

Artists, Technology & the Ownership of Creative Content
Creative Control in the Digital Age:
Scenarios for the Future

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Special thanks to the ATO conference committee for the production of this publication and planning of the conference: Johanna Blakley, Caty Borum and Tim McKeon of The Norman Lear Center; Kathy Garmezzy and Amy Brotherton of The Artists Rights Foundation; and Karen Sprague of the USC Law School

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Saturday, March 31st, 2001, 9:30 a.m. – 4:00 p.m.
Annenberg Auditorium
The Annenberg School for Communication, University of Southern California

CONFERENCE SCHEDULE

- 8:30 am Continental Breakfast, Annenberg East Lobby
- 9:30 am Welcome by Martin Kaplan (The Norman Lear Center)
Annenberg Auditorium
- 9:35 am David Bollier presentation, *The Future of Creative Control in the Digital Age*
- 9:50 am **PANEL 1: Theater**
Discussion moderated by case study writer Jay Dougherty,
featuring the short play “A Vietnam Diary”
- 11:00 am Break *****
- 11:15 am **PANEL 2: Music**
Discussion moderated by case study writer Jane Ginsburg,
featuring the short film “Three Dead Rats”
- 12:30 pm Lunch *****
- 1:30 pm **PANEL 3: Film**
Discussion moderated by case study writer Arnold Lutzker,
featuring the short film “Artista Speaks Out”
- 2:40 pm Break *****
- 3:00 pm **PANEL 4: New Media & Gaming**
Discussion moderated by case study writer Sara Diamond,
featuring the short play “Power to the People”
- 4:10 pm Closing remarks by Ruth Weisberg (USC School of Fine Arts)

Panelists



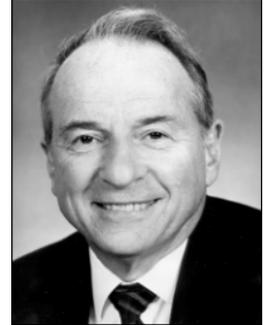
John Perry Barlow



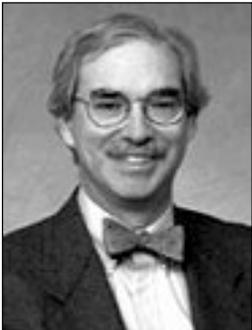
Marilyn Bergman



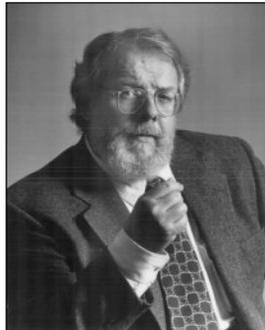
Edward Damich



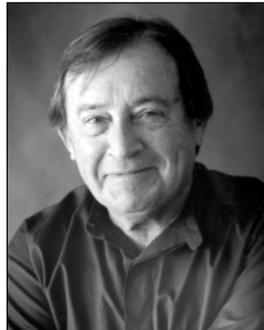
Jared Jussim



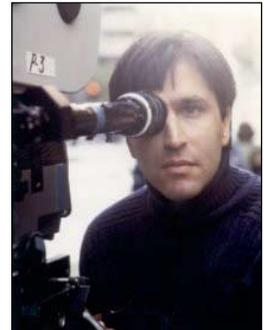
I. Fred Koenigsberg



David Lange



Paul Mazursky



Nicholas Meyer



Marybeth Peters



John Podesta



Gigi Sohn



Harold Vogel

Photo for Madison Shockley unavailable.

Artists, Technology & the Ownership of Creative Content Biographies: Panelists

John Perry Barlow

John Perry Barlow is a former Wyoming rancher and Grateful Dead lyricist. More recently, he co-founded and still co-chairs the Electronic Frontier Foundation, and he was the first to apply the term Cyberspace to the "place" it presently describes. In 1997, he was a Fellow at Harvard's Institute of Politics and he has been a Berkman Fellow at the Harvard Law School since 1998. He works actively with several consulting groups, including Diamond Technology Partners, Vanguard, and Global Business Network.

In June 1999, *FutureBanker* magazine named him "One of the 25 Most Influential People in Financial Services." He has written for a diversity of publications, including *Communications of the ACM*, *Mondo 2000*, *The New York Times*, and *Time*. His name has been on the masthead of *Wired* magazine since it was founded. His piece on the future of copyright, "The Economy of Ideas," is taught in many law schools and his "Declaration of the Independence of Cyberspace" is posted on thousands of Web sites.

Marilyn Bergman

Marilyn Bergman is President and Chairman of the Board of ASCAP (The American Society of Composers, Authors and Publishers). In this post, she acts as an advocate for songwriters and composers around the world, championing their rights and the protection of their copyrights. As an award-winning lyricist (songs include "The Way We Were," "The Windmills of Your Mind," "You Don't Bring Me Flowers"), she has received three Academy Awards, four Emmy Awards, two Grammy Awards, and a Cable Ace Award. Bergman was inducted into the Songwriters Hall of Fame in 1980.

The Honorable Edward J. Damich

Judge Damich serves on the U.S. Court of Federal Claims in Washington, D.C. From 1995-98 he was the Chief Intellectual Property Counsel for the U.S. Senate Judiciary Committee. During this time he assisted the Chairman, Senator Hatch, in passing the Digital Millennium Copyright Act, which updated U.S. law for the digital age and for the Internet and is perhaps the most significant change in copyright law since the Copyright Act of 1976.

Judge Damich was a commissioner of the U.S. Copyright Royalty Tribunal and has been a Professor of Copyright Law at various universities for 20 years. Currently he serves as Adjunct Professor of Law at Georgetown University Law Center. As a professor, he testified before congressional committees and subcommittees on numerous occasions on copyright issues, including U.S. adherence to the Berne Convention and moral rights. He has written numerous articles on copyright, mostly on moral rights.

Jared Jussim

Jared Jussim is a graduate of the City College of New York and Harvard Law School. He is admitted to the Bar in New York, Michigan, and California. Currently, he is Executive Vice President of the Intellectual Property Department at Sony Pictures Entertainment.

I. Fred Koenigsberg

Mr. Koenigsberg is Counsel to the American Society of Composers, Authors and Publishers (ASCAP), and he advises the Society and its Board of Directors on all matters as its chief legal officer. He also represents the Walt Disney Company, BMG Music, Inc., Demart Pro Arte B.V. (owner of all intellectual property rights of Salvador Dalí) and Henry Holt & Co., Inc., among many other clients, advising as to copyright matters.

Mr. Koenigsberg concentrates in copyright law, including counseling and litigation. He negotiates and drafts license agreements, counsels on copyright matters including estates with copyright issues, litigates infringement claims, conducts administrative proceedings before the United States Copyright Office and the Copyright Arbitration Royalty Panel (successor to the Copyright Royalty Tribunal) and participates in legislative efforts in the United States Congress. With significant experience in international copyright, Mr. Koenigsberg has been named by the United States Department of State to the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, was a member of the National Committee for the Berne Convention, and the Advisory Committee on Copyright Registration and Deposit (ACCORD) of the Library of Congress and was a private sector representative on the United States delegation to the diplomatic conference on the WIPO Copyright Treaty.

Other Bar Associations and memberships include: American Bar Association Section of Intellectual Property Law, Chair; American Intellectual Property Law Association, Former President (first copyright lawyer to hold that position); Volunteer Lawyers for the Arts, Director; Copyright Society of the U.S.A., Former Trustee; Columbia University, Adjunct Professor of Law. Mr. Koenigsberg is admitted to the New York State Bar.

David Lange

David Lange is Professor of Law at Duke University, where he has been a member of the faculty of the School of Law for 29 years. He is currently a member of the Board of Trustees of the United States Copyright Society. Prior to joining the Duke faculty he worked as a writer, producer, director and production coordinator in radio, television and motion picture production; as a practicing lawyer in Chicago, with an emphasis in media law; and as General Counsel to the Mass Media Task Force of the National Commission on the Causes and Prevention of Violence. He is a founding member of the ABA Forum Committee on the Entertainment and Sports Industries and served on the Forum Committee's initial Governing Board. He acted for a number of years as counsel to a leading North Carolina law firm where his practice emphasized copyright, trademarks and unfair competition and related intellectual property matters.

At the Law School he teaches courses in intellectual property, copyright, trademarks and unfair competition, software protection, entertainment law (including motion picture production, finance and distribution), and telecommunications law and policy from Gutenberg to cyberspace.

Paul Mazursky

Writer-director-actor-producer Paul Mazursky has created a body of work over the past thirty years that has established him as one of America's most respected filmmakers. Besides acting in many films, including Stanley Kubrick's "Fear and Desire," "Blackboard Jungle" and "Two Days in the Valley," his directorial credits include, "Bob & Carol & Ted & Alice," "Blume in Love," "Next Stop Greenwich Village," "Down and Out in Beverly Hills," "Enemies: A Love Story" and most recently, the HBO movie "Winchell."

Nicholas Meyer

Nicholas Meyer is a screenwriter and director with numerous credits. His career began at Paramount Pictures' publicity department in New York in 1968, where he became the unit publicist on the 1970 hit, "Love Story," before writing a non-fiction account of the filming, "The Love Story Story," and relocating to Los Angeles.

Meyer's directing debut – from his own screenplay – occurred in 1979 with "Time After Time." This was followed by "Star Trek II – The Wrath of Khan" (1982), and "The Day After" (1983), ABC's nuclear-themed movie, which remains the single most watched television film ever made. Other directing credits include "Volunteers" (1986), "The Deceivers" (1988), "Company Business" (1991), "Star Trek VI, The Undiscovered Country" (1991), and most recently, the HBO film "Vendetta" (1999), starring Christopher Walken. Other screenplays include "Sommersby" (1993), as well as co-writing chores on "Fatal Attraction" (1987) and the animated feature "Prince of Egypt."

Marybeth Peters

Marybeth Peters became the United States Register of Copyrights on August 7, 1994. From 1983-1994, she held the position of Policy Planning Adviser to the Register, and from 1986 through 1994, she was a lecturer in the Communications Law Institute of The Catholic University of America Law School and previously served as Adjunct Professor of Copyright Law at The University of Miami School of Law and at The Georgetown University Law Center. She has also served as Acting General Counsel of the Copyright Office and as chief of both the Examining and Information and Reference divisions.

Ms. Peters is a frequent speaker on copyright issues; she is the author of [The General Guide to the Copyright Act of 1976](#). During 1989-1990, Ms. Peters served as a consultant on copyright law to the World Intellectual Property Organization in Geneva, Switzerland. She is a member of the Bar of the District of Columbia, The Copyright Society of the U.S.A., the Intellectual Property Section of the American Bar Association, ALAI-USA, the District of Columbia Bar Association, including the Computer Law Section, the D.C. Computer Law Forum, and the Computer Law Association, currently serving as a member of the Board of Directors.

John D. Podesta

John Podesta served as Chief of Staff to President Clinton from 1998 until 2001. In that capacity, he was responsible for directing, managing, and overseeing all policy development, daily operations, and staff activities of the White House and coordinates the work of federal departments and agencies.

Mr. Podesta first served in the Clinton Administration from January 1993 to 1995 as Assistant to the President and Staff Secretary. In that capacity, he managed the paper flow to and from the President, including coordination of White House Senior Staff advice on Presidential decision memoranda and approval on all Presidential documents. He also served as a senior policy advisor to the President on government information, privacy, telecommunications security and regulatory policy.

Following his tenure as Staff Secretary, Mr. Podesta joined the faculty of The Georgetown University Law Center, his alma mater, as a Visiting Professor of Law, teaching courses on congressional investigations, legislation, copyright and public interest law.

In January 1997, Mr. Podesta returned to the White House as an Assistant to the President and Deputy Chief of Staff where he managed policy initiatives, developed overall legislative and communications strategy, and coordinated the selection of senior Administration appointments, including federal judges.

Mr. Podesta has held a number of positions on Capitol Hill including: Counselor to Democratic Leader Senator Thomas A. Daschle (1995-1996); Chief Counsel for the Senate Agriculture Committee (1987-1988); Chief Minority Counsel for the Senate Judiciary Subcommittees on Patents, Copyrights, and Trademarks; Security and Terrorism; and Regulatory Reform; and Counsel on the Majority Staff of the Senate Judiciary Committee (1979-1981).

In 1988, Mr. Podesta founded with his brother Tony, Podesta Associates, Inc., a Washington, D.C., government relations and public affairs firm.

A Chicago native, Mr. Podesta worked as a trial attorney in the Department of Justice's Honors Program in the Land and Natural Resources Division (1976-1977), and as a Special Assistant to the Director of ACTION, the federal volunteer agency, (1978-1979). He has served as a member of the Council of the Administrative Conference of the United States, and the United States Commission on Protecting and Reducing Government Secrecy.

