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ART
TECHNOLOGY
&
INTELLECTUAL
PROPERTY

**THE ONE HUNDREDTH
AMERICAN ASSEMBLY**

February 7-10, 2002

Arden House

Harriman, New York

Art, Technology, and Intellectual Property

THE AMERICAN ASSEMBLY
COLUMBIA UNIVERSITY

[PREFACE]

On February 7, 2002, sixty-seven men and women gathered at Arden House in Harriman, New York for the 100th American Assembly entitled “Art, Technology, and Intellectual Property.” The participants included artists, attorneys, foundation and government officials, representatives from the academic and communications communities, as well as from the for-profit and not-for-profit arts sectors. Consistent with The American Assembly’s format, the participants came from across the country and represented a broad spectrum of views and interests.

The premise of the meeting was that in the twenty-first century transition to an information-driven economy, intellectual property is a critical resource. Most sectors of American society, including business, communications, government, science, medicine, and education are racing to deal with this new economy and to anticipate its consequences. The arts

sector is poised to join the other sectors, but first, a closer examination of intellectual property issues is essential. While the for-profit arts have actively pursued their intellectual

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property interests and technological opportunities, the not-for-profit arts have been less able to secure a place at the policy and decision-making table. Both parts of the arts sector share common concerns about fostering creativity, but they often have different interests, values, perspectives, and resources. At the 100th American Assembly, leaders from the for-profit and not-for-profit arts met in structured discussions to explore these issues with authorities from other sectors,

in the belief that understanding both common causes and varying interests is essential to the wise and productive development of America's creative assets in the twenty-first century. This is their report.

Alberta Arthurs, former director of Arts and Humanities at The Rockefeller Foundation, and senior associate at MEM Associates, and Frank Hodson, former chair of the National Endowment for the Arts, and principal of Hodson and Associates, served as co-chairs. Michael S. Shapiro, former General Counsel of the National Endowment for the Humanities and intellectual property consultant to arts organizations, and Margaret J. Wyszomirski, professor and director of the Arts Policy and Administration Program at The Ohio State University, assisted in the design and structure of the project, and wrote two papers, which served to focus the issues. Andrew Blau, principal of Flanerie Works, and Andrew Taylor, director of the Bolz Center for Arts Administration at the University of Wisconsin-Madison School of Business joined the leadership and were invaluable in assisting in the Assembly's design. The project also benefited greatly from the advice and guidance of a distinguished steering committee whose names and affiliations are listed in the appendix of this report.

At the suggestion of the steering committee, and over a twenty-month period, The Assembly held two day-and-a-half-long meetings at Arden House to provide guidance and understanding on two critical areas at the confluence of art, technology, and intellectual property. The first focused on "The Arts Disciplines" and was attended by thirty representatives of various arts disciplines. The participants heard formal addresses by Elise Bernhardt, Howard Besser, and Mary Beth Peters. (Affiliations of these and other participants can be found in the appendix of this report.) Following the formal addresses, the participants listened to presentations from representatives of the various arts disciplines about the impact of technology and other issues. The participants divided into discussion groups to continue their dialogue. Later Messrs. Blau, Shapiro, and Taylor and Ms. Wyszomirski reported back to the entire group on the findings of the discussions.

The second day-and-a-half meeting focused on "Business Models"

and was also attended by thirty participants who came together to discuss emerging models and how they are adjusting to rapid technological change. The participants heard formal addresses by Eric Scheirer, Andrew Blau, and Connie Cranos, followed by a panel moderated by Bruce Polichar and including Tod Cohen, Kevin Cunningham, Ann G. Kirschner, Tom Roli, and Kathleen Clark as panelists. As with the prior mini-Assembly, the participants were divided into two groups for structured discussions. At the conclusion of those sessions, Messrs. Blau and Taylor reported the findings to the entire group.

With the success of these two meetings, and as the planning for the national meeting grew near, the co-chairs scheduled two day-long meetings with several participants from each of the two mini-Assemblies and other experts both to refine the issues and to set an agenda for the national Assembly. The participants in these two meetings are noted in the appendix.

