What Moral and Legal Terms Should Govern?

As new technologies make it much easier to gain access to other people's creative works, it is stimulating a tremendous explosion of new creativity. But it is also enabling entirely new forms of unauthorized uses. It is a highly contentious issue whether the new uses should be called borrowing, stealing – or the essence of creativity.

"I can't think of a song that I ever wrote that didn't in some way borrow from all the other songs that were written – in some cases, quite specifically," said John Perry Barlow, the former lyricist of the Grateful Dead and co-founder of the Electronic Frontier Foundation. "I mean, the whole project of creation – and music in particular – is a matter of sampling and taking and borrowing and enhancing."

This sentiment was echoed by Reverend Madison Shockley, who argued that there must be certain limits to the ownership of creativity if people are going to have "the freedom to re-create." "We have to be careful about asserting our own personal moral rights [to our creative works] to the extent that no one else will be able to utilize what we've put out there."

"Fair use" is the traditional copyright doctrine that enables creators to re-use the works of previous artists. Although the boundaries of fair use are not precisely drawn, the doctrine generally allows uses of copyrighted works for the purposes of criticism, comment, news reporting, teaching, scholarship and research. Limited forms of copying are permitted for private uses, educational purposes and library distribution. In this sense, fair use is an indispensable principle for a democratic society.

"You can't hamper the artist's right to satirize, to make fun of, to enhance, to change, to reinterpret," said film director Paul Mazursky. "I like documentaries about gypsies," he said, referring to the fictional Bellini film, "but if you want to make fun of them in a certain way, like the Ritz Brothers used to do, then you're losing something valuable that our society has to offer."

Artistic freedom requires a certain liberality in the application of fair use, said Mazursky, as well as a freedom from excessive legalism. Ever since some copyright owners began complaining that films contained even a few frames of copyrighted materials without authorization – posters, designs, images -- Mazursky feels, as a director, that he almost needs "a lawyer next to me for every shot, every line, every moment of filming. I'm serious! It's getting so complicated that how can you take a step in any direction and let the artist be free to be an artist? …Too much legality is going to make it impossible to do anything."

Fair use has been characterized as a "safety valve" that strikes a fair and practical – if imperfect -- balance between the conflicting claims of artists as *re-users* of creative works and artists as *owners* of creative works. It is also the means by which the citizens of a free society

are allowed to carry on a conversation among themselves about all manner of public and private concerns. Newspapers can quote from other sources; book reviewers can excerpt paragraphs; citizens can carry on public dialogues by citing previously published material.

But how should fair use – or more generally, the right to re-use or copy other people's creative work – be calibrated in a digital world? Because digital technology permits a re-user to make a perfect copy indistinguishable from the original, should the law tilt toward stricter new forms of control, sanctioning the use of technological encryption and "watermarks" to prevent unauthorized uses of digital works? This is essentially the rationale behind the Digital Millennium Copyright Act, which prohibits people from breaking technological encryption of copyrighted works or even sharing information *about* encryption techniques. Or should fair use in the digital era be more expansive, permitting the concept to be liberally construed on the grounds that this is precisely what encourages new creative output in a networked environment and advances public knowledge in a democratic society?

The answer to this dilemma depends a great deal on how you regard the creative process itself. Some people consider authors in the "romantic genius" tradition; they create something new from scratch, and therefore deserve maximum copyright protection for their originality. Others see authors as creative borrowers from shared artistic and cultural traditions, which suggests the need for modest copyright protection so that others can also have access to prior creativity.

"Moses didn't write the first five books of the Bible," Reverend Shockley pointed out. "They were, in fact, the old tradition of a people that later generations found convenient to codify and identify with a personality. That's true about a lot of the Bible in terms of how it evolved. That's why I think we need to preserve the character of communities and peoples."

If authorship is going to be defined as some mixture of these two perspectives – an individual act but also a cultural legacy -- the question is how copyright law can devise fair and legally feasible definitions of authorship for the digital age.

For John Perry Barlow, creativity is something that passes through a person's mind that one doesn't really own, and *shouldn't* be able to own. "I personally think that there is something blasphemous about that assumption," he said. "It's like a tap claiming to own the water that goes through it."

But for I. Fred Koenigsberg, Counsel to ASCAP, Barlow's notion is itself "blasphemous." "Everyone in this room has a shared, common cultural heritage. Does that make each and every one of you a creator? Is that what enabled Marilyn Bergman and her husband to write the lyrics to *The Way We Were*? Were they just nothing, just empty vessels through which the water of the cultural background flowed? It's silliness to me."

For denizens of cyberspace, however, this is precisely the point: *everyone* is a creator, even if the marketplace fails to recognize that fact. In the cultural space defined by the

Internet, the quality of one's creativity may not be recognized or rewarded by the market. But that, too, is precisely the point, say many Internet users. Highly centralized and controlled markets tend to privilege a more narrow range of mass-appeal, star-driven styles of creativity. By contrast, creativity in the Internet universe tends to privilege more idiosyncratic, unpredictable and democratic genres of expression. "Quality" and "creativity" are highly pluralistic and heterodox in the extreme. There is no single "bottom line" standard of judgment, just the messy social and aesthetic standards of thousands of online communities ranging from Web artists to political newsgroups, Civil War buffs to foreign policy academics, flower gardeners to Perry Como fans.

Whether and how the new forms of collaborative creativity on the Internet *can* be integrated with the principles of traditional copyright law remains an open question.

II. The Moral Rights of Creators

As the genres of creativity proliferate and mutate, due in no small part to the Internet, they are giving new prominence to the moral rights of authors. Why? Perhaps because the new technologies both empower and threaten creators. On the one hand, technology threatens the integrity of creative works as never before, allowing third parties to alter and distribute them with great ease. On the other hand, the technologies are also giving creators new options in reaching audiences/buyers directly, which naturally is quickening their interest in controlling how their works are distributed, sold and used.

To be sure, selling one's work directly via the Internet or other distribution channels may or may not be a viable economic proposition. Still, the very possibility of bypassing established market gatekeepers -- publishers, record labels, film studios -- is a heady prospect for many talented creators who cannot break into the market for whatever reason. Also, many artists are starting to take matters into their own hands by developing new creator-controlled venues such as peer-to-peer file-sharing and Web-based repositories of content. All this tumult seems to be sensitizing more creators to their distinct artistic and economic self-interests, and in turn spurring new controversies about artists' moral rights.