Reverend Madison Shockley

In a career spanning several decades, the Reverend Madison Shockley has been a minister, educator, community leader, television consultant, feature writer, and distinguished member of several community organizations in Los Angeles. As a pastor of a Los Angeles inner-city congregation for ten years, he has been responsive to a range of ecumenical, social and political issues, including organizing and moderating over 150 multiracial "community conversations" after the 1992 Los Angeles riots. He has served as a board member (past and present) of various community organizations including: Southern Christian Leadership Conference/Los Angeles (SCLC), National Association for the Advancement of Colored People/Los Angeles (NAACP), Love is Feeding Everyone (LIFE), Los Angeles Educational Alliance for Reform Now (LEARN), Mobilization for the Human Family: A Progressive Christian

Movement (vice president), United Church of Christ Commission for Racial Justice (vice president), United Church of Christ Justice and Witness Ministries, and on the Advisory Board for the National Black Religious Summit on Sexuality. In addition, he acted as a key community trustee for the Los Angeles Educational Alliance for Restructuring Now (LEARN), and he was a recent candidate for the City Council of Los Angeles.

Reverend Shockley served as a television sitcom consultant for “Amen” for five years, and “Good News” for two years. He is featured as a freelance commentary columnist for *The Los Angeles Times*, and has written op-eds on race relations, religion, police reform and misconduct, law, music, culture and politics.

Gigi B. Sohn

Gigi B. Sohn is a consultant with the Center for the Public Domain, a nonprofit foundation that seeks to strengthen the public community of shared information, culture, and ideas that is vital to a democratic society. She is currently an Adjunct Professor at the Benjamin N. Cardozo School of Law, Yeshiva University, in New York City, and a Senior Fellow at the University of Melbourne Faculty of Law, Graduate Studies Program, in Melbourne, Australia. She is a former Project Specialist in the Ford Foundation’s Media, Arts and Culture unit and former Executive Director of the Media Access Project (MAP), a Washington, D.C.-based public interest telecommunications law firm that represents citizens’ rights before the FCC and the courts. In recognition of her work at MAP, President Clinton appointed Ms. Sohn to serve as a member of his Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (“Gore Commission”) in October 1997.

Harold Vogel

Harold Vogel, presently Adjunct Professor of Media Economics at Columbia University’s Graduate School of Business and a chartered financial analyst, is the head of Vogel Capital Management, which specializes in venture capital funding of early stage companies in media/entertainment and aviation. His hedge fund partnership is Atrium Partners, LLC, based in New York City. Mr. Vogel is the author of two textbooks, Entertainment Industry Economics and Travel Industry Economics, both published by Cambridge University Press. He is also the author of the novel Short Three Thousand.

As a former senior entertainment industry analyst for Merrill Lynch, Mr. Vogel was selected a record ten times as the top entertainment industry analyst by *Institutional Investor* magazine. He holds an MBA in finance from Columbia and an MA in economics from NYU.

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Artists, Technology & the Ownership of Creative Content Biographies: Case Study Writers

Sara Diamond

Sara Diamond is currently the Executive Producer for Television and New Media and the Artistic Director of Media and Visual Arts at the Banff Centre for the Arts (Alberta, Canada), where she works to integrate television and video environments with visual arts. She also created the New Media Institute in the Media and Visual Arts department, which offers a year-long series of think tanks, summits and workshops. She continues to curate at least one or two major exhibitions each year that usually involve interactive media (most recent: “Cyber Heart” at the Banff Center). Before joining the Banff Centre, she taught at the Emily Carr Institute of Art Design in Vancouver, at UCLA and at CAL Arts.

Jay Dougherty

Jay Dougherty is an Associate Professor of Law at the Loyola Law School, where he teaches courses on Copyright Law, Entertainment Law, Motion Picture Production & Finance, and Entertainment Law Practicum. Before joining the Loyola faculty, he served as Assistant General Counsel for Turner Broadcasting System, responsible for Turner Pictures, and as Senior Vice-President of Production/Worldwide Acquisition Legal Affairs for Twentieth Century Fox. He has also worked in a legal capacity for United Artists Pictures and Metro-Goldwyn-Mayer, and he has represented various Broadway composers and authors. He is a Trustee, Los Angeles Copyright Society and Trustee, Copyright Society of the U.S.A.

Jane Ginsburg

Jane Ginsburg is the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia University. She has published three casebooks: Legal Methods: Cases and Materials (1996); Cases and Materials on Copyright (with Gorman, 5th ed. 1999); Trademark and Unfair Competition Law. 2nd ed. 1999). She has authored numerous law review articles as well.

Ms. Ginsburg has taught French and U.S. intellectual property and contracts law at several French universities and in the Columbia-Leiden program. She serves on editorial boards of several intellectual property journals. Her principal areas of specialization/interest are: intellectual property, private international law, comparative law, and legal methods.

Arnold Lutzker

Arnold Lutzker practices Copyright, Trademark, Internet, Art and Entertainment Law. He currently has his own firm, Lutzker & Lutzker, located in Washington, D.C. Prior to that he was a partner in the Washington law firms of Fish & Richardson and Dow, Lohnes & Albertson. For over 20 years he has handled multi-million dollar compulsory copyright royalty claims for broadcast stations and television program producers and distributors.

Mr. Lutzker has drafted legislation and testimony on numerous bills including: the Satellite Home Viewers Act, the Berne Treaty Implementation Amendments, the National Preservation Act, the Digital Millennium Copyright Act, and the Copyright Term Extension Act.

He is the author of two books: Copyright and Trademarks for Media Professionals and Legal Problems in Broadcasting. He has also authored a video called "Copyrights: the Internet, Multimedia and the Law" as well as numerous articles. He also wrote the Directors Guild President's Committee position for the Berne Convention.

David Bollier

David Bollier is a Senior Fellow of The Norman Lear Center and Director of the Information Commons Project at the New America Foundation in Washington, D.C. Since 1984, he has been a collaborator with television writer/producer Norman Lear on a wide variety of projects. He is also an occasional strategic advisor to foundations and citizen groups.

Much of Mr. Bollier's recent work has been focused on developing a new analysis and language for reclaiming "the American commons" – publicly owned resources such as the Internet, public lands, the airwaves, government R&D, public institutions and cultural spaces, which are being rapidly privatized and commercialized. In March 2001, Bollier released a major report on this subject, *Public Assets, Private Profits: Reclaiming the American Commons in Age of Market Enclosure*. A longer version will be published as a book in spring 2002.

Over the past five years, Mr. Bollier has developed a number of strategic initiatives designed to pioneer new analyses or policy innovations. In conjunction with the Lear-founded Business Enterprise Trust, Bollier examined the dynamics of socially visionary business management in *Aiming Higher: 25 Stories of How Companies Prosper by Combining Sound Management with Social Vision* (AMACOM, 1996). In 1998, he published *How Smart Growth Can Stop Sprawl*, a early critique of the literature and activist battles against uncontrolled development – a report that led to the founding of Sprawl Watch Clearinghouse. In 1999, Bollier wrote a lengthy essay examining the pro-consumer implications of open source code software for Harvard Law School's Berkman Center on Internet and Society. (The paper is available at <http://eon.law.harvard.edu/opencode/h2o>.)

Over the past fifteen years, Bollier has written extensively about the social and economic impact of new digital technologies in reports prepared for The Aspen Institute's Communications and Society Program. He also wrote the official report released by the Gore Commission (formally the Advisory Committee on Public Interest Obligations of Digital Broadcasters) in December 1998. Bollier has also worked on projects with People for the American Way, the constitutional rights and civil liberties organization, and advised citizen groups affiliated with Ralph Nader, the John D. and Catherine T. MacArthur Foundation, the Ford Foundation and the Turner Foundation.

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The Future of Creative Control in the Digital Age

Introductory Remarks By David Bollier

Artists, Technology & the Ownership of Creative Content

USC Annenberg School for Communication

March 31, 2001

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 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 be 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 bucks -- or the far larger cohort of talented individuals who are trying to 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, what is it getting in return? How can we assure that ordinary people can have access and use of copyrighted works through the kind of "information commons" that any democratic society needs?

One of the preeminent challenges in the digital age, I believe, is to address such questions. 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. But that, I'm afraid, for the foreseeable future, is 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. 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.

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 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, all of it hoarded away on computers. Film studios trying to shut down Web sites that openly talk about 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, 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

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

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

transactions that the “gift economy” of the Internet – and the open markets of the Internet – are ready, able and willing to serve.

A gift economy 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 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.

Meanwhile, dozens of businesses with brand franchises have straight-out capitulated to the topsy-turvy economic logic – or perceived logic -- of the Internet. The *Encyclopedia Britannica*, prestigious medical journals, 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.

The new peer-to-peer file-sharing software is another intriguing experiment in harnessing the power of free 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, are 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 it 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 Traditionalists 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 hybrid. 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 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, it may be one of the preeminent political arenas in the emerging Knowledge Economy.

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.

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, determined to secure 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 citizen 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."⁴

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 public rights of access, use and reproduction.

The trick -- made much harder by today's technologies and markets, not to mention politics -- is finding an equitable, sustainable balance to this important cultural bargain. The economic interests of various copyright industries are quite relevant, of course. But we should remember that they are not authors, the intended beneficiaries of copyright protection. They are intermediaries -- gatekeepers -- marketing and distribution systems -- means to an end.

The divergent interests of authors and Big Content are becoming increasingly evident. 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."⁵ 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

⁴ 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.

⁵ 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>.

resentment among many artists, would have given the industry copyrights to songs that would otherwise revert to musicians after 35 years.⁶

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 three days ago, on March 28, alleges that publishers are re-selling freelancers' articles to electronic database owners and CD-ROM publishers without permission or payment.⁷

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 sanctioning exploitative control of authors by publishers. 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.

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.⁸ 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.⁹

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!

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.

⁶ Eric Boehlert, "Four Little Words," *Salon*, August 28, 2000, at http://www.salon.com/ent/music/feature/2000/08/28/work_for_hire.

⁷ Felicity Barringer and Ralph Blumenthal, "Big Media v. Freelancers: The Justices at the Digital Divide," *The New York Times*, March 19, 2001, p. C1.

⁸ Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society* (New York: The Free Press, 1995).

⁹ See John Gilmore, "What's Wrong With Copyright Protection?" at <http://www.toad.com/gnu/whatswrong.html>.

Napster may yet prove to be a boon to the music industry, if a fair economic model for the service can be negotiated.¹⁰ 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 beneficiaries of the Constitution’s Copyright Clause.”¹¹ 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].”¹²

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 the promoting the flow of ideas and content, and so advancing 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 anticompetitive way to control the new, independent music services that are attempting to enhance the consumer’s experience of music.¹³

¹⁰ 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.

¹¹ 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.

¹² Ann Powers, “Artists Take a Serious Look at the Business of Music,” *New York Times*, January 16, 2001, p. B1.

¹³ See Orrin Hatch remarks to the Future of Music Coalition conference, Washington, D.C., January 11, 2001, <http://www.senate.gov/~hatch>.

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.¹⁴ 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 endeavor.

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¹⁴ National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (Washington, D.C.: National Academy Press, 2000), p. 233.

Artists, Technology & the Ownership of Creative Content

CASE STUDIES

“A Vietnam Diary”— Authorship, Collaboration, Persona Rights, Moral Rights, Conflicts Among Authors

F. J. Dougherty, Loyola School of Law

3 Dead Rats and Sound Recordings: Authorship, Ownership, Technological Protections and Digital “Private” Copying

Jane Ginsburg, Columbia University School of Law

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Arnold P. Lutzker. Lutzker & Lutzker, LLP

Secret Mergers and Acquisitions: A Designers’ Game, or, Collective and Individual Creativity and Ownership in New Media Cross-Platform Design

Sara Diamond, The Banff Centre

“A Vietnam Diary”— Authorship, Collaboration, Persona Rights, Moral Rights, Conflicts Among Authors

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Artists, Technology & the Ownership of Creative Content
The USC Annenberg School for Communication
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“A Vietnam Diary” by Ming Nguyen has been a bestselling book for over a year. The book is the diary of Ming, who was a young girl in Saigon during the most violent days of the Vietnam War. It was translated and substantially edited by Tina Blue, the chief editor at Harbor House, which published the book.

Theatrical impresario, Sammy Schulander, thought the book could be dramatized and would make a moving stage musical. Sammy acquired dramatic rights, motion picture rights and other rights in the book. He interested Bill Shakes in writing the book and lyrics for the show, in collaboration with Elton James, who composed the music. They entered into a Dramatists Guild Approved Production Contract, and the authors proceeded to write the book and songs for the musical.

After a rough first draft was completed, Bill was not happy with the dramatic structure, and he engaged Darla Thomas, a dramaturg, to work with him in restructuring the play. Dramaturgs can render a variety of services in the development of a play [see www.dramaturgy.net], including analyzing the story and the text, doing historical research, attending rehearsals and giving detailed notes to the director. Bill didn't intend to co-write the play with Darla, and, as an experienced and successful Broadway playwright, he expected to be the only credited writer (with Elton of course, as to the music), and to retain complete control over the play throughout its development and production. Bill paid Darla out of his own pocket, and they worked together at his apartment for weeks. Darla's involvement with the play grew over time, and ultimately, she suggested the creation of a new character, Colonel Joe Friday, to represent the American soldier presence, created substantial dialogue for that character, changed substantial portions of Ming's dialogue, to make it sound more like that of a young girl, and collaborated with Bill on the lyrics to several of the songs, including “Napalm Nights,” a poignant ballad which is sung by Ming in the last act. They never entered into a written agreement, or discussed much about Darla's credit or payments, but Bill told Darla that her contributions were invaluable and that he would “take care of” her.