For the national Assembly, Ms. Wyszomirski served as editor of the volume of background reading for the participants. This book is the first draft of a volume to be commercially published. Its table of contents is printed on the inside back cover of this report. Also, as part of this project, Mr. Shapiro was commissioned to write a book-length manuscript tentatively titled, *The Cultural Bargain: Arts, Copyright, and the Public Interest*, which is intended for publication. These materials will extend the discussions that took place at Arden House.

During the 100th American Assembly, participants heard a panel presentation and two keynote addresses, which provided additional

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background and informed their discussions. The panel built on much of the research gathered prior to the national meeting and set the parameters for the meeting. The panelists were Messrs. Blau, Shapiro, Taylor, and Ms. Wyszomirski. The two addresses were given by Debora L. Spar, professor at Harvard Business School and Lawrence Lessig, professor of law at Stanford University.

On February 10, 2002 the participants reviewed as a group the draft report, which contained their findings and recommendations. Their adopted draft of the report is available on the arts and culture section of The American Assembly's web site (www.americanassembly.org) along with reports from The Assembly's other arts projects. Visitors to the web site can also view the presentations by Professors Spar and Lessig, which were videotaped for this purpose by Streaming Culture, a project at the New Media Lab of the Graduate Center of the City University of New York..

It should be understood that in this report the Assembly defined the arts inclusively, as it did in its 1997 report "The Arts and the Public Purpose," which identified the arts as representing "...a spectrum from commercial to not-for-profit to volunteer, resisting the conventional dichotomies of high and low, fine and folk, professional and amateur, pop and classic..." and "...including the whole spectrum of artistic activity in the United States—from Sunday school Christmas pageants to symphony orchestras to fashion design to blockbuster movies."

We gratefully acknowledge the generous support of The Rockefeller Foundation, The Pew Charitable Trusts, The David and Lucile Packard Foundation, The AT&T Foundation, AOL Time Warner, The Mary Duke Biddle Foundation, and eBay.

We owe our special gratitude to the project's co-chairs, Alberta Arthurs and Frank Hodsoll, for their leadership in every aspect of this project. We would like to express our appreciation for the fine work of the discussion leaders and rapporteurs, who guided participants in their sessions and prepared the first draft of this report: Andrew Blau, Jeffrey Cunard, Kenneth Hamma, Ellen McCulloch-Lovell, Andrew

Taylor, and Caroline Williams, and to Michael Shapiro and Margaret Wyszomirski for the work that they also did in bringing the report and this project to completion.

The American Assembly takes no position on any subjects presented here for public discussion. In addition, it should be noted the participants took part in this meeting as individuals and spoke for themselves rather than for the organizations and institutions with which they are affiliated.

David H. Mortimer
The American Assembly

ART, TECHNOLOGY, AND INTELLECTUAL PROPERTY

At the close of their discussions, the participants in the 100th American Assembly on "Art, Technology, and Intellectual Property," at Arden House, Harriman, New York, February 7-10, 2002, reviewed as a group the following statement. While the statement represents general agreement, no one was asked to sign it. Furthermore, it should be understood that not everyone agreed with all of it, and some vigorously disagreed with some of it.

[PREAMBLE]

In the late spring of 1997, when the Ninety-Second American Assembly considered "The Arts and the Public Purpose," two large goals were achieved, goals which relate directly to those of the 100th American Assembly. The first was to define the arts in American life, which the participants did in these words:

"The arts in America derive in unique ways from the pluralism of our society, and from many traditions—preserved, imported, wedded, and put into collision—that originate here and in every country on earth." In all their diversity, the participants wrote, "The arts in our country celebrate and preserve our national legacy in museums, concert halls, parks, and alternative spaces; they also inhere in the objects and buildings we use every day, and in the music we listen to in our cars, workplaces, homes, and streets. They calm us and excite us, they lift us up and sober us ... they entertain as well as instruct us; they help us understand who we are as individuals, as communities, and as a people. They include the not-for-profit arts and the for-profit arts, as well as ... community, avocational, traditional, or folk arts, the indigenous

arts in their many manifestations."