"Moral rights" is a legal notion which states that artists have the right to protect the integrity of their works (and thus their reputations) even after their works are sold in the marketplace. The essential integrity of an artwork cannot be compromised, for example, by unauthorized alterations, mutilations or destruction by subsequent owners. In those nations that recognize moral rights, the law makes a distinction between authorship of *a work* (whose artistic integrity must be protected) and ownership of *the copyright* (the legal right to exploit the work by sale, exhibition, distribution, performance or creation of a derivative work).

Europeans have long recognized the moral rights of authors, most notably in the Berne Convention, the most important international copyright treaty since its adoption in 1887. In most countries of the world, said Edward J. Damich, Judge at the U.S. Court of Federal Claims, "there is a connection between the personality of the author and his or her work, such that it endures and actually trumps the economic rights of copyright owners to some degree."

American law has taken a minimalist view to moral rights, however. With one notable exception – the right to regain ownership of a copyright after a thirty-five year period, the so-called "termination right" -- moral rights are not expressly provided for in copyright law. Rather, moral rights consist of a body of rights drawn from derivative copyright, laws of unfair competition, defamation and slander, and enforcement of contractual obligations.

Creators of "fine art" – paintings, drawings, prints, sculptures and still photographs – received a new set of moral rights protections in 1990 when Congress enacted the first federal

law giving artists moral rights, The Visual Artists Rights Act (VARA). The law consists of two key rights – the right of attribution and the right of artistic integrity. Artists can object to any alterations or mutilations of a work that would be "prejudicial to the honor or reputation" of an artist. They can also insist that they be credited as the author of a work or dissociate their names from altered works of theirs.[16]

While the law represented an advance for artists' moral rights, its scope is diminished by the fact that works-for-hire are excluded and the rights may be waived. Apart from VARA (which covers only a limited number of works), about a dozen states have moral rights statutes that provide limited moral rights to artists in certain circumstances.

These exceptions prove the rule that, in American law, copyright is primarily an economic, proprietary matter. It is not freighted with personal, moral or aesthetic claims.

The law aside, most Americans at some level continue to regard artistic integrity as an important if not inalienable right. They believe that an artist's reputation is embodied in his or her creative works, and that there ought to be a means for protecting that moral and reputational interest.

"I believe that there are human rights," said film director Nicholas Meyer, "and if I sign my name to a painting, a story or a script, my name is associated with that material and I do not want it used in a way that would be injurious to my honor or reputation." Even when alterations to an art form have the effect of *enhancing* the reputation of an artist, it is an ethical violation, said Judge Damich, because it violates the moral connection that people make between a creative work and the artist.

So despite the fact that creative works are items placed into commerce – commodities with price tags that can be sold to the highest bidder – there remains an irreducible sense that creators should retain certain moral control over their works. The precise *extent* of this control is likely to be contentious, however, because where the lines are drawn can affect other parties' economic and cultural interests.

For example, should performers be able to control future uses of their dramatic personas? This was one dilemma posed in the case study, *A Vietnam Diary*: the filmmakers use a combination of makeup on a relatively unknown actor and digital manipulation to recreate the Colonel Friday character previously portrayed by a major star who had died.

Should studios be able to re-edit or colorize a completed film as they see fit? This is a question posed by *A Little Cut, A Splash of Color…*: the filmmakers make drastic editing and music changes to the film about gypsies, *Hidden*, to make it more marketable.

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[16] Edward J. Damich, "Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status," 12 *Cardozo Arts & Entertainment Law Journal*, 387 (1994). See also Christopher J. Robinson, "The 'Recognized Stature' Standard in the Visual Artists Rights Act," 68 *Fordham Law Review* 1935 (April 2000).

Should artists be able to prevent unauthorized sampling of their music? This issue was examined in *3 Dead Rats*, in which the rock group, The Brutish Boys, liberally used digitally sampled sound tracks recorded by 3 Dead Rats.

In American law, questions such as these tend to be regarded through an economic scrim. The moral dimensions of creativity have limited independent standing in the law, which prompts some artists to expressly negotiate such rights in contracts, if they can. It is difficult to talk about artists' moral rights in any case because intangible artistic interests tend to blur with economic interests.

"If we colorize a film," said Sony's Jared Jussim, "it can go on television. If we don't colorize it, it will not go on television and will sit on our books because nobody wants to buy it. That's a fact of life." Some filmmakers such as Woody Allen are adamant about protecting their artistic rights despite the economic consequences, while other directors are more willing to surrender their artistic scruples or capitulate to studio edicts. The fugue between artistic integrity and market imperatives, in short, is a complex one.

Defining moral rights is made difficult, also, because market considerations frequently trump artistic concerns in show business. Films are scanned and compressed for broadcast transmission, which changes the work's original frame size and color resolution. When network shows are put into syndication, they sometimes have several minutes deleted to make room for more ads. Recorded music transmitted using MP3 compression technology loses some of its dynamic range and realism.

So when does the loss of artistic integrity become abhorrent and when is it a normal fact of life? The issue is skirted in some instances by disclosures – at the beginning of videotapes, for example -- that a work has been altered from its original version. But when changes are more significant, few artists are happy with a mere disclosure.

It bears noting that moral rights are not just about protecting authors. Changes to an artwork can also alter our understanding of history. Reverend Shockley pointed out that preserving the 1915 film *Birth of a Nation* in its original version is important for what it reveals about Americans' racial attitudes of the time. Sanitizing the film would not only violate the director's moral rights, it would mutilate a significant historical artifact.

An interesting twist on this issue arose in June 2001 when the Cartoon Network assembled a retrospective of old Bugs Bunny cartoons, some of which contained egregious slurs of African Americans and Native Americans. Rather than air the racist cartoons to a contemporary children's audience with no context, Warner Bros., the owner of the *Looney Tunes* cartoons, decided to withhold a dozen offensive cartoons. The company's extensive merchandising of *Looney Tunes* characters was an influential factor, it was reported.[17]

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[17] Associated Press, "Bugs Bunny Retrospective Coming," May 7, 2001.

The point of defending moral rights is that alterations to creative works can amount to tampering with history. Film director Nicholas Meyer recalled that historian Kenneth Clark once said that "a civilization keeps records of itself in three books -- the book of its deeds, the book of its words and the book of its art. I would submit that economics aside, movies are a part of our art. When you start changing movies, you are re-writing history."