Sammy engaged Jimmy O'Brian to direct the show. Experienced in directing musicals about serious subjects, Jimmy's sensitive direction contributed substantially to the mood of the play and the movement of the characters. Among the cast, Su Small as Ming and Ben Fleck as Colonel Friday stood out. Su was made up to look exactly like photos of Ming, and Fleck, well-known from his role as a tough police detective in the hit television show “Chicago P.D. Hope,” brought similar “tough cop with a heart of gold” qualities to his Vietnam peacekeeper role.

Sammy arranged for a rehearsal to be videotaped, so that the actors and others could see and critique their performance.

As ultimately presented, the play is very different from the book. Although much of Ming's dialogue is taken from the book, and the central dramatic narrative follows from the events described in the book, new characters and dramatic incidents were added and other incidents were changed. One of the most controversial new scenes involved an attempted rape of Ming by a Viet Cong soldier in the final scene of the play, which is prevented by Colonel Friday.

"A Vietnam Diary" opened to rave reviews and became a massive Broadway hit. Bill and Elton were immediately approached by executives from Flashlight Pictures, the "art film" division of Giant Studios, which optioned the motion picture rights from Bill and Elton, and proceeded to develop the motion picture version. Mort Mogul, the producer who interested Flashlight in the project, was attached to produce. Mogul wanted to stay faithful to the play in many ways. Since much of the play took place in a farmhouse just outside of Saigon, much of the film will also take place in a similar location, and the movement of the characters will be virtually identical to that in the stage production. The set design will also be inspired by the fabulous sets from the stage production. In other respects, the play would be changed.

Su Small will reprise the role of Ming. Tragically, Ben Fleck was killed in a hang-glider accident in Palm Springs, so he is unavailable to play the Colonel Friday role. Flashlight's parent company, Giant Studios, produces "Chicago P.D. Hope", so Mogul and Flashlight believe that they can use a combination of makeup and digital image manipulation to recreate the Colonel Friday character as portrayed by Fleck using a relatively unknown actor.

Mogul and Flashlight hired Nora Newby to direct the film. Although a theme of the play was that the conflict that was going on in the U.S. in connection with the war weakened the American military's ability to protect its allies in South Vietnam and ultimately led to the loss of the war, Nora had a different take on the subject matter—that the American military, represented by Colonel Friday, was looking to draw out the war for the benefit of the military-industrial industries. Nora felt that the rape scene should be handled completely differently, much more graphic and violent, and Colonel Friday should not succeed in stopping the rape, symbolizing the ineffectiveness of the U.S. forces to protect the innocent during the war.

After Nora completed her DGA cut of the film, it was completely re-edited by Mogul, who eliminated some scenes and dialogue, in order to make the film "less political." Mogul envisioned the film as a pure action film, without either the play's suggestion that the U.S. conflict undermined the military or Nora's approach, indicting the military industrial complex. However, Mogul changed his mind about the rape scene, and it was returned to something closer to the play. That is, Colonel Friday succeeds in stopping the rape.

Flashlight is about to release the film, and, within days after a test screening, it has received several letters that have placed its ability to release the film in jeopardy. First, it received a letter from Darla, who claims to be a co-owner of the play. Darla wants a substantial rights payment and is threatening an injunction. Second, Jimmy O'Brian has claimed that his direction was used in the film without his permission. He also is threatening an injunction. Third, attorneys for Ben Fleck have written, claiming that the portrayal of Colonel Friday violates Fleck's right of publicity and constitutes unfair competition and trademark infringement. Fourth, Nora Newby claims that Mogul's editing of the film mutilates her work and will be devastating to her career. In particular, she is outraged that the rape scene has been modified, since, in her view, the most important point of her film is the ineffectiveness and moral failure of the U.S. military in Vietnam.

PRELIMINARY ANALYSIS OF ISSUES

I. DARLA'S CLAIM

A. CO-AUTHORSHIP UNDER U.S. COPYRIGHT LAW

Darla has claimed to be a co-owner of copyright in the play. Copyright vests initially in the “authors” of a work. In order to be an “author” under U.S. law, one must contribute original, minimally creative material that is concrete and detailed enough to be considered more than just an abstract “idea.” Originality means that the material wasn’t copied from someone else, but it does not require that the material actually be novel or unique. A person who originates such material is an “author.”

Under some circumstances, copyright in a work will initially vest in multiple authors. Under the current U.S. copyright law, a work can be considered a work of co-authorship, called a “joint work,” if it is created by two or more authors with the intent that their contributions will be merged into inseparable or interdependent parts of a unitary whole. The consequences of characterizing a work as “joint” are substantial. The co-authors share ownership of the entire work, including the material contributed by the other. Either author can use or license others nonexclusively to use the work, subject only to a duty to account to the other co-author. Unless they agree otherwise, they each own an equal proportionate share of the whole (and the revenues), regardless of the size or significance of their contribution.

Perhaps because of those consequences, courts have developed additional requirements in order for a work to be considered “joint;” namely, that each purported co-author contribute a separately copyrightable contribution, and that the authors intend to share authorship of the work.¹⁵ In 2000, one court held that, at least in the context of a motion picture, to be a co-author, one must also superintend and control the work.¹⁶ In addition, that court said that the material furnished by a co-author must contribute to the audience appeal of the work, but the contribution of each author’s material to the success of the work must not be determinable.

Did Darla satisfy those requirements, so that she could successfully claim to be a co-author of the play? Presumably, she would assert that claim in order to force the owners (the other authors and their licensees) to make a favorable deal with her, sharing revenue and possibly control over dispositions of the play. It would seem that Bill and Darla had the requisite intent to merge their contributions—Bill incorporated Darla’s contributions into the revised play. Darla’s contribution was also copyrightable. Her creation of a new character, if sufficiently delineated, her alterations to dialogue and her lyrics would all probably qualify as contributions of original, minimally creative authorship. However, it is unlikely that the playwrights intended to share authorship of the play with Darla, a dramaturg. A court would look primarily to objective actions of the

¹⁵ See *Childress v. Taylor*, 945 F.2d 500 (2d Cir., 1991); *Erickson v. Trinity Theatre, Inc.*, 13 F. 3d 1061 (7th Cir., 1991).

¹⁶ *Aalmuhammed v. Lee*, 202 F. 3d 1227 (9th Cir., 2000).

other authors, such as how they credited authorship, who entered into agreements, and who controlled what ultimately was incorporated into the play. It is unlikely that a dramaturg would be treated as a co-author in that way. Therefore, it is unlikely that a court would find that Darla is a co-author of the play as a unitary whole.

Is that appropriate? Many collaborators don't enter formal agreements, so the law's default rules are important. Should courts deny co-authorship in those circumstances, or should they instead accept co-authorship but restructure the results to more fairly allocate rights among the co-authors? Perhaps also keep in mind the following section in considering those questions.

B. IMPACT OF A FINDING THAT A CONTRIBUTOR OF SEPARATELY COPYRIGHTABLE MATERIAL IS NOT A CO-AUTHOR OF THE RESULTING WORK

1. Use is an infringement of copyright

However, that Darla is not a co-author does not necessarily mean that she has no rights with regard to her contributions. In fact, as the author of those contributions, she would own the copyright in that material. Unless a court found that she had licensed the other authors the right to use her material, any copying, distribution, performance or adaptation of her material would constitute a copyright infringement.

2. What's the appropriate remedy?

There are many potential remedies for copyright infringement. Although copyright owners are entitled to damages (e.g. the market value of the use, or any reduction in market value as a result of the use) and any of the infringer's profits from the use, courts often award injunctive relief. That is, the court will order the infringer not to use the material, with serious consequences if the order is ignored, including jailing the infringer. Some have argued that courts should not readily give injunctions in all cases, particularly where the infringing material is a small part of a work that contains other material, access to which would benefit the public.

Obviously, the threat of an injunction gives the copyright owner substantial leverage to negotiate a favorable settlement. One way that courts have limited the impact of such remedies in some cases is to find that the author has licensed the use. Under U.S. copyright law, most transfers of copyright must be in a signed, written form. But "non-exclusive" licenses may be oral, or implied from conduct and circumstances. Where an author has prepared material at the request of another, knowing it is intended to be used by the other in certain ways and has "delivered" it to the other, a court will find an implied license.

This part of the problem is similar to a real case involving the Broadway hit show, "Rent."¹⁷ In that case, the court found that the dramaturg was not a joint author of the show. Shortly after that decision, the dramaturg filed a claim seeking an injunction against the producers of the show and others who planned to exploit the show or its by-products, such as the cast album. The parties quickly settled

¹⁷ Thomson v. Larson, 147 F. 3d 195 (2d Cir., 1998).

the case, reportedly giving a significant share of revenues from the play to the dramaturg.

In “Rent” the court did not have to consider whether there was an implied license, since the parties settled. Would an injunction be appropriate here, with the implications on the leverage of the parties? Would an implied license be fair to Darla?

II. JIMMY O’BRIAN’S CLAIM

A. IS STAGE DIRECTION COPYRIGHTABLE?

Commentators have taken contrasting positions as to whether that which is contributed to a stage play by the director should be considered copyrightable.¹⁸ There has been virtually no case law on the question.¹⁹ A person who actually originates and controls the creative expression that is rendered in a tangible form by another is the author of that expression. To the extent that the stage director contributes herself or originates and controls the creation of original, minimally creative expression, then, she is an author and copyright owner of that material. A stage director’s contribution might be reflected in actors’ movements, production design or changes in the dialogue of the play.

B. CONTRACTUAL RELATIONS BETWEEN AUTHORS AND DIRECTORS IN THEATRE

To the extent it comprises copyrightable material, if O’Brian assigned or licensed rights in the direction to the producer it would have probably been “merged” with the other elements of the play and conveyed to the playwrights. Presumably, O’Brian did not do that in this case.

Should a stage director own a copyright in his direction? In what exactly should he be able to claim copyright? To some extent, these questions arise again in connection with the film director’s claim. A film director may contribute similar material to a film as that contributed by a stage director to a play, although there are other elements of film authorship that may be contributed by a film director. Should the playwrights be entitled to own the directorial material for purposes of adaptations like film versions of the play, or should film producers making motion picture versions of plays be required to obtain rights from the stage director too? The sale of motion picture rights in plays is regulated by the Dramatists Guild to reduce potential conflicts of interest. Should there be similar regulation as to stage directors?

¹⁸ Compare Jessica Litman, *Copyright in the Stage Direction of a Broadway Musical*, 7 COLUM.-VLA J. ART & LAW 309 (1982)(stage direction copyrightable) with David Leichtman, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM.-VLA J.L. & ARTS 683 (1996)(stage directions not copyrightable).

¹⁹ But see *Apple Barrel Productions, Inc. v. R.D. Beard*, 730 F.2d 384 (5th Cir., 1984)(children’s country music show format and other elements may be copyrightable when viewed as a whole).

III. BEN FLECK'S CLAIM

A. RIGHT OF PUBLICITY—CHARACTER COPYRIGHT vs. ACTOR PERSONA

The right of publicity developed from roots as a form of invasion of privacy when a person's name or photograph is used in advertising or on commercial products without her consent. Unlike the right of commercial appropriation privacy, the right of publicity is viewed as a form of intellectual property right, reflecting the commercial value of a celebrity's association with a product.

The subject matter of the right of publicity has gradually expanded to encompass not just name, photograph or likeness, but also other indicia of a particular person's identity or persona. The use of the phrase "Here's Johnny," associated with talk-show host Johnny Carson, as the name of a portable toilet was found to violate the right. The use of artists singing "soundalikes" of the voice of well-known and distinctive singers in commercials for consumer products has also been found to violate the right of publicity.

Some cases have found that a character can be so closely associated in the public mind with a particular actor that use of that character's name, or of other elements of the program in which the character appeared, may violate the actor's right of publicity. Thus a bar called "Spanky McFarland" was found potentially violative of the actor George McFarland's publicity rights. The Ninth Circuit has been in the avant garde in so expanding the right of publicity. It found that the use in an advertisement of a robot dressed in an evening gown and wig violated Vanna White's publicity rights because the robot was seen on a game-show set reminiscent of "Wheel of Fortune," the show on which Ms. White played a similar role.

None of those cases confronted the owner of copyright of the show from which the character was taken against a claim by the actor who became known for playing the character. In a case currently pending in the Federal courts in California, that confrontation is taking place. Paramount Pictures licensed Host Hotels to create a bar in some hotels that recreated the bar from the well-known TV show, "Cheers." Host created two robots who sit at the bar and who bore a slight resemblance to the two characters in the show who also sit at the bar. The actors who played those characters have sued Host for violation of their rights of publicity. The lower court has rejected the claim at several stages, but the Court of Appeals has consistently reversed and sent the case back to the District Court, where it will now receive a trial.

Here, Flashlight presumably could acquire a license from its parent company to use the original cop with a heart of gold character that became so associated with Ben Fleck. Presumably some people who see that character (or the similar character he portrayed in the play) will think of Fleck. Should this be considered an unlawful appropriation of Fleck's persona?

Should the copyright owner's ability to exploit or authorize adaptations or remakes of its properties be limited by persona appropriation claims by the actors who were closely associated with the fictional characters in those properties? Or should the state law rights in persona be pre-empted by Federal copyright law?