The participants voiced a second, associated concept, a second goal that "...a fully functioning, flexible arts sector is institutionalized within our society, and this sector should figure in public debates with force and importance...The arts can and do meet the needs of the nation and its citizens." The report specified the several specific and significant ways in which the arts meet the public purposes of all Americans. And, the report also points out, "Public purposes are not static; they change and evolve; they are reinterpreted over time. For our time," the report goes on to say, "...the context (is one) of rapid technological, media, and social change." In that context, participants argued, "the arts ... have special public responsibilities."

Now, five years later, this Assembly is examining one of the most dynamic opportunities we Americans have to realize these public purposes—to achieve the aim of the arts to convey meaning, to inspire citizens, to educate,

stimulate, and move Americans to action. The digital technologies we come together to discuss present opportunities for all the arts—for-profit, not-for-profit and informal—to reach

Americans in new and myriad ways. These opportunities can be realized; the challenges, though, are considerable. We come together here to consider the opportunities and the challenges of our technological time.

The charge that we were given is clear. The twenty-first century transition to an information-driven, globalized economy makes intellectual property a key resource and requirement for understanding and

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action. The arts sector's unique assets can advance technological innovation, provide meaningful content and economic strength through technology, and disseminate creative and intellectual products. But this can only be accomplished by the sector through a close examination of intellectual property issues.

Individual cultural organizations, some discipline and trade organizations, distributors and consumers, and various ad hoc groups have taken up specific issues, but seldom in constructive connection with each other, and seldom guided by a sectoral vision of the place and function of the arts in an information society or in a technologically-driven economy. The not-for-profit and the for-profit parts of the arts sector share concerns about promoting creativity in this digital age, but they often have different perspectives, priorities, interests, values, and resources to bring to bear in policy debates and "deals." We come together in this Assembly to explore these issues from across the arts and business, and from the perspectives of law, scholarship, philanthropy and government.

It is in a spirit of discovery, in the hope of making change possible, that we have worked together in the 100th American Assembly on the subject of "Art, Technology, and Intellectual Property." Our findings and our recommendations follow.

[THE PUBLIC INTEREST]

The public has an interest in a continual renewal and expansion of the nation's "artistic capital"—in literature, visual art, music, performance, the media of moving and still images, and in other works that comprise our artistic expressions and become our artistic heritage.

The public is enriched by being able to enjoy, being stimulated by, and participating in a variety of artistic works. Underlying the nation's creativity and artistic development is a precious American principle: freedom of expression. The public also gains when creators are encouraged to produce new works and when the marketplace of ideas functions effectively—as envisaged in the Copyright Clause enshrined in

our Constitution. Access to the artistic heritage in a technological age has, however, become increasingly complex.

Those who make art and those who make it accessible to the public must take many factors into consideration. These include a variety of new media and technologies: telecommunications systems, new digital formats, and ways to protect intellectual property using technology itself, among others. The Constitution and laws of the United States, including international treaty obligations, provide the basic underpinnings for all of the discussions at this Assembly

"To promote the Progress of Science and useful Arts," the U.S. Constitution authorizes Congress to grant to authors and other creators a number of exclusive rights to their works for limited times. Under the Copyright Clause, Congress has enacted copyright laws for more than two centuries to provide economic incentives to promote the public welfare. What vision of the public interest did the framers have in mind? The Supreme Court answered this way: "The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."

To secure the benefits of creativity for the public, Congress has over the years repeatedly revised copyright law to accommodate changes in technology and the marketplace, striving to maintain the balance among creators, copyright owners, distributors, and users of creative works. This balancing of often competing, but often congruent, interests is the "cultural bargain" inherent in U.S. copyright law. It is still relevant to ask: who benefits from the rules, whose voices are being heard, and how is the balance between private and public interests shifting?

Creators and owners are intended to be economically rewarded for their efforts. Other creators and users may build on their accomplishments through the entry of their work into the public domain and through fair use, which generally excuses certain uses of protected works (such as criticism, comment, scholarship, and education). Distributors of copyrighted materials are entitled to receive a return on

their investment, but consumers may dispose of particular copies of lawfully acquired works. Copyright provides incentives for the production of new works, but upon the expiration of the copyright term the work enters the public domain.

In evaluating the impact of rapid legal and technological change on the arts, this Assembly—which included artists, producers, distributors, aggregators and consumers of creative works—endorsed the primacy of the public interest. Participants in this Assembly affirmed the view that the copyright system remains a highly effective, market-oriented mechanism for the production, distribution, and use of creative works by the public. Nonetheless, individual creators expressed serious concern that rapid changes in technology and business practices have eroded their ability to secure a fair return for their creative labor.