Even though moral rights have not had a prominent place in American copyright law, attorney Arnold Lutzker believes that we are in the midst of a re-evaluation of the issues. The digital revolution is raising too many inescapable questions, he said, such as: "How should society treat its authors, its history and its creative works? How do we preserve them? How do we change them appropriately? When are changes inappropriate -- and who has rights with respect to them? I think we're in the process of clarifying these issues."

The following sections explore several significant theaters of controversy surrounding artists' moral rights:

- Should authors embrace or reject technological protections (e.g., encryption, digital watermarks) as a way to protect their moral rights?

- Should artists welcome or challenge unauthorized derivative uses of their works in a networked environment?

- Should there be such a thing as "persona rights" for actors, and when do those rights conflict with the public's freedom of expression?

- Is the work-for-hire doctrine a threat to artists' moral rights or simply a necessary tool for orchestrating large groups of diverse creative talent?

A. Technological Protection for Creative Works

Technological protections are increasingly popular ways for copyright owners to prevent copying and piracy. Two approaches predominate: encryption, which can prevent access to a work, and unique digital "watermarks," which facilitate "digital rights management" for determining how users may access and use a particular work.

Content industries have enthusiastically embraced these tools, especially since enactment of the Digital Millennium Copyright Act of 1998. The DMCA makes it illegal for users to overcome a technological measure that restricts access to digital works. The DMCA also makes it illegal and possibly criminal to *share* information about how to defeat a technological lock.

One of the first people prosecuted under the DMCA was a Norwegian teenager who wrote DeCSS, a program that allows people to run DVD movies on Linux operating systems (and not just on Windows-based DVD players), and posted the program on a hacker website. Civil libertarians and others argue that there was no piracy in this case (no one sold DVD films), but simply a legitimate fair use (reverse engineering of the encryption software and private viewing). In any case, they argued, the First Amendment protects the dissemination of software code. But the film industry argued that the program enables the theft of its intellectual property and violates the DMCA. A federal district court agreed, and banned the site from posting DeCSS and even linking to other sites that have the program. The case in now on appeal.

Two other highly controversial DMCA actions have occurred in 2001. In April, the music industry informed Princeton computer science professor Edward Felten that he would violate the DMCA if he went ahead, as planned, and presented a conference paper about flaws in the music industry's antipiracy techniques. Felten is now seeking a declaratory judgment that would allow him to present his paper. And in July, federal agents arrested a Russian programmer in Las Vegas for "trafficking" in a program that can break the copy-protection encryption in electronic books distributed by Adobe Systems. The arrest provoked widespread protests.

Anti-piracy technologies are needed, insisted Jared Jussim, Executive Vice President of the Intellectual Property Department at Sony Pictures Entertainment, because "without these technologies and the protections that they have, copyright owners will not release the works in a digital medium." In the analog media world, these technologies were not necessary, explained Jussim, because the integrity of analog works (TV images, radio signals, telephone voices) diminishes as they travel over distances. This makes it difficult or impossible to make useful, high-quality copies. But since the advent of the Internet, perfect copies of digital works can be made for virtually nothing and easily distributed around the world. That is why most copyright owners today insist upon technological protections against unauthorized access and downstream copying and dissemination.

B. Should Creators be Rewarded Through Copyright Control or Network Effects?

But should strict copyright control be applied to creative works circulated on electronic networks? John Perry Barlow rejects traditional copyright arguments that creators necessarily suffer economic loss if their works are freely used over electronic networks. "There is an assumption in the industrial economy that if you widely distribute something of value, then it loses its value the more that there is of it. This is certainly true in the physical world. But this is not necessarily the case with information."

Barlow cited Jack Valenti's dire warning in the late 1970s that "the videocassette recorder was to Hollywood what the Boston strangler was to women." In fact, the film industry now earns more revenues from videocassette and DVD releases of its product than from theatrical releases: $7.38 billion from video and $3.41 billion for DVDs (total, $10.79 billion) versus $7.67 billion from theatrical releases in 2000. "Valenti didn't get the fundamental economics," said Barlow, "and that is that the more things are distributed in information and creativity, the *more valuable* they become. It is exactly the opposite of what applies in the physical world. And if the motion picture industry is going to continue to fail to get this, they're their own worst enemy."

When new media technologies appear, said Gigi Sohn, a long-time media activist and former Project Specialist for the Ford Foundation, copyright law is invariably enlisted to help an industry fend off a would-be competitor. "But content industries always seem to conveniently forget history," Sohn noted. "Radio was going to kill film. Television was going to kill film. Television was going to kill radio. The VCR was going to kill film. Every single time, that's been proven incorrect."

The reason that information can *gain* in value the more that it is distributed, according to many economists, is a phenomena often called "network effects," or Metcalfe's Law. In the 1970s Robert Metcalfe of Xerox PARC helped formulate an equation for understanding the value created by adding one additional person *n* to an electronic network. His law holds that the value of a network grows by the square of the size of the network. In other words, the more nodes in a network, the value increased by the square of the number of nodes. This law explains why a telephone network becomes more valuable as more people become part of the network. It is also why the value of information distributed on the Internet grows at an exponential rate.

In a networked environment, said Hal Vogel, a media economist at Columbia University's Graduate School of Business, "Who's to say that this guy ripped off my sound bite and put it into something else, or re-configured it – 'Damn, I'm really angry about that!' But you know what? You put it out there. And if it's good enough or interesting enough to people, they're going to buy it."

Columbia Law Professor Jane Ginsburg took issue with the premise of this analysis: "You say that I do you *a favor* by making unauthorized copies or derivative adaptations of your works, because even if you didn't authorize it, you will get more fame and somebody will buy the work?"

Such an analysis skirts the issue of moral rights, Ginsburg suggested. Shouldn't an artist be allowed to prevent unauthorized or derivative versions of his or her work? An equally troubling question, she said – one that should be empirically verified – is whether people will indeed buy the creator's latest or next work.

John Perry Barlow took Ginsburg's argument as a dare and attempted an impromptu survey of the audience. He asked for a show of hands: "How many of you have downloaded music from Napster and subsequently bought an album?" Over half of the audience raised their hands. But the real question, countered Fred Koenigsberg of ASCAP, is: How many people have downloaded music from Napster and then *not* gone out and bought the album?