B. RIGHT OF PUBLICITY—COMMERCIAL USES vs. EXPRESSIVE WORK USES

Generally, the right of publicity protects against “commercial” uses of persona, such as use in advertising or on consumer product packaging. But uses in expressive, speech works are often found not to be violative of the right of publicity, at least where the use is not one permeated by falsity but held out to the public as true. For example, if there were a real Col. Joe Friday, it is unlikely he would be able to succeed in a right of publicity claim against a truthful biography or docudrama in which he was portrayed. Hence, freedom of speech interests can often defeat potential right of publicity concerns. However, in the one case in which the U.S. Supreme Court addressed the right of publicity, it found that the First Amendment did not prohibit a right of publicity action against a news program that broadcast an unauthorized film of the “entire performance” of a human cannonball. The court viewed the state interest in encouraging creative productions by protecting the proprietary interests of performers as outweighing the news broadcaster’s interests. What is the proper analysis of these issues in the context of imitative performances such as that in the film version of “A Vietnam Diary”? Is such imitation a taking of an “entire performance”? Would permitting such imitation destroy important incentives to performers?

C. RIGHTS RIGHT OF PUBLICITY—SURVIVAL AFTER DEATH

Does the analysis change if the performer is no longer alive, so he would no longer be capable of doing the job himself? Although the commercial appropriation privacy/right of publicity cause of action does not survive death under the law of all states, most states who view the right of publicity as a proprietary, rather than personal, right find that it does survive death. Should that apply with respect to imitative performances of a character associated with the actor?

D. UNFAIR COMPETITION/TRADEMARK RIGHTS AS AN ALTERNATIVE TO RIGHT OF PUBLICITY

In some instances, celebrities bring claims for unfair competition or infringement of trademark against certain uses of their name, likeness or other material associated with the celebrity. This type of cause of action reflects a concern to prevent public confusion as to approval, endorsement or association with a product or service. For example, a purely imitative performance of Elvis Presley that used names and images associated with Elvis was found to violate such rights, even after his death. In many instances, public confusion can be limited by the use of accurate credit information or disclaimers. Would an unfair competition/trademark type claim apply to the use of a characterization associated with a particular actor in a film? Does it add anything to the right of publicity action? Would an appropriate disclaimer eliminate that cause of action? What would be an “appropriate” disclaimer?

IV. NORA NEWBY’S CLAIM

Although United States copyright law has largely focused on protecting intellectual property rights in works of authorship in order to encourage the production of such works, it has been increasingly recognized that works of the mind also reflect the personality of the author, a rationale for the approach of “author’s rights” jurisdictions that is also recognized in the Berne Convention, the major international treaty regarding protection of such works, to which the United States became a signatory in 1989.

A. MORAL RIGHTS—INTEGRITY AND ATTRIBUTION

Pursuant to that approach, in addition to the economic property rights in works, many countries also enforce another set of rights to protect the more personal interests of the author, including the right of attribution and the right of integrity. The right of attribution usually means the right to receive an accurate credit for one's work, and a concomitant right not to be credited for works one did not create. The right of integrity usually protects against modifications to a work, particularly if they would be harmful to the author's honor or reputation. Often such changes are referred to as "distortions" or "mutilation."

To some extent the United States has recognized similar rights through actions such as common law copyright and unfair competition law. More recently, the copyright law has been amended to specifically cover those rights with regard to a limited class of works called "works of visual art." That category primarily covers works of fine art, and, notably, excludes motion pictures and other works made for hire. Directors of motion pictures have long sought to have more control over changes made to their works, motivated in part by the prevalence of practices such as cutting films for purposes of commercial television exploitation or technologies such as "colorization."

Often the director's arguments are countered by the argument that motion pictures are extremely expensive to produce and that the financier/producer/distributor should have the right to modify them if they deem it necessary in order to protect and make a return on their investment. This problem illustrates another aspect of the issue. Namely, the fact that motion pictures are created by many authors and are often themselves modifications of other pre-existing works such as novels or plays complicates morally-based arguments that directors should be the authors who have definitive control over the form in which the motion picture is distributed. Flashlight's economic argument for modifying the rape scene might be that they feel that the film will secure a less restrictive rating and receive a larger general audience if the rape is less graphic and is ultimately prevented. Regardless of the validity of that argument, it can also be argued that the film was modified to be more like the underlying play on which the film is based. Indeed, one might wonder if Flashlight would receive a complaint from the playwrights if they were to permit Nora's version to stand, yet permit credits and advertising indicating that the film is based on the play by Bill and Elton. It can also be argued that Mogul, the producer, is an author of the film. After all, the editing of the film is one of the most important components of its authorship, and, to the extent that Mogul actually controls those creative editorial elements, he is an author, too. Which "author" should prevail in these circumstances? Should all the "authors" have a veto power? What would be the impact of that approach on the film-making enterprise?

B. CONTRACTUAL RELATIONS BETWEEN PRODUCERS AND DIRECTORS IN FILM--WORK FOR HIRE AND MORAL RIGHTS

C. CREATIVE CONTROL UNDER THE DGA COLLECTIVE BARGAINING AGREEMENT

D. CREATIVE CONTROL AND INDIVIDUAL CONTRACTS

###

3 Dead Rats and Sound Recordings: Authorship, Ownership, Technological Protections and Digital "Private" Copying

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Artists, Technology & the Ownership of Creative Content
The USC Annenberg School for Communication
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3 Dead Rats, an immensely popular rock music group, recorded its signature song, "Greed is Awesome," for Death Jam Records on October 31, 1999. Death Jam executives had the composer-performers sign a contract effecting a total assignment of copyright in the music and the recorded performance, and stating that their work was "for hire" under the 1976 Copyright Act. [1]

Death Jam also records other artists, notably The Brutish Boys, a group made famous by their extensive and provocative use of "samples" of other performers' recordings. Death Jam and other record producers have entered into a series of cross license agreements to authorize sound sampling. The Brutish Boys' most recent recording, "Straight from the Sewer," includes samples of "Greed is Awesome," made with Death Jam's permission, but not with 3 Dead Rats'. The members of 3 Dead Rats, Robert Rodent, Victoria Vermin and Melvin Mouse, are in fact very unhappy with the Brutish recording, which they contend distorts and demeans their music. [2]

As a forward-looking producer, Death Jam Records is exploring ways to make its current and future catalogue of music recordings, and the individual songs from the albums, available over the Internet. Technologies like Napster, however, have persuaded Death Jam that any music it releases for digital dissemination must be accompanied by technological protection measures. One possibility would be to make the music available in streaming-only format, but Death Jam would also like to make the music available for downloading on a variety of bases – provided it can be reasonably confident that customers who, for example, pay for a week's worth of listening, or who pay to make one copy in addition to the downloaded copy, will not be able to bypass the protection and make (and send) unlimited copies for an unlimited period.

Death Jam Records accordingly has begun to "watermark" each recorded song to identify itself as the copyright owner, and to set forth the terms under which it permits use of the songs. [3] Death Jam Records also has cooperated with other record producers and hardware producers on developing a standard access protection protocol that restricts play of protected works to approved devices. These devices permit the making of one additional retention copy of a recorded song from a prerecorded source or download, but none thereafter. [4]

Despite these efforts, young Jack Ripper and other gleeful teenage hackers have devised a program to neutralize the access protection protocol. They distribute the program, which they call Prankster, for free over the Prankster.com Web site. [5] (Despite the ".com" suffix,

Prankster.com does not charge for the program, takes no advertising, and does not purport to have a business plan other than to amuse its operators and audience.) Computer users who install Prankster can play the protected songs on equipment that does not comply with the access protection standard. Prankster also ignores the copy-protection information encoded onto the recorded songs; as a result, Prankster users can copy and disseminate the recorded songs. [6] Another feature of Prankster facilitates sharing of files among Prankster users: any time a file is accessed through Prankster, a “.pnk” suffix is attached. Because Prankster includes a file-sharing protocol, Prankster users can explore “.pnk.” files on each others’ hard drives and import those files to their own hard drives. Although “.pnk” files initially were devised for recorded music, computer users have discovered that adding a “.pnk” suffix makes any kind of file exchangeable. As a result, Prankster is now widely used to share a broad variety of works, many of them distributed with their creators’ permission. Moreover, the Prankster program has become so popular, it has proliferated across many Web sites. [7]

Death Jam is considering taking legal action, but is no longer sure against whom. Robert Rodent of 3 Dead Rats, by contrast, has resorted to self-help by making available virus-infected “.pnk” files of 3 Dead Rats and other songs. Any Prankster user who copies and tries to access one of these files soon finds that her hard drive has been erased. [8]

ISSUES

- [1] Sound recordings as works for hire: Were they before the 11/29/99 amendment adding sound recordings to the list of commissioned works capable of being works made for hire? What is the effect of that amendment? What is the effect of the subsequent repeal of the amendment?
- [2] Even if Death Jam owns the copyright and has authorized “Straight from the Sewer,” does 3 Dead Rats have any kind of moral rights claim to protect the integrity of their work, enforceable under the Lanham Federal Trademarks Act, or other state or federal law? What about the laws of other countries, such as France, where moral rights are more vigorously protected?
- [3] DMCA Section 1202 (protection of copyright management information): Should Death Jam be listing Rodent, Vermin, and Mouse as the authors, too? What kinds of acts will the watermarked information be protected against?
- [4] Are the protocol and devices protected under DMCA Section 1201(a) and (b) provisions against the circumvention of access and copy-protection controls?
- [5] Do the Prankster program and its authors and users violate the Section 1201(a)(1) and (2) provisions against circumventing access controls, or providing devices that circumvent those controls?
- [6] Do the authors and distributors of the Prankster program violate the section 1201(b) prohibition against distributing devices that circumvent anti-copy controls?
- [7] Are Prankster users engaging in copyright infringement? Are the authors and Web site distributors of Prankster contributorily liable for copyright infringement?

[8] Has Rodent violated any laws by engaging in this form of self-help? Is there a better, practicable, way to promote compensation for recording artists and copyright holders?

#

**A Little Cut, A Splash of Color, A Change of Mood – It’s Only a Movie!
The Clash between Filmmaker and Film Owner
Over Alteration in the Name of Commerce**

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Artists, Technology & the Ownership of Creative Content
USC Annenberg School for Communication
March 31, 2001

Time 1985 – Enter Bellini.

In 1985, a young filmmaker, 25 year-old Frederico Bellini, a native of Italy who along with his family moved to California in 1976, was determined to write and direct a film, “Hidden.” “Hidden” was Bellini’s story about an Italian war resistance family that supported and protected dozens of persecuted gypsies, who were special targets of fascism. While he pitched the film project to several Hollywood studios, Bellini found no support. Aware of the difficulty of a new director selling a story, he persevered. He received a small stipend from a local LA family whose relatives were victims of fascist oppression.

Since his script called for many of the scenes to be filmed on location, he moved back to Italy, where he used his local Italian connections to obtain more financial support for the project. The angel for the project was Film Firenzica, a prominent film and television production and distribution company in Italy modeled after the US Hollywood studios. Film Firenzica agreed to underwrite the project in exchange for long term domestic and international distribution rights. It also required Bellini to execute the standard Film Firenzica employment contract making his contribution a “work for hire” and Film Firenzica the author of the picture under U.S. copyright laws. While Bellini found it odd that the Italian company would rely on “U.S. copyright laws,” he concluded that if he did a deal with a U.S. production company, he would face similar terms. Committed to the project, Bellini signed the deal.

The Making of “Hidden”

Over the next three years, Bellini researched and wrote the script. He spent much personal time with surviving gypsies, traveled with them, heard stories of first-hand experiences during the war. He was also told about many secret ceremonial activities. When he told his gypsy friends that he intended to portray their lives graphically and honestly, he was assured unique access to some of their heretofore unseen rituals. At some sessions, he was permitted to video record their ceremonies, prayers and musical performances. The movie was filmed entirely in Italian, in black-and-white. As to the latter choice, Bellini explained, “It is a dark and somber story that can only be told in dark and somber cinematic tones.”

Released in Italy in 1990, the film achieved instant acclaim and was hailed by the difficult Italian cinema critics as a “unique cinematic accomplishment that touched the raw nerve of national prejudice.” Despite the acclaim, gaining foreign distribution was a struggle. This coincided with a particularly bad financial period for Film Firenzica, which abandoned efforts to advance the film. Without his film company’s support, Bellini decided to seize the initiative. He prepared a subtitled version in English and personally arranged for its showing in three theaters in LA and two in NY. To Bellini’s joy and great surprise, “Hidden” was nominated for an Academy Award as Best Foreign Film for 1990. Even though it did not win, Bellini was acclaimed in the trades as “a worthy successor to the great lineage of Italian directors.” At the same time, Film Firenzica faced a horde of creditors and teetered on the verge of bankruptcy.

After the award nomination, there was some distributor interest in the film. Bellini referred all inquiries to Film Firenzica, hoping that it would help his struggling benefactor. Film Firenzica had limited resources to do anything with the movie, but it finally granted one US firm a short term distribution deal, which in turn licensed the film to art houses in the subtitled version for the next year.