Producers, distributors, and aggregators of copyrighted materials are

also turning toward contractual and technological measures to protect their works. Record companies, movie studios, book publishers, and other for-profit organizations are fearful that copyright has not been strong enough to protect their investments.

They have adopted a cau-

tious approach to using digital media, such as the Internet, to deliver cultural products, thereby limiting (at least in the near term) the availability to the public of art in digital form. To respond to these concerns, the Digital Millennium Copyright Act (DMCA) was enacted, a statute that itself provokes debate about whether it unduly limits access to creative works.

America's arts institutions are entrusted with caring for, interpreting, providing access to, and preserving the collections that contain the nation's artistic heritage. Although the conversion of these collections

into digital format holds great promise in permitting these organizations to discharge their responsibilities more efficiently, the same technologies present new intellectual property issues.

Finally, the limited terms of copyrights and patents establish the boundaries between private property and the public domain. On one side, copyright and patent grants of monopolies for limited terms provide an effective system for the creation, production, and distribution of creative works. On the other side is the public domain, an intellectual commons where creative works are available for use by all without permission or payment.

* * *

To put copyright in perspective, it is an important component of the public interest in art. But the public interest in art, technology, and intellectual property is much broader than copyright. To protect the public interest in the marketplace of artistic expression, the United States, like many other countries, not only protects freedom of expression, but also prohibits anticompetitive behavior, and ensures access to communications facilities, including broadband networks. There are also provisions for public and private subsidy to assist in the creation of, and access to, quality art and to assure the availability of minority voices. All these things are done, in addition to traditional protections for contractual obligations freely arrived at. These laws and policies continue to evolve as the marketplace and technology evolve.

CHALLENGES AND OPPORTUNITIES OF THE NEW TECHNOLOGIES FOR THE ARTS

The “technology” discussed in “Art, Technology, and Intellectual Property” encompasses a range of digital media technologies useful for the creation, display, description, and dissemination of artistic product. While much of the discussion centered on the Internet—the most visible of these new technologies—other technologies considered included computer technologies, DVDs, CDs, mp3s, database storage and retrieval systems, digital cameras, and many others, both current

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and those to come. The Internet, as important as it is, might be thought of as the tip of the iceberg, emblematic of the large number of digital devices that do and will affect the arts. Together these digital technologies catalyze a profound shift to new formats, setting in motion structural changes in the ways that all the work of the arts is conducted.

The opportunities that digitization offers to the arts are an integral part of a broader set of changes in society at large. Digital technologies affect every aspect of modern life in America. As of September 2001, 65.6 percent of the U.S. population were computer users, 54 percent of the population used the Internet. Since 1997, computer use among Americans has grown rapidly at the rate of 5.3 percent annually. Internet use has surged even more dramatically, at the rate of 20 percent a year since 1998. (From “A Nation Online,” a U.S. Department of Commerce study.) The arts have no option; to remain an important aspect of life in America today, they must have a vital digital presence.

And, indeed, the arts are engaging with digital technologies in many ways. The points of contact exist across the spectrum of artistic needs and commitments, from production to preservation. Some creators use digital technology to make their work, some of which they never would have been able to produce otherwise. Artists, producers, and presenters use the Internet to communicate the work and to promote it: offering information and schedules and selling tickets—using technology to develop demand. Curators, scholars, and critics find their materials on web sites or in databases around the globe. Arts administrators digitize the development, financial, and other systems essential to their organizations. Preservationists, librarians, and archivists make effective use of storage and retrieval systems. The most revolutionary use of the digital technologies is in the distribution function; from museum images to pop icons, the transmission of artistic materials to their publics is changing radically.