The problem with the "network effects" argument, Koenigsburg continued, is that it can always be used to justify "the other guy" paying creators. He cited his experiences at ASCAP in trying to get the jukebox, radio and recording industries to pay songwriters for the use of their music. "The radio stations tell us, 'You should be paying *us* because we're publicizing your music and you're going to make a fortune from all the records you sell. And the jukebox operators say, 'We shouldn't pay you. You should pay *us* because we're going to give you great record sales, and that's how you're going to make your money.' Then we sit down with the record companies – who by law must pay songwriters a total of about 7.5 cents for every record sold – and they say, 'Why should we pay you anything? You're going to get all that airplay on the radio and people are going to listen to it on the jukebox. You should be paying *us!*'"

Koenigsburg scoffed at "all of this wonderful pie-in-the-sky stuff about added-value and you'll make your money." The business model for *The Grateful Dead* may work for them, he conceded, but how about the individual songwriter who needs to earn money from a single hit song? Copyrights are indispensable for creators to earn a living, Koenigsburg insisted. It is an evasion to think that you can tell an author who stutters or a privacy-obsessed J.D. Salinger that he can simply earn money on the lecture circuit.

So in the collision between traditional copyright control and the value gains that can come through network effects, which regime should prevail?

"The point to me is not whether people can use music for free or whether the recording industry is going to litigate everyone out of existence," said Gigi Sohn. "There are 62 million Napster users [March 2001], and I'm a very happy one. But something needs to be done. A solution needs to be found. What are the options?"

Sohn called attention to a law review article by Harvard Law Professor Terry Fisher, which lays out six different possibilities. In an attempt to imagine new ways in which digital music could continue to circulate freely but composers and musicians would still have adequate incentives to produce music, Fisher proposed six possibilities: 1) tying Internet distribution to the sales of containers (the MP3.com model); 2) a tax and royalty system using hardware sales; 3) secured formats for copyrighted works; 4) subscriptions; 5) advertising; and 6) voluntary contributions. None of these options is perfect, Fisher concedes, but then, neither are the two strategies now warring for supremacy -- perfect control of digitized, copyrighted music and free distribution over the Internet.[18]

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[18] William Fisher, "Digital Music: Problems and Possibilities," posted at http://www.law.harvard.edu/

C. Publicity Rights in the Digital Era

If creators should have moral rights in their works, how far should they extend? Should unauthorized uses of an author's characters be permitted? Should actors have control of their fictional personas? Under what circumstances should third parties be allowed to use a celebrity's image without consent?

These issues are part of an obscure, murky area of the law often known as "persona rights" and "rights of publicity." Persona rights essentially involve the ownership of a fictional character that a performer may have crafted over the years. Think Groucho Marx, Archie Bunker, the Three Stooges. Publicity rights entail the rights of celebrities to control how their images may be used by others, particularly for commercial purposes.[19]

Seventy years ago, the federal courts rejected claims that anyone could make property claims in their public recognition, declaring that "fame is not merchandise." But a series of cases in later decades slowly carved out distinct rights for prominent people to control the commercial use of their name and likenesses. The early cases involved a circus performer, "the human cannonball," who objected to a television station broadcasting his act without payment, and a chewing-gum manufacturer who objected when another gum company put the same baseball stars on its cards.

But the floodgates for expanding the right of publicity swung wide open after a 1972 court decision, *Lugosi v. Universal Pictures Company Inc.*[20] Actor Bela Lugosi's estate complained that Universal Pictures, without permission, was exploiting the deceased actor's likeness in its commercial licensing of the Dracula character developed by Lugosi in the 1930s.[21] The court agreed, and soon the right of publicity blossomed into a new species of property that could be passed on to future generations ("descendability," in legal parlance).

The *Lugosi* decision set a trajectory that logically resulted in the April 2001 lawsuit seeking to block the publication of Alice Randall's *The Wind Done Gone.* The estate of Margaret Mitchell, author of *Gone With the Wind*, objected to Randall's re-telling of that novel from the perspective of a slave, arguing that it was plagiarism. Randall countered that while her book indeed used characters, scenes and dialogue from the Mitchell book, hers was a

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Academic_Affairs/coursepages/tfisher/Music.html, last revised October 10, 2000.

[19] Adam Liptak's article, "The New Protected Class?" in the Fall 2001 issue of *Brill's Content* offers an excellent overview of the history and current status of the rights of publicity. This section draws upon some of Liptak's examples.

[20] 172 U.S.P.Q. 541 (1972), *aff'd,* 25 Cal. App. 3d 813 (1979).

[21] For more on the aftermath of *Lugosi*, see David Lange, "Recognizing the Public Domain," 44 *Law and Contemporary Problems* (1981), which is considered a landmark law review article on the history of the public domain in intellectual property law.

critical reinterpretation of a major cultural work, which should therefore be protected by the First Amendment. A federal court struck down a preliminary injunction preventing publication of the book, but the Mitchell estate said it would appeal the ruling.[22]

A similar squabble broke out in France in 2001 when an author wrote a sequel to *Les Misérables* using many of the same characters from Victor Hugo's 19th century novel. Unlike the various plays, movies, television mini-series and even comic books that have been based on the original novel, the great-great grandchildren of Hugo consider the new derivative work -- *Cosette or the Time of Illusions,* by François Cérésa – a vulgar commercial exploitation of "an undeniable treasure of universal cultural heritage." Descendants of Victor Hugo cite his explicit claim that he wanted no sequel or deformation of his characters, and the French law protecting the moral rights of artists in perpetuity. Said Pierre Hugo, one of Hugo's descendants, "It's not a sequel when you resurrect characters. Just because the book is in the public domain, it doesn't mean you can do what you like with it." The Hugo descendants are trying to ban the publication of the new book.[23]

It is one thing to prevent false or misleading claims that a celebrity or artist endorses a given product. Such acts have been prohibited for decades under the federal Lanham Act, which bans false advertising and commercial fraud. But over the past thirty years, the federal courts have greatly expanded the rights of publicity to allow celebrities to prevent commercial expression that might merely *evoke* their distinctive public identity. Thus Johnny Carson in 1977 was able to squelch a company from naming itself "Here's Johnny Portable Toilets Inc.," and Vanna White successfully sued Samsung for futuristic print ads showing a robot in a fancy dress turning letters on a television game show.