Bellini Becomes a Legend; Film Firenzica Becomes History

With the success of “Hidden,” Bellini became a hot commodity in Hollywood. He was signed to a three-picture deal with Silver Pictures, and given his handsome physique and outspoken character, became a constant in the gossip pages. His storybook life ended tragically in 1995, when Bellini at the tender age of 35 was struck and killed driving his motorbike in the Hollywood Hills. In death, Bellini’s fame only increased. Though he had a legacy of but four films, he was idolized by a passionate and growing number of fans.

At the time of Bellini’s death, Film Firenzica was also undergoing a dramatic change. The company’s long-time owner had experienced severe financial reversals; finally, in 1997 Film Firenzica sold all its interests in some 45 films to an American company, FOXXY Films, that was gobbling up titles all around the world. Rupert Burner, head of the company, fancied himself a titan of the Selznick and DeMille standard, and wanted to own movies to feed his growing international satellite television operation and what he saw as the “new frontier for film, this thing called the Internet.” He instructed his VP of Development, Ima Faque, to “buy, buy, buy especially from those foreign companies that’ll sell us movies real cheap.” Rather than licensing movies, Burner felt he could buy films and then parlay them into new revenue streams with the advent of newer technologies.

The Remaking of “Hidden”

Burner knew that in acquiring Film Firenzica’s titles he had purchased the great first film of Bellini and felt he had hit a jackpot. “Now that I own that film, I can make it more suitable for American audiences and market in on the ‘net and in DVD.” After viewing a screening of the film, Burner decided he could improve upon it by “brightening it up with some color.” Also, “those sober scenes with the gypsies should be cut back. Who needs it? And that music! It’s ghastly dreary. My boys can juice it up!”

For the DVD version, Burner wanted to add some scenes from his library of acquired World War II stories. He felt they would make a fitting supplement, explaining more clearly than the movie, what terror fascism wrought on the world. He also believed “those gypsy ceremony scenes

were too long. If we cut them out of the tv version, why we could squeeze in a dozen more commercials. Go for it!" he told his business staff.

Burner also was a disciple of internationalism when it came to film distribution. He felt the movie could make some extra money if it could be translated into other languages. He set about to have the movie dubbed into French, German and Japanese. "Of course, when we do the German versions, we'll have to cut that entire section that had the Italian gypsies shipped off to one of those Nazi prisoner camps." And with that, Bellini's vision, his masterpiece, was cut, tinted, diced and spliced. But, of course, when the credits rolled, in all versions, it was known as "A Federico Bellini Film," and Bellini was the credited Director.

FOXXY Films also developed a hot Web site. It offered the English, French, German, Japanese and Italian versions on line, and featured an interactive component. To promote the Web site's capabilities, Ima Faque created FOXXY's "Chose Your Star" contest and used Bellini's film as a prototype for the plan. Residents of each country were encouraged to log on and identify their favorite male and female actors. Based on the polling, FOXXY contacted the winning performers, and for those that agreed, their images were substituted for the lead roles in "Hidden." "This contest makes the film 'more relevant' and 'updated' for a youthful audience," Ima explained. As you might expect, Burner just loved the idea and, after the Bellini test, gave it the green light for a dozen more titles.

The Wounded Widow: Artista Rites

It turns out that when Bellini lived in Italy during the making of "Hidden," he not only spent time with the gypsies, he fell in love with one. Artista Rites was a spirited and passionate soul, who believed in the beauty of her people and the earnestness of this filmmaker. After more than a year of being together, they were wed in an Italian church. Artista played an instrumental role in the making of "Hidden," bringing her friends and family to her husband's side. She contributed to many of the scenes, rewriting the dialogue and even singing several of the ballads in the film. There was never anything in writing between Film Firenzica and Artista; however, Bellini dedicated the film to Artista.

While Bellini did live a wild life after returning to the States, he remained faithful to Artista. She was with him on his bike on that fateful ride, when he rounded a sharp curve, throwing them both off. Bellini was killed instantly, while Artista was hospitalized for six months and had to undergo multiple operations. Her recovery was slow and painful. Among her greatest pain, however, was what she calls "the mis-X-ploitation" of her husband's name and reputation. Although she felt powerless to stop the gossip (much of cruel and unfair to her), Artista was determined to keep his artistic reputation intact. When she discovered all that FOXXY Films had done to his – and her – masterpiece, she was heartsick. "His great work, destroyed. I will save this film if it is the last thing I do!" she determined.

###

**Secret Mergers and Acquisitions:
A Designers' Game, or, Collective and Individual Creativity and Ownership in New
Media Cross-Platform Design**

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Artists, Technology & the Ownership of Creative Content
USC Annenberg School for Communication
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Joan (USA), Phil (USA), Anika (Finland), Bjorn (Finland), Mel (Hong Kong), Susan (UK), Daphne (UK), Jeannette (Canada) and Paul (Canada) have designed a game together over the Internet. The game will be played on line and may have a platform game component. They are launching the online version first in order to build audience loyalty with a server-based version before they go to a platform game.

The Secret Mergers design team has grown to know each other over the years through the Internet. They first met through game playing and associated chat groups; they found their affinities, participated in design conferences online, and in software collaboration. They live in the USA, Finland, and the UK, Hong Kong, Canada. Some of them have met face to face, prior to the game launching, others not. They anticipate a possible television series as a result of the game, and a few members of the team are writing the treatment. In developing the television component, a multi-territory development strategy is needed. The first company in requires that all rights be cleared. They are all very nervous about how they might or might not get along in the "real world."

The team members are artists/developers who span interactive design, software engineering and computer science, the visual art gallery world, music composition, architecture, television writing and direction. The game is really about them, about the high-powered world of interactive media and software, and about how effective collaboration can be in the face of competition, but also, about secrets, gossip and innuendo, about copyrights that might go astray, about things that the players know indirectly about each other, companies around the world and their products. It is about bonds, flirtations and emotional secrets. The game is dangerous, because it hovers constantly on the edge of libel as well as intellectual property theft. This is what makes it so compelling to the designers and players.

In the game, you can access blueprints, visual designs, sound, story elements, and media objects. You are also expected to crawl and trawl the Net in order to find competitors' or cooperators' designs that are similar. You can try to talk them into cooperating, you can adapt the designs or media objects (images, words, and music), and you can trade the designs of yourself and others, at peril of being caught and losing your position. Players form companies or act on their own. There are consumers and companies who bid on the work. There are chat

rooms, secret clubs. The game includes votes from various teams on design quality, these votes effect plays for company mergers and acquisitions, actual media creation and design creation and exchange. You can lurk, but as a lurker, you cannot modify designs. Still, lurking is fun, since the game designers and then players incite each other to use stealth to steal secrets and blackmail other players. As a player, you can modify designs and try to sell these, a la Napster.

In some transactions, special rules define the play. If you are working for a nonprofit environment and the players decide your "cause" is worthy, you can have the patents at a nominal cost. There are "characters" that you play in order to play the game and you can invent these yourself as a player or join a character team.

To further complicate matters, the players log on as avatars. The play of making design consistently results in high-level design objects. As well software is invented by the collaborators. The software that is the underpinning of the avatars is a 2 1/2D-3D animation software that allows the characters to move their faces and bodies, once players have logged on and scanned their own (or their chosen) images into the environment. The facial expressions and body movements of the software came from scans and motion capture made of Bjorn a number of years ago, in the development phase of the software. For those who know him, the software, no matter who wraps their image around it IS he. Now that the software is moving into the public eye, Bjorn jokingly asks, "will he own the facial expressions and body movements of game characters?" He is more and more uncomfortable with being the model since the game has some ethical challenges.

This project merges software cultures. Much of the software that drives the game is built in JAVA in a LINUX environment. Some of the software was built in an open source environment, administered through an artist-based center for art and technology, located in Canada and supported by a major research university. The financing of the research comes from granting agencies that require repaying equity if the software approaches a commercial market. Over the years, some of the software has become proprietary, and some is freeware. If the game is successful, the open source code will be very attractive to many, since the programming challenges for speed; communication and image adaptation are huge in this project. Other software was developed with European Union development funding. The design team is investigating where it should locate a company in order to pay back the smallest amount of investment. This leads to some notoriety in the international software media. This bad press seamlessly becomes part of the content of the game.

As implied before, a key element of this online world are a set of services that are provided for users outside of the games world. The design group has created a design forum in their virtual games world. It functions within the narrative of the game to provide user input, a space where the experts can comment on the projects presented by users. They assist users to talk to each other and find resources in developing designs. Our team is playful, iron-edged, whimsical and at times, dismissive in their relationship to users' postings. They also appropriate the best designs into the content of the show. Over time, this service centre becomes very popular. Jeanette contacts design, fashion, fabric, home supplies and other related companies around the world. She successfully brings in these companies for product placement in the game and as direct sponsors of the service. Some of the audience for the game feels that this is a cheesy move and abandons the game. Others find it very useful, as it is a one stop-shopping environment for high-end self-motivated design. The site becomes popular in the UK because of its home improvement component. GAT negotiations suggest that services should be granted exemptions, while cultural products might not. What is the status of the project now that

there are international services? What are the rights of the use when their designs are used as part of the show?

To further complicate matters, one element of the design forum becomes an erotica showcase for innovative new media sexual aids. While this is perfectly acceptable in the USA, it raises the ire of Canadian regulators who threatens to lay charges against the Internet Service Provider, who is a broadcaster and hence regulated, for exhibiting degrading content. This means that the group needs to create a "Canadian version." Canadian content regulations from one of the key funding sources also force the localization of parts of the game into a Canadian context.

The coordination of the software build is a challenge in itself as are the rights issues. It also provides an ideal opportunity for a commercial venture for the participants, as open source code can be commercialized. The group appears to have reached agreement about this strategy. They must plan to pay off the previous investors. Just as they are comfortably negotiating their way towards a joint development agreement, Daphne decides that her programming initiatives are the core underpinnings of the avatar environment. She hires a patent lawyer and registers the software as an invention. This sudden rupture of their collective shocks the other collaborators. They feel that they own shared intellectual property in the various elements of software and the design. What can they do to regain control over the product? It is a very traumatic situation for the entire group. They need to keep production of the game moving while they sort these issues out. Of course it means that the other designers write Daphne into the game fiction and levels as the evil betrayer. She begins to get threatening emails from outraged fans. What if she did provide the key intellectual property? On the software? Does she have the right to sue the group for the threats she is receiving over the Internet? Even if she achieves peace with her colleagues will they be able to work again without a clear contract delineating roles and intellectual property? Will this not kill the collaborative spirit?

Over the process of designing the game, Susan and Mel fall in love and get married. Phil and Joan develop an intense flirtation, but then break up, leaving some feelings of bitterness on Phil's part, especially when Joan flies to Montreal to meet Paul and have an affair. The game includes a double indemnity rule -- "scarlet lovers" have additional power, but if they betray each other, there are penalties, particularly with regard to access to information that they are forced to pay.

After all, the project was bound by passion, but as it develops, we can see that there are significant challenges that come to the fore. The collaborators span seasoned industrial new media designers who are secure in their other careers, but committed to the project because it provides a tremendous creative outlet. The artists are excited about the collaborative environment because their visual ideas and lifestyles are present in the work and they feel that they have finally influenced technology and software design. The engineers and scientists are excited by the project because the team is creative, embrace their participation and provide inroads to the world of design, high art and fashion. The researchers have been able to lever money from granting agencies in their companies to work on the more challenging engineering problems. They are bound to the game design because all of them have committed significant time and energy to the project, their intellectual property and their reputations. Conflicts aside, what resolution of rights could allow them all to get their needs met.

After two months on the Web the game is tremendously successful, although without a clear economic model. A large international content creation and technology development company offers a significant amount of money to buy out the property. What will the joint owners need to sort out in order to make the sale? The problem has also arisen that a number of the game

players have publically declared that they are the owners of their designs and the rather complex software that created these levels or experiences. In principle, our designers would agree with them! Do you? After all, the designers created the context, if not the actual content.

Well, you may well ask, what company in its right mind would invest in such a product? It turns out a large international game company has, as well as a venture firm and an angel. They are eager to get paid back, as profits begin to come in from the product placement sponsors, subscriptions grow. A distributor wants to buy out the rights and pick up the property altogether. How can the small producers and artists in the project defend their intellectual property, while gaining a viable economy through the sale?

This case study considers these points:

- 1) What happens to rights when a group of international artists and software/technology designers author an environment together that allows for the creation and exchange of various media objects. What if each can contribute, but each can change the others' original intellectual property?
- 2) What happens when a larger group of users/players can enter the environment (online for e.g.) from various national jurisdictions and play with, add to, and author in the environment? Who owns which rights? What about moderators? Do they have the same rights as talk show hosts?
- 3) How do digitization and the collaboration that is so often part of that world change the role of the artist?
- 4) What, if any, models from the software sector might be valuable for collaborative creative environments? What about individual rights?
- 5) Who owns invention – the artist or the engineer or both?
- 6) How do we think about authoring across platforms, or media? What happens to television rights when these go to the Internet? What happens when the unregulated Internet production goes to television? For example, in Canada, the product would immediately face Canadian content regulations when it came to financing, or the payback of previous financing.
- 7) Can art be redefined as a service?
- 8) When should rights begin and end? One solution is the patenting or copyrighting of ideas, the other is shareware or freeware. How do we decide what is appropriate for each situation or context?
- 9) How can we define new media rights across national boundaries? For example, the USA and Canada have very distinct positions on the responsibility of the ISP, on whether or not new media are services, whether GAT and other treaties should cover new media. The UK in turn is closer to Canadian law. Hong Kong is changing constantly with its closer relationship to the Chinese pirate market. What laws would govern conflicts in this international project?