The different disciplines of the arts, by virtue of their histories and the forms they create, are making different uses of these technologies. Current popular music, for instance, is a natural digital discipline—it

is created digitally to begin with—and the consumer buys it in digital format and plays it in digital format. From composer to consumer, there is a clear digital track. Most major and even smaller independent producers in television and motion pictures use digital technologies to lower costs, and broadcasters and movie theaters are expected to begin using digital transmission and display to improve visual and audio quality. When digital broadband networks become widely available, they are expected to enable direct delivery to homes throughout the country. The literary arts may be created digitally, but readers remain committed to traditional formats, preferring books to e-books so far. Museums fall in between—much of the material they own and exhibit, the physical holdings, can be made visible on the web, extending their missions and their audiences and increasing educational and retail outreach. But not all of the experiences that museums can offer are translatable to the digital realm. The same is true of such live performing arts as dance, opera, symphonic music, jazz, and theater. These forms live on stage, and the transition to the virtual realm can never be complete.

The disciplines alone do not account for the differences in the digital experience. There are other differences across the artistic sphere. Emerging artists differ from established artists in their access to technologies. The for-profit arts may be more likely to engage audiences digitally than the not-for-profit arts.

The overall challenges presented to the arts by the digital environment are formidable. The new technologies are expensive. Finding the resources, justifying the expense, is difficult for virtually all the players, and it is particularly so for all but the largest not-for-profits, not to mention individual artists. The not-for-profits and many individuals are also particularly disadvantaged by the technological expertise that is required.

The most profound challenge, perhaps, is that these technologies undermine the systems that have traditionally protected the intellectual property at the heart of creative endeavors. Traditional copyright protected the “container” within which the creation existed—the book

that held the fiction, for instance. The new technologies break that traditional unity between the container and its contents. They allow the content to travel without the container and beyond the control of the rights holder.

Furthermore, the new technologies make possible endless perfect copying of any product that appears in digital form, and the Internet allows for those copies to circulate globally at almost no cost. The ease of copying and distribution that digitization allows defies the usual policing and the usual protections enacted by individual territories, states, or nations. Finding remedies that allow creators to feel secure about maintaining their interests in their work, and to be fairly compensated under these conditions, is a crucial challenge. These same characteristics create the conditions for the potential disruption of the traditional distribution systems. Digital media can also be changed by admirers of the work, who often appropriate it, violating the copyright of the rights holder even as they promote the “brand” of the artist.

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required, and the “fit” with the art form itself keep them from participating in the digital revolution. Yet for others, the problems stem from the fact that these technologies are too easy to use, too cheap, too widely available, and growing beyond our legal and social understandings. This could be a revolution that threatens its own creators.

[LEGAL ENVIRONMENT]

COPYRIGHT

The legal environment has a profound effect on the production, transfer, distribution, and use of creative works. Based on the Constitution, the intellectual property laws of the United States grant creators and owners of intellectual property economic incentives for the creation and distribution of creative works by granting them monopoly rights for limited times. For all works of creative expression, the most significant of these laws is that of copyright, but this Assembly also discussed the roles of patent and trademark laws in promoting creative endeavors.

Copyright law acknowledges the role of all actors involved in the creative disciplines. The law initially vests copyright in the creator, as the original author of a work. A copyright holder owns a “bundle of rights,” including the rights to reproduce, prepare derivative works and distribute copies of the work, as well as to perform publicly, publicly display and, for sound recordings, to perform the work publicly by means of a digital audio transmission. Rights are granted for a term of copyright, after which the copyright in a work falls into the public domain, where anyone can make use of the work.

The author is generally free to transfer any one or all of the monopoly rights he or she owns in a copyright to others, whether by exclusive or nonexclusive license or by outright transfer of ownership. Those acquiring such rights can, in turn, create new works, aggregate works with other works, and distribute or otherwise make them available to the audience.

To reflect and preserve the critical balance between the rights of copyright holders and the ability of users, the law authorizes fair use of copyrighted works, without permission of the copyright holder, for certain uses, such as criticism, education and scholarship. The copyright law also establishes other limitations on copyright owners’ exclusive rights, for example, for libraries and other archival organizations, educational institutions, and public broadcasters.

The Berne Convention for the Protection of Literary and Artistic Works (1896), the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization (WTO) (1994), the World Intellectual Property Organization (WIPO) Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (WPPT) (1996), set out basic copyright principles and a floor of protection for copyright owners, to which the United States must adhere. Several of the proposals for changes to U.S. copyright law discussed during this Assembly would have to be reviewed in light of these obligations.