The trend has shown no signs of abating. Tiger Woods sued a "sports artist" who was selling prints of his original paintings of Woods. Rosa Parks is suing a rap group, OutKast, to prevent them from using her name in a song title and a chorus, "Ah, ha, hush that fuss. Everybody move to the back of the bus."

Even the estates of public figures who have died are moving to cash in on the economic value of their images, raising curious issues about the moral rights of deceased celebrities. The estate of Martin Luther King, Jr., for example, has a copyright on the "I Have a Dream" speech, and recently licensed the speech to Alcatel, a telecommunications company, for a television ad showing King orating at the Lincoln Memorial. The ads drew derision and condemnation as a betrayal of King's identity and message.[24]

The new digital technologies have certainly accelerated the trend of propertizing celebrityhood. Many advertisers, as part of their job of attracting attention, find the new

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[22] David D. Kirkpatrick, "Court Halts Book Based on 'Gone With the Wind,'" *The New York Times*, April 21, 2001. Also, Kirkpatrick, "'Wind' Book Wins Ruling in U.S. Court," *New York Times*, May 26, 2001.

[23] Alan Riding, "Sequel to 'Les Misérables' Causes Legal Turmoil," *New York Times*, May 29, 2001.

[24] Vanessa O'Connell, "Alcatel Has a Dream – and a Controversy," *Wall Street Journal*, March 30, 2001.

possibilities irresistible. Who could not be jolted by a recent television ad showing deceased actor John Wayne shilling for Coors beer, or footage of Christopher Reeves, the paralyzed actor, getting up from his wheelchair and walking across a stage? The latter ploy was used in an ad by Nuveen, the asset management firm, to dramatize the "amazing" scientific advances that will happen in the future, which would presumably be financed by investments made via Nuveen.

As digital manipulation of characters and film evolves, the possibilities for moral and legal confusion are rampant. In the 2001 film, *Final Fantasy: The Spirits Within*, Columbia Pictures released the first feature film using software-synthesized actors. While critics complained that the characters did not look entirely real (slow lip movements, a weightless look when walking), future attempts at digitized characters are likely to be vastly improved. One trembles to imagine what happens when computer-synthesized characters begin to look and sound remarkably like some celebrated actor. How will legal boundaries be drawn then?

Other frontiers await. AT&T Labs announced in July 2001 that it would soon start selling a new software product, Natural Voices, that can reproduce the most subtle inflections and tones of the human voice. While the software will probably be used chiefly for text-to-speech voice synthesizing – a valuable service for blind people – it could also be used to simulate the voices of famous people for routine functions. Regis Philbin could do all of ABC's automated customer-service calls, suggested an AT&T Labs executive, and famous voices such as the late Harry Caray, the Chicago Cubs play-by-play announcer, might be resurrected for lucrative purposes.[25]

This naturally raises the question of who should "own" the synthesized celebrity voice. Similar questions will arise over the use of "character substitution" – the digital manipulation of celebrity images and characters in contexts that were not originally intended.

If the scientific community has conversations about bioethics, then perhaps the artistic and entertainment communities need to have similar conversations about the moral and legal quandaries that these new technological developments pose. "What vocabulary do we need in the artistic community to understand the issues?" asked attorney Arnold Lutzker. If the wills left by John Wayne and Fred Astaire are silent about the future commercial uses of their image, how should we as a society -- and how should the law -- regard such moral questions? Should the law have anything to say about the fact that Albert Einstein may be better known to young people as a pitchman for Apple Computers than as the greatest physicist of the 20th Century? Should heirs be free to strike whatever licensing deals they wish, or whatever the celebrity stipulates in his will?

These questions are not simply matters of private contract law. The public has a distinct stake in how publicity rights are defined. If the power to license is the power to

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[25] Lisa Guernsey, "Software is Called Capable of Copying Any Human Voice," *The New York Times*, July 31, 2001. Also, Guernsey, "The Desktop That Does Elvis," *The New York Times*, August 9, 2001.

commercialize and the power to suppress, then the scope and character of free expression is greatly affected. "Because celebrities take on public meaning," said one federal court, "the appropriation of their likenesses may have important uses in uninhibited debate on public issues." Despite this declaration, the court in this instance found that an artist who sold his sketches of the Three Stooges on t-shirts "conveys no discernible message" and so was not subject to the First Amendment. Yet another court, in August 2001, found that Mattel, the toymaker, could not suppress an artist's website photos of Barbie dolls in various sexual and violent circumstances, which the artist said were intended as cultural commentary.

"It's really about cultural power," law professor Michael Madow told *Brill's Content*. "It's about who gets to control the meaning of these people."

John Perry Barlow sees a larger significance in disputes over property interests in personae and fame: "These are the problems that we get ourselves into when we assume that expression is a form of property. I mean, copyright and the term, 'intellectual property' were not commonly used twenty years ago. Now they are very commonly used. And people assume that expression is the same thing as holding property….There's this sense of *ownership*."

Barlow urged that we regard creative expression as a social act – "a conversation between the audience and the creator" – rather than a legal fiction that objectifies expression as economic property.

D. The Work-for-Hire Doctrine and Moral Rights

When Congress created the work-for-hire doctrine as part of copyright law in 1909, it intended, in part, to make copyright renewals for composite works (encyclopedias, anthologies) more convenient. But with the rise of the new communications technologies and large media industries, the work-for-hire doctrine took on a much larger significance. It effectively vested copyright ownership in companies, not individual authors. *Employers* would henceforth own the copyright of whatever work products their employees produced.

Critics often complain that the work-for-hire doctrine changes the constitutional meaning of copyright. It gives corporations rights intended for individual creators. As a result, said Elliot Silverstein, President of The Artists Rights Foundation, authors are essentially deprived of moral rights over their works – something that authors in European nations take for granted.

"Only the copyright holder has the right to object in court to a reputation-damaging alteration of a film," noted Silverstein. But corporate owners of copyrighted works can make whatever alterations they wish, he said, "making the true author publicly responsible for the monster created by the alteration -- and the abuse of credit, truth and integrity." Silverstein concludes, "Legislatures have tortured the language until it surrendered – and reversed the

meaning of copyright in order to justify political service to giant economic constituents – government-sponsored misquotation."