- 10) What rights does an “actor” have when his or her movements and expressions are part of an avatar or software environment?
- 11) What rights do the original owners of copyright retain when their materials are “quoted” in the game play? How can the designers reconcile these rights issues over national boundaries? What is fair use?
- 12) There are real attempts to create an advanced design network for professionals to share media objects as they design and change these, to create teams that can work together and compete at times and to have contests and exchange the relevant software. Are there legal barriers to achieving these utopian ideals?
- 13) Are there different rules that should govern nonprofits’ activity?
- 14) What are the implications of museum display and acquisition? Should the number of copies of a work be limited in order to make it more valuable? What happens to the non-museum participants in such a project?
- 15) Should consumers have the right to share their adaptation of artists’ work over the Internet, Napster ruling aside?
- 16) Will the economies be different, encouraging content lock-ups, in the areas of graphic works, visual arts and tools as well as digital content?
- 17) Will the freedom of expression of visual artists be eroded piecemeal by a patchwork of ill conceived protection measures designed to protect software manufacturers?
- 18) What implications are there when two members of a team enter into a marriage contract? Does this implicate their intellectual property? Position?
- 19) What happens when one member of a group registers that group’s creative endeavors as their sole property? How can the group as a whole react to protect its freedom of expression, creativity and rights?

###

Artists, Technology & the Ownership of Creative Content Additional Resources

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at <http://www.cyberlaw.harvard.edu/cc>.

Key Legal Issues

A. ARTISTS' RIGHTS AND AUTHORSHIP

- ◆ European moral rights of paternity and integrity: Berne Convention For the Protection Of Literary and Artistic Works (Paris Text 1971), Article 6bis. Available at <http://www.law.cornell.edu/treaties/berne/6bis.html>
- ◆ Application of Section 43(a) of the Lanham Act to effect as U.S. equivalent to the French right of attribution
- ◆ Key French case: *Huston v. La Cinq*, French Supreme Court Judgement (Abandoning on policy grounds the prevailing choice of law rule for ownership issues and applying the French moral right of integrity to prevent the broadcast of a colorized version of film director John Huston's *The Asphalt Jungle*)
- ◆ US Caselaw
 - *Lamothe v. Atlantic Recording Corp*, 847 F.2d 1403, 1407-08 (9th Cir. 1988) (holding that attribution of "authorship to less than all of the joint authors of the musical compositions" violates Section 43(a))
 - *Jaeger v. American International Pictures, Inc.*, 330 F. Supp. 274 (S.D.N.Y. 1971) (recognizing that the Lanham Act is arguably applicable where a defendant represents to the public that a work the plaintiff had nothing to do with is the plaintiff's product)
 - *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.* 818 F. 2d 266 (2d Cir. 1987) (holding that marketing of record albums as "featuring" Jimi Hendrix was false advertising where Hendrix was merely a background performer or undifferentiated session player.)
 - *Tristar Pictures, Inc. v. Director's Guild of America, Inc.*, 160 F.3d 537 (1998) (9th Cir. 1998) (upholding arbitrator's resolution of dispute between TriStar Pictures and Director Michael Apted over TriStar's alteration of Apted's film *Thunderheart* for purposes of television distribution.)
 - *Boosey & Hawkes Music Publisher, Ltd. v. The Walt Disney Company*, 145 F.3d 481, 487 (2d Cir. 1998) (dismissing plaintiff's breach of contract claim and vacating summary judgment declaring that Disney's foreign video format marketing of the film *Fantasia* exceeded the terms of its license with composer Igor Stravinsky, in part based on conclusion that analysis of contractual allocation of rights in new uses of copyrighted works should be governed by neutral principles of contract interpretation rather than by solicitude for either party.)

B. WORK FOR HIRE DOCTRINE

- ◆ Relevant Statutory provisions, available online at Cornell Law School's Legal Information Institute, [http://www.law.cornell.edu/uscode/17/17 U.S.C. §101 and 201\(b\)](http://www.law.cornell.edu/uscode/17/17%20U.S.C.%20%26%20101%20and%20201%28b%29).
- ◆ Statement of Marybeth Peters, Register of Copyrights regarding what's at stake when the work for hire doctrine is extended to sound recordings. <http://lcweb.loc.gov/copyright/docs/regstat52500.html>
- ◆ Text of H.R. 5107, Copyright Corrections Act of 2000, which restored status quo as it existed prior to the Nov. 29, 1999 amendment adding sound recordings to the statutory definition of "work made for hire."
- ◆ Key Case: *Community for Creative Non-Violence v. Reid*, 109 S.Ct. 2166 (1989) (rejecting the argument that an independent contractor may also qualify as an employee by virtue of the control exercised by the hiring party over the final work product). Available online at Cornell Law School's Legal Information Institute, <http://supct.law.cornell.edu/supct/>

C. FAIR USE, MUSIC SAMPLING and ALTERNATIVE ARTISTS' VIEWS

- ◆ Fair Use – 17 USC §107
- ◆ U.S. Copyright Office's Fact Sheet on Fair Use, available at <http://www.loc.gov/copyright/fls/fl102.pdf>
- ◆ Lydia Pallas Loren, "Redefining The Market Failure Approach to Fair Use in an Era of Copyright Permission Systems." Available at <http://www.lclark.edu/~loren/articles/fairuse.htm>
- ◆ Georgia Harper, "Will We Need Fair Use In the Twenty-First Century?" Available at http://www.utsystem.edu/ogc/intellectualproperty/fair_use.htm
- ◆ Perspectives from Negativland, a musical group in support of free appropriation:
 - "Negativland's Tenets of Free Appropriation," available at <http://www.negativland.com/riaa/tenets.html>
 - "Changing Copyright," available at http://www.negativland.com/changing_copyright.html
 - "Fair Use," available at <http://www.negativland.com/fairuse.html>

D. TRADEMARK

- ◆ Lanham Act caselaw recognizing that sound(s), slogans, and word series may function as trade or service marks if they function primarily to indicate source or to distinguish the would-be mark owner's goods or services from those of others.
- ◆ *In re Owens-Corning Fiberglass Corp.*, 774 F.2d 1116, 1119-20 (Fed. Cir. 1985) ("Registration has been granted for...sounds...")
- ◆ *Smith v. M&B Sales & Manufacturing*, 13 U.S.P.Q.2d 2002, 2010 (N.D. Cal. 1990) (holding that slogan "Next Time You're Caught in a Doorway With Your Arms Full, Think WIREHANDLER" functioned as advertising copy rather than as a trademark because use of the slogan was not calculated to project a single source or origin.)
- ◆ State unfair competition law caselaw upholding a publicity right in voice as a personal identity feature: *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (holding unlawful an imitation of performer Bette Midler's voice in an automobile advertisement).

E. FILE-SHARING TECHNOLOGIES

- ◆ *A&M Records, Inc. v. Napster*, 2001 U.S. App. LEXIS 1941 (February 12, 2001, Filed) (affirming in part district court's preliminary injunction against Napster, and reversing in part and remanding for modification as to defendant's liability for contributory copyright infringement)
- ◆ United States Government Amicus Brief in *A&M Records v. Napster*, Available online at <http://www.loc.gov/copyright/docs/napsteramicus.html>
- ◆ Electronic Frontier Foundation White Paper on the Napster decision, arguing that the decision restricts the freedom of expression online by curtailing the Supreme Court's Betamax standard for secondary liability. Available at http://www.eff.org/Intellectual_property/P2P/20010226_rgross_nap_essay.html
- ◆ Fred von Lohmann, Attorney and Visiting Researcher, Berkeley Center for Law & Technology, "White Paper on Peer-to-Peer File Sharing and Copyright Law after Napster," summarizing potential liability and making recommendations for conforming to the Napster decision requirements. Available at http://www.eff.org/IP/P2P/Napster/20010227_P2P_Copyright_White_Paper.html

F. TECHNOLOGICAL PROTECTIONS OF COPYRIGHTED CONTENT AND COPYRIGHT MANAGEMENT INFORMATION

- ◆ Summary of Digital Millennium Copyright Act provisions available online at <http://www.loc.gov/copyright/legislation/dmca.pdf>
- ◆ Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works at <http://www.loc.gov/copyright/1201/anticirc.html>

G. TRANSMISSION OF COMPUTER VIRUSES

- ◆ Computer Fraud and Abuse Act, 18 U.S.C. §1030(a)(5). Available at <http://www4.law.cornell.edu/uscode/18/1030.html>
- ◆ *United States v. Morris*, 928 F.2d 504 (2nd Cir. 1991) (construing the Act's intent and unauthorized access requirements)

H. Online Service Provider Liability under the Digital Millennium Copyright Act

- ◆ 17 U.S.C. §512 (limiting online service provider infringement liability upon compliance with statutory conditions)

I. CROSS-BORDER OWNERSHIP AND INFRINGEMENT

- ◆ *Itar-Tass Russian News Agency v. Russian Jurrier, Inc.*, 153 F.3d 82 (2d Cir. 1998) (holding that ownership issues are to be determined by the law of the state with the "most significant relationship" to the property and the parties, and that infringement is to be analyzed under the law of the place of the tort)
- ◆ *Subafilms Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1099 (9th Cir. 1994) (extraterritorial acts of infringement authorized in the United States are actionable under U.S. copyright law)
- ◆ *Los Angeles News Serv. v. Reuters Television Int'l*, 149 F.3d (9th Cir. 1998) (holding that once acts of domestic infringement are found, the copyright owner is entitled to recover damage "flowing" from the exploitation abroad of defendant's domestic infringement.)
- ◆ *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67 (2d Cir. 1994) (awarding damages from Israeli newspaper's unauthorized publication of a photograph of U.S. citizen's "Ronbo" poster later reproduced in the U.S.)

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Appendix

Film and Play Scripts (based on conference case studies)

Special thanks to The USC Film School for support in the production of the ATO films, particularly faculty members Doe Mayer and Lisa Leeman.

Scriptwriter: Tim McKeon -- The Norman Lear Center

Film Director: Jon Berkowitz – USC Film School

Theater Group: Comedus Interruptus (USC improvisational student theater group)

UPROAR OVER THE MUSICAL "A VIETNAM DIARY"

Written by Tim McKeon

Based on the case study by Jay Dougherty

SETTING: A large curtain runs horizontally across the stage. There are four stools, two on either side of the curtain. Whenever it is noted that the actors enter or exit, it is always through this curtain.

AT RISE: Enter our host, JOAN KELLHEYWITH. She is dressed in a suit and is charming but serious. She holds a microphone.

JOAN

Hello, and welcome to "Theater Law," where we explore the law in theater, the theater in law, vice versa and once again, vice versa. I am your host, Joan Kellyheywith.

(She pauses for applause. If there is none, she prompts the audience with her hand.)

JOAN (cont'd)

Thank you.

(Pause.)

Recently controversy has erupted over the hit musical, "A Vietnam Diary," which is based on the best selling book by Ming Nguyen. Darla Thomas, ex-dramaturg for the play, has filed a lawsuit claiming she wasn't given credit for writing several songs and pages of dialogue, as well as changing it from a tragedy into a drawing room comedy. I caught up with her this week in a theater downtown.

(Enter DARLA THOMAS, dressed all in black with a loud colorful scarf. She and Joan pull up two stools.)

DARLA

Originally I was hired as a dramturg for the production. As time went on however, my role changed. For example, I wrote lyrics for the songs, "It's a Hard Knock Southeastern Asia Life," "The Sun Will Come Out Over Saigon Tomorrow" and of course, "Vietnam," which was inspired by the title song from the musical, "Oklahoma!" I also created the character of Joe Friday, who, as you know, marries the main character in the end.

JOAN

And yet when you asked the writer, Bill Shakes, to be recognized as the co-author of this play-

DARLA

He refused.

JOAN

There are rumors that you are mounting a rival production of "A Vietnam Diary" across town. Is this true?

DARLA

Kind of. I want to let the public know exactly how much I contributed to the play. So what my lawyers and I have done is remove every single word I added to the musical including the "ands," the "buts," the "thes," and sort of mesh them together to make

a twenty minute show I call
"A.V.D."

JOAN

And "A.V.D." - is it similar
to "A Vietnam Diary"?

DARLA

It's the same plot, but my
play is far superior. I may
not have all the verbs the
Broadway version does, but
that is a minor point. For
example, here is the final
scene from the original play:

(Enter a woman, MING, dressed in Southeast Asian
clothing. She sits on the floor, writing in a
diary. Enter a white man, JOE FRIDAY, wearing
fatigues.)

JOE FRIDAY

Ming, I couldn't get on that
chopper. Not without you.

MING

I couldn't leave my diary
behind. My Vietnam Diary.

JOE FRIDAY

I love you.

MING

I love you too, Joe Friday.

(They kiss and freeze.)

DARLA

(To JOAN)

And here is my version, with
my words only.