Marilyn Bergman complained that she finds it "deeply offensive" that the work-for-hire rule gives film studios the right to make adaptations, a separate right that affects the moral reputation of the author. Studios can change a song however they wish, for example, said Bergman: "They always like the lyrics but never the music. They can change it. They can use it in a commercial without asking permission of the real author."

A basic rationale for the work-for-hire doctrine in copyright law is that it allows the centralized control of talent and resources. This makes for a more efficient and effective management scheme in large-scale productions such as films. But it is also highly offensive to some artists that a corporate name, and not the director, appears as the "author" at the end of a film. Director Paul Mazursky asked, "Couldn't we have the effective result of work-for-hire without saying that the corporation *is* the author – thus taking away a serious irritant to the real authors?"

Such a proposal was actually made in Congress during the course of copyright deliberations, reported Marybeth Peters, the U.S. Register of Copyrights. But the motion picture industry prevailed in its arguments that it needed to be the legal author in order to collect royalties in foreign countries.

Jared Jussim of Sony Picture Entertainment believes that a lot of moral rights issues are "imaginary problems." If a studio were to take an actor's image and use it in another film without his or her permission, that would violate his or her contractual rights. The listing of a studio at the end of a film as the "author" is an economic expediency, not a real usurpation of moral rights, he said, because the public is fully aware of who is the actual director of a film.

The "genius of the system," said Jussim, is that the work-for-hire doctrine allows the film studios "to bring people together to make films." Without such legal rights, no one would be able to assemble diverse resources, coordinate different talent, and finance film production. "Now if anybody wants to go and do it directly and pay themselves," said Jussim, "it's a free country. But I suggest you put it in the bank and your CD might do better." The United States film industry dominates the world market because of the copyright regime in place, said Jussim: "Who gives more to artists? We do. So don't go around killing the goose because you want the golden egg. The golden egg and the goose is the system we have now. Don't play with it."

Film director Nicholas Meyer replied that he was "very sad" to hear that "the status quo is the best and inevitable of all possible worlds….I think that just because this is the way that it is doesn't necessarily make it either just or best or incapable of being improved." For a filmmaker, in particular, Meyer believes "there has to be a way in which moral rights and economic rights can be equitably divided, such that we don't feel that our work can be taken and sub-divided and manipulated *ad nauseum* to the injury of honor and reputation – while at

the same time allowing the people who finance the work a reasonable chance of recouping their investment."

Judge Edward Damich, who previously dealt with the movie industry as Chief Intellectual Property Counsel for the Senate Judiciary Committee, was dubious about claims that nothing can be done: "I believe that the movie studios, if they wanted, could in good faith sit down with creative people and work out a moral rights regime that would work for both of them. But I've found that the movie industry is incredibly resistant even to talk about moral rights."

Legal authorship of a work is not a mere spiritual or moral concern, it was pointed out. There are significant legal and economic ramifications, namely, the termination right. After a company has held an artist's copyright for 35 years, it reverts to the individual author – *unless* the work is a work-for-hire. It was precisely this legal distinction that inspired the recording industry to seek a four-word amendment in a 1,740-page omnibus congressional spending bill in 1999. The amendment, adopted without hearings or debate, made sound recordings a work-for-hire.

The change enraged much of the artists' community. Don Henley complained, "On the one hand, RIAA [Recording Industry Association of America] creates all this flap about Napster and copyright infringement, while with the other hand, they've taken away artists' copyrights."[26] A year later, under intense pressure from recording artists, the amendment was repealed. "There was something elegantly honest about the work-for-hire legislation," John Perry Barlow sardonically noted, "because it ratified and gave legal sanction to what is already true in most cases. The recording industry takes some eighteen-year-old kid, promises him the world, and extracts from him anything he may think from that point forward."

The more fundamental problem is not so much copyright law itself, said some panelists, but the unfair economic power that content industries enjoy in their negotiations with artists. Whatever moral rights or copyright protections artists may enjoy in law can still be swept aside through contractual agreements. As an audience member put it, "In the great big picture, the artist may still have copyright protections. But if you want to do business with us, if you want to pay your rent this month [say the studios or record labels], then go ahead and sign away these rights to us. Hey, it's legal! We're simply making a contract with you."

The audience member suggested that, just as the various media industries have converged in recent years to reap new synergies, various artistic communities should do the same, especially with respect to contract practices. Fred Koenigsberg suggested that Congress could stipulate that certain rights be permanently vested with authors and cannot be waived

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[26] Eric Boehlert, "Four Little Words," *Salon.com*, August 28, 2000, at http://www.salon.com/ent/music/feature/2000/08/28/work_for-hire. For a legal analysis of the amendment, see Marybeth Peters, Register of Copyrights, Statement before the House Subcommittee on Courts and Intellectual Property, May 25, 2000.

by contract. The termination right in copyright law has such legal status. Why not extend it to other moral rights of creators? suggested some panelists. But they also agreed that persuading Congress to make other moral rights inalienable – i.e., not subject to legal transfer or sale – would be exceedingly difficult in the current political climate.

Strong moral rights are available to *some* artists: those who have the market power to bargain with content industries on a more equal footing. A famous instance in which a performing group asserted its moral rights and won involved the *Monty Python* television comedy series. ABC Television bought the show and proceeded to delete offensive scenes and re-edit episodes to give more time for advertisements.

Members of *Monty Python* sued ABC for trademark infringement, arguing that by contract they had retained the right to make derivative works, but ABC had done so without authorization. Furthermore, the *Python* troupe argued that ABC had violated the federal Lanham Act, which prohibits false or misleading descriptions of the origins of goods and services in commerce. Essentially, the edited ABC version of *Monty Python* was ruled to be a fraud on the public.[27]

John Podesta, a former Chief Minority Counsel for the Senate Judiciary Subcommittees on Patents, Copyrights and Trademarks, expressed doubts about using the Lanham Act to defend artists' moral rights. He noted that an artist recently brought suit against the Family Research Council, a Washington advocacy group, for reproducing a work, altering it and then holding it out to the public in a vile fashion. But the court found no Lanham Act violation, said Podesta, because the work had been presented in a non-commercial context. "I'm not sure the Lanham Act is a useful tool for artists in defending their moral rights," he said, recommending instead the use of contract language or changes in federal law, especially on the issue of proper attribution of a work.