(MING and JOE break. She sits down again and he
exits. He enters and they begin the scene
again.)

JOE FRIDAY

Ming, get that you.

MING
I couldn't Diary. Diary.

JOE FRIDAY
I you.

MING
I you, Friday.

(They shake hands and freeze. Pause. MING and JOE quickly exit. DARLA turns back to JOAN.)

DARLA
As you can see, my lawyers were able to win me most of the key nouns. We couldn't get the kiss, but I think the handshake works. Kind of takes their relationship down a notch, but it's still very powerful.

(JOAN nods. DARLA smiles weakly then exits. JOAN stands.)

JOAN
I caught up with the writer of "A Vietnam Diary," Bill Shakes and the composer, Elton James, to see how the lawsuit is affecting their production.

(Enter BILL and ELTON. They sit on stools opposite JOAN.)

BILL
First of all, the cast and crew have been fantastic...

ELTON
No candles in the wind here.

BILL

And our show is still the best on Broadway. Of course we had to make some small changes with the lawsuit pending. We cut the marriage scene, which means our main character is living in sin in the end...

ELTON

And we had to remove all the parts Darla claims she wrote... The play is still standing at its original length of 3 1/2 hours though.

JOAN

How?

BILL

Well, we added long silences. Wherever there were words before, there are meaningful pauses now.

JOAN

(To audience)

Here's a scene.

(Exit BILL and ELTON. Enter MING. She sits on the floor and begins writing in her diary again. Enter JOE FRIDAY.)

JOE FRIDAY

I couldn't... on chopper, not without...

MING

Leave my... behind. My Vietnam...

JOE FRIDAY

...love...

MING

...love... too, Joe.

(They kiss, freeze, and exit quickly. JOAN looks to the audience.)

JOAN

One of the questions many people are asking is how will this affect the film version of "A Vietnam Diary," which is slated to be in theaters next summer? Morticia Mogul, producer of the film:

(Enter MORTICIA MOGUL, producer of the movie, "A Vietnam Diary." She pulls up a stool next to JOAN.)

MORTICIA

Our solution to bypassing this legal mess was to buy rights from everyone who had anything to do with the play. We also bought the word "Diary." You look that up in next year's dictionary and you'll see our name next to it. "Vietnam" was unavailable for purchase but we have several other words that rhyme with it. Point is, we've spent over 200 million dollars in pre-production, already making this the most expensive picture ever made.

Unfortunately, just when we were about to start shooting, the star of the play died.

JOAN

Ben Fleck, who is also the star of your film.

MORTICIA

That's correct. Because we've spent so much money already, we can hardly abort production. Luckily for us, our parent company, Giant Studios, owns the rights to the Cop Drama "Chicago P.D. Hope," which Ben Fleck starred in. So what we've done is digitally inserted him into our film by using scenes he performed as the punk cop Calaban in "Chicago P.D. Hope." It's a little jarring at first, but I think overall it works.

JOAN

I believe you have a clip for us?

MORTICIA

I believe I do. This is the last scene:

(Enter MING once again. She sits on the floor and begins writing in her diary just as she has every other time. Enter JOE FRIDAY, except instead of wearing fatigues, he is now wearing a cop uniform. He may not even face MING while speaking to her.)

JOE FRIDAY

I don't care who you work for, I don't care who you know, all I care about is finding out who killed Rodriguez, you scum.

MING

(As if he'd said his original line)
I couldn't leave my diary behind. My Vietnam Diary.

JOE FRIDAY

...because I'm a cop. And
being a cop is all I'm good
at.

MING

I love you too, Joe Friday.

(MING and JOE FRIDAY kiss, freeze, then exit.
JOAN turns to MORTICIA.)

JOAN

(Laughing)

Looks like a blockbuster.

MORTICIA

I certainly hope so.

JOAN

(Looking at her
watch.)

That's all the time we have.
Join me next week when I'll
be talking with the team
behind the off-Broadway drama
"Howard Kemp" and Howard Kemp
himself who is suing the team
for killing him six nights a
week and two matinees on the
weekends. I'm Joan
Kellheywith and this has been
"Theater Law."

(She pauses for applause. If there is none, she
prompts the audience with her hand. Lights fade
to black.)

THE END

THREE DEAD RATS

Written by Tim McKeon

Based on the case study by Jane Ginsburg

EXT. PICKET LINE - DAY

Several men and women are outside of a record store protesting. They are holding signs depicting the band The Brutish Boys with a red mark through them.

JOYCE (V.O.)

The new Brutish Boys CD, "Straight from the Sewer" was released today but instead of rushing to record stores to buy it, many fans rushed stores to protest, calling this popular group, "a pack of thieves."

A MAN approaches the camera. Joyce holds a microphone out to him.

MAN

My name is Kevin Willis, I coined the phrase "a pack of thieves."

JOYCE

Why do you consider the Brutish Boys thieves?

MAN

Because all their music is sampled. They don't write new stuff. It's totally stolen from 3 Dead Rats. "Totally stolen" that's my phrase too. I coined that.

INSERT SHOT: The Brutish Boys Album, "Straight from the Sewer" next to the 3 Dead Rats single, "Greed is Awesome."

JOYCE (V.O.)

Brutish Boys are taking the most criticism for sampling music from a song, "Greed is Awesome," by 3 Dead Rats.

Both bands are represented by
Death Jam records.

CUT TO:

INT. STUDIO - DAY

Joyce is sitting down with three men in their twenties, MIKE E., SALAMANDER, and COKIE, all of them dressed like the Beastie Boys in jumpsuits etc. Underneath them is the title: "The Brutish Boys."

MIKE E.

We did sample from the 3 Dead Rats mostly in our song, "Brutish Boys in the House," but it's totally legit. We took pieces from their song that we liked and put it in ours.

SALAMANDER

The vocals, the guitar part.

COKIE

I played the flute.

MIKE E.

It's not like we re-did the whole song.

(Pause.)

What's wicked dumb about this scandal is that the message in "Brutish Boys in the House" and "Greed is Awesome" is the same. People should support small businesses, not big corporations.

SALAMANDER

We may not actually spell that message out in our song, but it's definitely inferred.

JOYCE

But doesn't the fact that
your song appears in a Spepsi
Cola commercial undermine
that message?

MIKE E.

Spepsi Cola is a drink. It's
not a corporation. You drink
it.

COKIE

It's like juice but fizzy.

CUT TO:

INT. STUDIO - DAY

Two black men and one black woman, all in their
20's, are in a studio rapping into a microphone
hanging from the ceiling. We can hear them
faintly in the background.

JOYCE (V.O.)

I caught up with Victoria
Vermin, Melvin Mouse and
Robert Rodent of Three Dead
Rats to find out their
reaction to The Brutish
Boys' comments.

CUT TO:

INT. STUDIO - DAY - A FEW MOMENTS LATER

Joyce is now sitting with 3 Dead Rats, ROBERT
RODENT, VICTORIA VERMIN, and MELVIN MOUSE, black
twenty-somethings. They are dressed like the
band "The Fugees". Underneath them a title reads,
"Three Dead Rats."

VICTORIA VERMIN

We don't care what they say,
that (BLEEP) is lifted. And
me and Rob and Mel, we are
getting a lawsuit suing
Brutish Boys, Death Jam
records, everybody who bought

the record, downloaded that song, or saw that commercial with it playing in the background.

MELVIN MOUSE

That actually includes us. We were watching TV and accidentally saw the commercial.

VICTORIA VERMIN

We don't care. We're suing everyone. If that means we lose a lawsuit and have to pay ourselves cuz we won that's what happens. It's our right as artists.

CUT TO:

INT. ERWIN CHEMERINSKY'S OFFICE - DAY

Erwin Chemerinsky, sits at his desk. Underneath him a title reads, "Erwin Chemerinsky, Law Professor at USC."

JOYCE

Do 3 Dead Rats have a case?

ERWIN

I've always thought that Three Dead Rats is a terrific band and personally, I hope they do have a case. It's a bit complicated because Death Jam records is claiming the contract the band signed categorizes their record as a "work for hire". If this is true, it's going to be an uphill battle for the Rats. If the record isn't

considered a "work for hire" however, and the band didn't give permission for songs to be used in a commercial... Well, then they may have claims under copyright law, trademark law, and even a California law claim for theft of their musical identity.

CUT TO:

JOYCE (V.O.)

In addition to filing several hundred lawsuits, 3 Dead Rats is also attacking the website Prankster which disseminates music across the Internet without permission from artists or record companies.

INSERT SHOT: As Joyce is speaking, graphics appear which show several computers attached to one another with lines. Poorly animated musical notes travel from one computer to the next, demonstrating how Prankster works.

JOYCE (cont'd)

In order to seek revenge, 3 Dead Rats have released several virus-ridden MP3's of their music which, when downloaded, will erase an entire hard drive.

INSERT SHOT: A poorly animated rat travels from one computer to the next. As the rat reaches each computer, the computer blows up.

CUT TO:

INT. JACK RIPPER'S BEDROOM - DAY

JACK RIPPER, a teenager wearing a Prankster T-shirt and ripped jeans, sits in a chair in a

cluttered bedroom. Underneath Jack Ripper is the title, "Jack Ripper, Founder of Prankster."

JACK RIPPER

What 3 Dead Rats has done is way uncool. I downloaded their cover of Nirvana's cover of the David Bowie song, "The Man Who Sold the World" and it erased my whole history paper. I bought it off this website historypapers.com. Now I gotta shell out like 6 more bucks.

CUT TO:

INT. CLASSROOM - DAY

MRS. ROSKINS, a teacher at Winslow High, stands in front of a blackboard. Underneath her the title appears, "Mrs. Roskins, Winslow High History Teacher."

MRS. ROSKINS

I don't care what the excuse. If a student doesn't turn in homework on time, it's 5 points off his final grade.

CUT TO:

INT. DEATH JAM RECORDS OFFICE - DAY

LYAR CONMAN a white businessman in a suit, and HUSTLA CRIMMONS, a black man with gold chains around his neck, sit behind a desk. Behind them could be framed gold records, posters of Three Dead Rats and The Brutish Boys etc. Underneath them a title reads, "Lyar Conman and Hustla Crimmons, founders of Death Jam Records."

LYAR CONMAN

The whole mess with 3 Dead Rats and Brutish Boys is very unfortunate. First and foremost Death Jam cares about making money, but 6th

or 7th - we're concerned
about our artists rights.

HUSTLA CRIMMONS

That's why we're sinking
millions of dollars into
developing technology to stop
people from downloading and
distorting music illegally.
The only people who should be
allowed to do that is us.

CUT TO:

INT. DEATH JAM LABORATORY - DAY

A SCIENTIST in a white lab coat looks at the
camera. Behind him, TWO OTHER SCIENTISTS are
sitting at a computer with a TEENAGE GIRL. The
title appears, "Death Jam Laboratory."

SCIENTIST

We're currently working on a
device that lets people
download MP3's legally. Now
the real trick here was
figuring out a way to make
sure only the person who's
paying the monthly fee to
record companies can use it.
One way we've safeguarded
this device from being loaned
out is by having a retinal
scan...

The teenager is sitting in front of a computer,
having her retina scanned.

SCIENTIST (O.S.)

...voice recognition...

The teenager speaks into a box near the computer.

TEENAGER

My name is Jenny Thompson.

COMPUTER VOICE

Repeat.

TEENAGER

My name is Jenny Thompson.

SCIENTIST (O.S.)

...and by having the computer constantly confirming that the user is indeed the same person who initially logged on.

The teenage girl types something into her computer.

SCIENTIST 2

You can listen to a song now.

The teenage girl puts on a pair of headphones and sways her head to the music.

TEENAGER

This isn't bad...

She stops swaying.

It shut off.

SCIENTIST 3

5 seconds passed.

SCIENTIST 2

That's enough time so that another person could have switched seats with you and started to listen.

SCIENTIST 2

If you want to hear more, you can do another retinal scan...

SCIENTIST 3

And voice recognition...

The first scientist turns back to the camera.

SCIENTIST

While these devices may seem restrictive, I think in the end consumers will thank us for creating technology which is legal and safe for all parties involved.

The teenage girl behind the scientist yanks her hand away from the keyboard.

TEENAGER

Ow! It shocked me.

A scientist looks over her shoulder.

SCIENTIST

Ah, you entered the wrong date of birth.

FADE TO BLACK

THE END

ARTISTA SPEAKS OUT

Written by Tim McKeon

Based on the case study by Arnie Lutzker

INT. STUDIO - DAY

The HOST, a woman in her thirties, dressed smartly in a navy blue suit, sits in a chair, smiling broadly.

HOST

Artista Wrights is widow to the famous filmmaker Federico Bellini. Her new book, "That's Not My Dead Husband's Movie" is an international best-seller. Welcome Artista.

We pull back to reveal ARTISTA WRIGHTS, a platinum blond in her late thirties who could easily be mistaken for Donatella Versace. She is holding a copy of her book.

ARTISTA

(In a thick Italian accent)

Thank you. It's a good to be here.

HOST

Some history for those who haven't read the book. In 1990 your husband's film "Hidden", the story of an Italian war resistance family which hid persecuted gypsies who were special targets of facism, was nominated for Best Foreign Film Academy Award. The film lost that year, really didn't come close to winning... at all, but it established your husband as a major talent. The two of you were the toast of the Hollywood community. What happened after that?

ARTISTA

Well after that he a die.

HOST

Oh, yes. Yes he did.

As Artista continues talking we see an overly dramatic recreation of the scene she is describing. The words "Dramatic Recreation" flash across the screen.

ARTISTA (V.O.)

My husband he was a little bit a wild, that's why I love him. One night we are riding the motorbike through the Hollywood Hills and I say, "Federico slow down you are going too fast!" And he say a, "What?" Because the wind it is so loud. Then he crash and die. I was thrown from bike to safety.

The image of the "dramatic recreation Artista" looking at the crash fades back into the real Artista.

ARTISTA (cont'd)

After he die, the film "Hidden" was bought by FOXXY films. Then it die too.

HOST

How do you mean?

ARTISTA

I tell you this all before show.

(Sighing)

My husband he do the "work for hire" to get the film made. When FOXXY Films buy it they said they own and do whatever they want. The original film was done in

black and white, they add
color. The original film is
drama they add comedy.

HOST

But did these few alterations
really
(making quote symbol)
"change" the film?

ARTISTA

I bring you a two stills from
the movie. First from one my
husband make.

INSERT SHOT: A black and white photo of two
priests sitting at a table. Underneath the
picture are the words, "Still from original
version of "Hidden"."

ARTISTA (cont'd)

Next from film they make.

INSERT SHOT: Another picture slides in next to
it. This is in color and shows two clowns
sitting in the exact same position. Underneath
this picture are the words, "Still from digitally
remastered version of "Hidden"."

ARTISTA (cont'd)

This version is still called
a film by Federico Bellini.

HOST

I see. (PAUSE) What about
(making quote symbol)
"content"? Did they change
any of the actual
(making quote symbol)
"story"?

ARTISTA

Again, I tell you this before
show. FOXXY Films it want to
make it enjoyable to all
audiences so they alter parts
so people in different

countries relate to it. For example, for Irish version they add a jig with fiddle and drums; in the German version they cut out part about work camps. I bring in two clips, one from original movie, one from French version to show how different they make it. This is the last scene of the film.

HOST

(To camera)

The last scene of the film, "Hidden".

ARTISTA

Original and French.

HOST

(To camera)

Original and French.

Artista looks at Host not understanding why she had to repeat her.

CUT TO:

EXT. A WALL - DAY

Two men in overcoats are standing in front of a wall. The picture is in black and white. Underneath the picture are the words, "Original version of 'Hidden'." The following subtitles accompany the actors speech in Italian:

MAN 1

I only wish I could have saved more of them.

MAN 2

You did all you could.

MAN 1

You're right. I guess both
of us should enjoy the open
space while we can.

Man 2 smiles at Man 1.

CUT TO:

EXT. THE EIFEL TOWER - DAY

The two men are standing outside with the Eifel Tower in the background. Man 1 is now wearing a beret and Man 2 carries a bagette. The picture is in brilliant color. Underneath them are the words, "French version of "Hidden"." The following subtitles accompany the actors dubbed speech in French:

MAN 1

I only wish I could have
saved more of them.

MAN 2

You are bound to lose one or
two croissants in a batch.

MAN 1

Would you like to join me for
a cafe au lait?

Man 1 and Man 2 share a hearty laugh.

CUT TO:

INT. STUDIO - DAY

The Host turns to Artista.

HOST

Artista, what are you hoping
to accomplish with the
publication of your book?

ARTISTA

I want the film restored to
how my husband he make it:
the color in black and white,

no clowns, and they put back
cello music instead of
soundtrack by rap group 3
Dead Rats.

CUT TO:

EXT. OPEN FIELD - DAY

There is a jeep parked next to a bush. A man, RUPERT BURNER, is in a khaki shirt and khaki shorts a la The Croc Hunter. Behind him, two local guides point guns at the bush. We see the host standing off to the side with a microphone. She is wearing a similar outfit as before and looks very uncomfortable.

HOST (V.O.)

I caught up with Rupert
Burner, president of FOXXY
Films, on safari, to get his
side of the story.

The words, "Rupert Burner, President of FOXXY
Films," appears under him.

RUPERT BURNER

(To Host, in a thick
Australian accent)

FOXXY films did wonders for
that film - you know I even
added some World War II
footage from my special
collection. I didn't have to
do that.

HOST

But adding to the film,
doesn't that violate
Bellini's rights?

RUPERT BURNER

What about the audiences
rights? Huh? To see a good
film? The fact is, thanks to
us, "Hidden" is seen across
the world. There is a soap

opera based on it and a Saturday morning cartoon. We're also developing technology where we can digitally insert famous actors into the parts. Imagine how much bigger ""Hidden"" will be with Bruce Willis and Brad Pitt?

HOST

But is that ethically-

Rupert holds up his finger. The bush in front of him shakes.

RUPERT BURNER

Shhh! There he is. The red-whiskered mountain lion. Look at the fangs on him! Very dayn-gerous. I'm going to try and crawl inside, work him like a puppet.

Rupert enters the bush. The host looks to the camera helplessly. She signals to cut.

FADE TO BLACK.

THE END

THE TROUBLE WITH SECRET
MERGERS

Written by Tim McKeon

Based on the case study by
Sara Diamond

SETTING: A large curtain runs horizontally across the stage. There are four stools, two on either side of the curtain. Whenever it is noted that the actors enter or exit it is always through this curtain.

AT RISE: A man, CONNOR HART, stands center stage. He wears a suit and holds several note cards. To his left, is BJORN GRETZ, sitting on one of two stools. BJORN looks very hip with the exception being his thick glasses, which have broken and are now taped. Upbeat music plays as CONNOR straightens his tie and jacket. As the music fades he looks at the audience.

CONNOR

Hello, and welcome to
"Entertainment This Evening."
I'm Connor Hart filling in
for Mary Shrine on vacation,
filling in for John Tosh,
also on vacation.

(He sits down next to BJORN)

CONNOR

Today we are talking to Bjorn
Gretz, author of the best
selling book, "Secrets I
Know."

(To BJORN)

Good to see you again.

BJORN

We just met.

CONNOR

So we did.

(Pause. He smiles,
trying to cover.)

Now, I understand this book
came out of your involvement

with a game that's played, I think the term is, "online"?

BJORN

Yes. It's called "Secret Mergers and Acquisitions," I created it about 3, 4 years ago.

CONNOR

Exactly. Now for viewers who may still be living in the digital dark ages like myself-

(He chuckles)

could you explain how this "online" game works?

BJORN

It concerns the high power world of interactive media and software, and how effective collaboration can be in the face of competition. As a player, your goal is to acquire as many secrets as possible - and when I say secrets I mean actual secrets in the world, new software in development by companies, visual designs, blueprints etc. - and then use them as bargaining chips. For example, say you know another player wants the new logo for the search engine "Yahool!"-

CONNOR

Engine. Now would this be a car engine or something with a little less power, like one for a lawnmower?

BJORN

It's for the Internet.

CONNOR

Of course.

BJORN

So, anyway, you would work the newsgroups, do a little hacking, find the logo for this engine-

CONNOR

(Pointing)

Which would be big enough to power an Internet.

BJORN

(Trying to ignore

CONNOR)

...and then sell it to the other player for say, the Golden Ring of Zolton, which will get you to the next level of "Secret Mergers."

(CONNOR laughs once more then turns suddenly stoic.)

CONNOR (cont'd)

One more question before you go, and really this has been a good time: What do you think of the recent lawsuit filed by co-creators of the game? They claim the information in your book was information they retrieved and so therefore not yours to publish.

BJORN

First of all, they are not the creators, I am. The only thing we have in common is we

went to Art school together.
The fact is, without me there
would be no game. I wrote
the programs, all the 3-D
Avatars you see are based on
my body and face-

(CONNOR gives him a puzzled look.)

BJORN

-in the game the character
you see on the screen looks
3-D - it's called an Avatar.
Anyhow, all I'm doing is
finally cashing in on my hard
work.

(BJORN exits. CONNOR addresses the audience.)

BJORN (cont'd)

Representatives for the
lawsuit filed by the so-
called co-creators are Jack
Schmidt a programmer, and
Kevin Baptiste, a twelve
year-old. I caught up with
them one afternoon when Kevin
had a half day.

(Enter JACK SCHMIDT, a twenty-something wearing a
t-shirt advertising the movie "The Matrix" and
KEVIN BAPTISTE, a twelve year-old complete with
baseball cap and backpack. He is also wearing a
t-shirt advertising a video game.)

JACK

What his book should be
called is "Secrets We Told
Him." All of the stuff in it
is stuff that other players
found and used to play the
game. He robbed us. What
hurts most though, is he
stole from our Avatars.

KEVIN

The other thing is, he's
ruined "Secret Mergers" with
all these fees he's set up.
For example-

(Enter BJORN again. He is now dressed in plastic
armor and carries a sword and shield.)

KEVIN

(Pointing to BJORN)
This is my Avatar: "Dungeon
Dude." I used to be able to
use the arrow keys to you
know, move his sword-

(BJORN moves his sword.)

KEVIN

His shield-

(BJORN moves his shield.)

KEVIN (cont'd)

and stuff.

(BJORN moves "stuff.")

KEVIN (cont'd)

Now Bjorn is saying because
the characters are all based
on his face and his body,
he's charging us \$29.95 for
every move. My allowance is
only 5 bucks a week, so right
now all my guy can do is kind
of kneel a little.

(BJORN kneels a little then exits. CONNOR turns
towards the GAMERS.)

CONNOR

Has there been any talk of
boycotting the game?

(Pause. Both KEVIN and JACK stare at CONNOR.)

JACK
What would we do?

KEVIN
You can't just stop playing
the game.

CONNOR
(Chuckling)
I guess I can understand
that. I know if I don't get
my daily dose of racquetball,
I'm a grump all day.

JACK
You do that on a Mac or PC?

CONNOR
With a racquet and ball.

JACK
I don't know that version.

(The GAMERS exit. CONNOR looks to the audience.)

CONNOR
Another group publicly
denouncing Bjorn and his book
is the Cinetex Corporation.

(Enter A BUSINESSMAN and a BUSINESSWOMAN. They
sit down along with CONNOR on stools
centerstage.)

BUSINESSWOMAN
The Cinetex Corporation is
extremely upset because many
of our unreleased designs and
software code are reproduced
in "Secrets I Know". This is
a clear case of theft and
we're in negotiations now
with the gamers in their
lawsuit against Bjorn.

BUSINESSMAN

The problem we're having is that the secrets stolen from us were originally stolen by the aforementioned gamers.

BUSINESSWOMAN

So our strategy now is to join the gamers in a lawsuit against Bjorn, win, and then file another lawsuit against the gamers, hopefully soliciting Bjorn's help.

CONNOR

But isn't it true that the Cinetex Corporation is in negotiations to purchase the rights to Bjorn's book and game in order to find out secrets and mergers about your competitors?

BUSINESSMAN

No, no, no, that's not us. That's the Bergelsman Group.

CONNOR

Which is a company also owned by you.

(Pause.)

BUSINESSWOMAN

I'm afraid we're not allowed to say anything else in regard to this matter.

BUSINESSMAN

But-

BUSINESSWOMAN

(To BUSINESSMAN)

Roger, shhh.

(BUSINESSMAN and BUSINESSWOMAN exit. CONNOR turns to the audience.)

CONNOR

Despite some legal problems,
life is looking good for
Bjorn. His avant garde design
in the game has been hailed
by critics as art for the new
millenium and his game will
be installed in the Museum of
Modern Art in New York in
2004. Perhaps most exciting
is the sitcom based on
"Secret Mergers" premiering
next fall. In addition to
featuring a cast of neurotic
New Yorkers, each episode
will also spotlight several
"secrets" which Bjorn says
could be gossip about
mergers, unreleased visual
designs, or new software
code. Here's a clip:

(CONNOR steps off to the side. Enter a WOMAN and
a MAN who look like Elaine and Jerry from
"Seinfeld." They sit on two stools across from
one another and mime eating at a diner.)

MAN

...and then I said to her
press Cntrl-S...
(Pausing for
emphasis)
and we cracked the code on
her DVD.

(Canned laughter floods the room. The MAN
smiles.)

WOMAN

You told her press Cntrl-S?
(Pause)
Terry, women hate Cntrl-S.
To a woman, Cntrl-S is like
Cntrl-L.

(More canned laughter.)

MAN

But if anything I meant
Cntrl-K!

(Another man, MAN 2, crashes through the curtain. He looks and acts suspiciously like "Kramer" from "Seinfeld". Canned laughter floods the room.)

MAN 2

Terry! I need to know the
new jingle for that Home
Grocery company! It's
driving me crazy!

(More canned laughter. The MEN and WOMAN freeze. CONNOR steps center stage and addresses the audience. He is still chuckling.)

CONNOR

If that's not good stuff, I
don't know what is. This has
been "Entertainment This
Evening." I'm Connor Hart,
filling in for Mary Shrine on
vacation, filling in for John
Tosh, also on vacation. Join
us next week with Carol
Helman, filling in for me on
vacation and if not her, well
then someone else. Thank you
and good night.

(The lights fade to black.)

THE END