Notwithstanding the *Monty Python* victory, the artists on the panel agreed with film director Paul Mazursky: "To me, it's very simple," he said. "The artist basically gets screwed. That's all there is to it." But another panelist objected, How can you say that if many of these stars get $20, 30 or 40 million dollars a picture? "As I said," Mazurksy replied dryly, "the artist gets screwed."

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[27] See *Gilliam v. American Broadcasting Companies*, 538 F.2d 14 (2d Circ. 1976). Although the court showed sympathy for the recognition of artists' moral rights, such rights generally cannot be vindicated in American law except through broader interpretations of the law of contracts, defamation, invasion of privacy, unfair competition and the right of publicity.

III. Control of Content in a Collaborative, Networked Environment

Over the years, copyright law has developed a number of legal standards for allocating rights among authors in joint works -- creative projects that involve collaborations among two or more people. While the fact-finding in disputes about authorship is sometimes debatable, the legitimacy of the legal categories for joint works has become well-accepted. However, the central point of Sara Diamond's case study, *Secret Mergers and Acquisitions*, is to question whether the received legal tests for joint authorship are really meaningful or practical in the online environment.

First, consider a more conventional dispute about joint authorship, as depicted in *A Vietnam Diary*, the case study presented by F. Jay Dougherty, Associate Professor of Law at Loyola Law School. The case explores a controversy between the estate of a playwright and a dramaturge over the authorship of a hit play. In the scenario, author Ming Nguyen writes *A Vietnam Diary*, a book about a young girl in Saigon during the most violent days of the Vietnam War. The book is translated into English and substantially edited by a book editor.

After it becomes a best-seller, a theatrical impresario acquires the dramatic and motion picture rights, and proceeds to hire playwright Bill Shakes to write the book and lyrics for a Broadway musical. Shakes in turn collaborates with a dramaturge, who adds a new character to the play, substantial new dialogue, and lyrics to several songs. Unfortunately, this collaboration is performed without any written agreement about the dramaturge's future credit or payment. But Shakes tells her that her contributions were invaluable and that he would "take care of" her.

The scenario raises questions about what criteria must be met for a collaborator to be legally considered a co-author. The case was inspired by the actual controversy between the estate of Jonathan Larson, the playwright for *Rent* who abruptly died two weeks before the show opened, and his dramaturge, who claimed she had made substantial creative contributions and so sued his estate for co-authorship credit and damages.

The outcome of a dispute over joint authorship turns on any number of variables, but in general the test under copyright law focuses on *intent* (Did the two or more parties intend that their contributions would be merged into a unitary whole?); *copyrightability* (Did each party contribute material that would be separately copyrightable?); and *intent to share authorship* (Did each party intend to share joint authorship in the final work?).

In Professor Dougherty's scenario, intent and copyrightability were present, but not the intent to share authorship. In the actual dispute over *Rent*, the court found that the dramaturge was *not* a co-author of the play as a joint work. Undeterred, the dramaturge

argued that she had nonetheless contributed copyrightable material to the play, and that various parties were therefore illegally using her works. This prompted a settlement of the dispute.[28] Professor Doughterty's scenario also examines a dispute between the director of the stage play, the producers and the film version of the play. The stage director claims that his stage direction is copyrightable, and was illegally used in the film without his permission. (For more, see the case study in Section III.)

A common problem in disputes about coauthorship, said Marybeth Peters, Register of Copyrights, is that "creative people go on and keep creating. They don't think about the consequences. There are basic consequences in the law for whether a work is a joint work or not; or whether somebody has a right to terminate the project or not; or whether it's a grant by joint authors or a grant by a single author. A lot of difficulties can be avoided if the parties had sat down early in the game and figured it out."

One reason this often does not happens, of course, is that the artists who are collaborating on a work – especially in its early stages – may not know if there's anything valuable there, any idea or character that might be worth developing. Also, establishing clear legal and economic relationships among a group of collaborators can chill the creative process. In some contexts, such explicit allocations of individual responsibility and reward can deter people from freely cooperating with each other in a spontaneous, creative way.

This is essentially the quandary posed by Sara Diamond's case study about creative collaborations in interactive, online environments. In *Secret Mergers and Acquisitions*, computer game designers from six nations are working together via the Internet to develop a new gaming platform. At the start, ownership of the software system is essentially moot because everyone is participating because they find it personally and professionally satisfying. They participate because they like the esteem of fellow designers, the cross-disciplinary collaborations and the challenge of exploring the outer boundaries of software design.

In this, the scenario mimics the dynamics of free software development, an open, collaborative process that has produced highly creative and effective software systems such as the Linux operating system and such major components of the Internet as Apache, Perl and Sendmail. The Internet has enabled tens of thousands of programmers around the world to participate in various software-development projects on a purely voluntary basis. Even though participants have no copyright stakes or hopes for financial rewards, these communities are producing some significantly innovative and effective programs. The latest frontier for much of this activity today is in peer-to-peer file-sharing programs, which allow individual computers to share digital files with each other without the intervention of a server computer.

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[28] *Thomson v. Larson,* 147 F. 3d 195 (2d Circ., 1998). See also Jesse McKinley, "Family of 'Rent' Creator Settles Suit Over Authorship," *The New York Times*, September 20, 1998. For more on how the role of dramaturge may overlap with the artist's role, see Lloyd Rose, "Whose Art Is It, Anyway?" *Washington Post,* December 8, 1996, p. G1, and William Grimes, "A Power Behind the Play Emerges Into the Light," *The New York Times*, February 2, 1997, Sect. 2, p. 4.

In Diamond's scenario, the Web-based game becomes a tremendous success and a large content company wants to buy the "property." This development prompts some members of the Secret Mergers design team to declare that they are the owners of the software platform, even though users have made many substantial elaborations and modifications to the game since its release.

The scenario raises issues that are currently on the frontiers of technology and law: What rights should users have to any software or content that they create in interactive online environments? According to conventional copyright principles, there are clear guideposts. But participants in online collaborations reject conventional legal distinctions as inappropriate to their medium. Indeed, leaders of the free software and open source movements adamantly resist attempts to apply traditional copyright principles to their work and have embraced the so-called "copyleft" provision (also known as the "General Public License"). This is a contractual clause added to copyrighted works that requires future users of the software to keep it in the public domain and forgo any proprietary claims. These programmers regard copyright law as undermining the social cooperation and sharing they see as central to their creative success.[29]

Another question raised by the scenario is how to allocate copyrights when the creators of a work via the Internet may actually live and work in different countries. Whose legal regimes should apply? In the online environment, it becomes exceedingly difficult if not impossible to tease out who is really responsible for the various aspects of the game – the engineering design, visual designs, sounds, story elements and media objects.

There are other interesting quandaries posed by the scenario, but the basic issue is whether the familiar legal categories of copyright law can suitably address the ways that creativity occurs on the Internet. While traditionalists may insist that it can, the denizens of cyberspace often insist that digital technologies have their own nature and that online culture is fundamentally different. On the Internet, creativity need no longer be channeled through centralized distributors such as TV stations or book publishers; it is more decentralized and democratically accessible. As a result, creativity and quality in cyberspace have a different "flavor." They emanate from the fringe in rich and unpredictable diversity and go way beyond the more homogenized genres of marketable cultural expression that we associate with the mass media. Shouldn't copyright law recognize the distinctive dynamics of these sorts of creativity?

Sara Diamond pointed out that the Internet is changing our relationships to creativity. People are no longer simply "consumers" of merchandised creativity that comes from distant mass-media sources in a one-way stream. Increasingly, because of the interactive capabilities of the Internet, people are becoming creators themselves.

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[29] See, e.g., Richard Stallman's reasons for founding the Free Software Foundation, at http://www.fsf.org. Also, see Chris DiBona et al., editors, *Open Sources: Voices from the Open Source Revolution* (Sebastapol, Calif.: O'Reilly & Associates, 1999).

Some of the tension that exists in copyright policymaking today may stem from the fact that many Internet creators have very different assumptions about creativity than the various media industries. Millions of Internet creators are indifferent about controlling or profiting from their creativity, which is why they so freely post their works on such an open, unsecured global medium. These creators are chiefly concerned about preserving their inalienable freedom to create online and to publish for a potentially large audience. Compensation, if it materializes at all, occurs through other avenues. But for the various media industries, legal ownership of creative works and the protection of existing market investments are indispensable concerns.

Resolving this "cultural divide" may become more difficult as the new online culture expands and flourishes – and clashes with the defenders of the "old culture" based on print and mass media. "I think there has been a fundamental shift in audiences," said Ms. Diamond. "Especially among the younger generation, there is a desire to adapt the cultural products that we see. It's about democracy. It's not necessarily about a desire to steal, but to appropriate. If you look at television, it's quotation, quotation, quotation. So people ask why they can't quote, too. Why can't they take what others make and find a way of making it different, better, transformed? Why can't we look at rights issues that *enable* rather than trying to shut the new technologies down?"

Diamond sees an inescapable dialectic between proprietary industries that want to cripple open technologies and software designs, and Internet subcultures that, as matters of cultural principle and design innovation, will relentlessly attack barriers to their creative freedom. Diamond contends that it is futile to try to design a closed technical system that will be utterly protected by technology or law. "The hackers won't let you. *They will not bloody let you.* I'm telling you, they'll hack it -- and figure out a way to hack the next technical solution. It *will* be hacked. And they will find ways of creating sub-cultures that you [copyright industries] will then appropriate, and bring into your companies and make a lot of money on." Diamond's impassioned statement drew a spontaneous burst of applause.

Conclusion:
Renegotiating a New Rapprochement Between Creativity and Commerce

A core question lingered: How will artists get paid?

"Anything that enables people to hear more music, to see more films, to read more books, is better," agreed Marilyn Bergman, the lyricist and ASCAP president. "But the creators of these works still have to be compensated thoroughly. There are new business models that will have to be worked out. At this point, nobody's making any money."

This may be the greatest impasse. The problem resembles that which faced Leo Tolstoy, who considered giving up the copyrights to his own works so that everybody and anybody could read them, said Nick Meyer. But Tolstoy's wife bitterly opposed that because she knew that the printers would simply publish his books without paying Tolstoy anything, and the public – and Tolstoy -- would be as bad off as before.

The irony, said John Perry Barlow, "is that copyright, which was originally designed to protect the rights of creators against institutions, is now largely being used by institutions to protect themselves against audiences and creators."

While that may be an overstatement, said Professor Jane Ginsburg, "What's really exciting about the digital age is the change of [communications] infrastructure. An author who surrenders the copyright but can't get the work to the public, doesn't get anywhere --- and neither does the public. But if you don't need the infrastructure of the 19th Century publishing industry – if you can use the Internet to bring your work to the public directly – that's a big change. There's still the question of how authors are going to get paid for it. But at least they can communicate without all those intermediaries whom we've learned to love to hate."

The dilemma of how to assure financial rewards for creators is linked to other knotty issues that have no easy resolution. Two prominent issues include the very definition of authorship and the fate of the public domain.

In a networked world that dissolves boundaries and facilitates easy collaboration, how shall authorship itself be defined? It is possible to imagine traditional legal notions of individual authorship being extended in the new digital environment. But will such extensions foreclose the kinds of fluid, collaborative creativity that are developing on the Internet, particularly through peer-to-peer file-sharing technologies? How far can creative

works be "propertized" before that process begins to harm new creativity by shutting off access to the public domain and limiting fair use?

The fate of the public domain in our digital culture is another issue of immense consequence. If property rights in digitally based creativity are going to be expanded in scope, duration and enforceability – tending to give copyright owners, especially corporations, much greater control over creative works -- how will the non-commercial needs of citizens, artists, students, libraries, schools and universities, journalists and other constituencies be met? Will most forms of information-exchange and expression be forced to occur through markets, or can there be viable forms of non-market content-exchange of the sort that we have taken for granted in science, democratic culture and the Internet? Will creators need formal permissions to do the kinds of copying, quotation, modification, sharing and private uses that are now taken for granted? The answers to such questions have serious implications for the character of our society in the decades ahead.

We may be stuck in this interregnum for some time. A farrago of venerable social practices and legal norms is colliding in unpredictable ways with utterly novel digital technologies, yielding up new permutations that resemble – but differ in crucial ways – from previous ones. The pace of such tumult shows no signs of lessening. While much is unclear about the future, it seems almost certain that we will have to develop new social and legal footings for nurturing creativity in the emerging digital culture.