[ISSUES AND CHALLENGES]

CHANGES IN THE LAW

The Assembly discussed the impact of two recent changes in intellectual property law on the public interest balance between users and copyright holders: the Copyright Term Extension Act of 1998 (CTEA) and the Digital Millennium Copyright Act of the same year (DMCA). Most participants in the Assembly felt that these changes, and other developments in the law, had shifted this balance in favor of copyright holders, though some participants emphasized that, in the aggregate, these statutory enhancements in copyright owners' rights encouraged investments in production and distribution, particularly in new formats, and reflected new business models, to the greater benefit of the public at large.

The CTEA, enacted in part to respond to pressures to harmonize the United States term of copyright with that of the European Union, extended the term of copyright for an additional twenty years. Many participants noted that this change had the direct and immediate effect of preventing historical materials nearing the end of their copyright term from falling into the public domain, without a demonstrable, countervailing benefit in establishing incentives to create new works. As a result, these materials will not be available for use by creators and users for many more years.

The DMCA supplements copyright by prohibiting circumvention of technological measures, such as encryption and Digital Rights Management (DRM) systems, that are used by copyright holders to protect their works when distributed in a digital environment. It also outlaws products (including software) that have the primary purpose of circumventing such measures. At this Assembly, some participants emphasized that such technologies, and therefore the DMCA itself, benefit the public by establishing the foundation for the dissemination of works in new digital formats, and by making it possible for users to acquire particular rights to view, listen or copy that which would not otherwise be made available in the absence of DRM systems.

Other participants at this Assembly expressed significant concerns, however, that the DMCA substantially altered the copyright balance because it cuts off fair use and inhibits access to and archiving of works protected by technological measures. These participants also said the DMCA could impair the ability to have access to encrypted works that have fallen into the public domain. Although the DMCA was enacted to bring the United States into compliance with two new international treaties of the WIPO, some participants felt that the law was more restrictive than the requirements of those treaties. In addition, they suggested that the DMCA has had a potentially substantial chilling effect on other activities, such as the development and use of legitimate encryption and other research tools.

The DMCA does provide for periodic Copyright Office assessment as to whether technological measures that restrict access might have an inhibiting effect on fair or other lawful uses of copyrighted works. In the first such review, the Copyright Office generally found that there was insufficient evidence to conclude that the use of such measures had had an adverse impact. Some participants in this Assembly, however, expressed the opinion that the scope of the review was inadequate because of flaws in the statutory instructions to the Copyright Office as to how to conduct the review.

Finally, this Assembly discussed the metes and bounds of the concept of fair use itself. Concerns were expressed that recent judicial applica-

tions of the fair use doctrine in the digital realm, such as with respect to sound sampling, had the effect of constricting legitimate uses and enhancing the rights of copyright holders. This Assembly discussed the potential benefits of developing an improved understanding of customary fair use practices in particular sectors or disciplines, as well as the possibility of a renewed effort to develop fair use guidelines.

ENFORCING RIGHTS UNDER COPYRIGHT

This Assembly perceived another significant shift in the public interest balance in the arts: the extent to which copyright holders were aggressively using copyright to safeguard or enforce their rights. Some evidence suggests that, as copyright holders increasingly have come to realize the value of their intellectual property assets, they may be choosing to adopt restrictive licensing programs, or setting licensing fees at levels regarded by not-for-profit or smaller arts organizations as prohibitively expensive. Copyright holders that may be uncertain of the value of their intellectual property, or fear the possibility of unauthorized use in a digital environment, may simply decide to “lock up” their assets, thereby depriving the public of access to those works.

Conversely, smaller institutions expressed concern that the enforcement remedies that copyright law makes available to copyright holders may not, as a practical matter, be available to them. By dint of lack of legal or technical information or financial resources, they may not be in a position to invoke their rights under law, including by tracking unauthorized uses of their works or by suing unauthorized users.

TRANSFER OF RIGHTS: CONTRACTS, COLLECTIVE NEGOTIATION, AND STATUTORY LICENSING

The Copyright Act itself expressly provides that the creator may transfer ownership in one or more of the rights in the bundle of rights in a copyright. Based on these provisions, in the disciplines not governed by collective bargaining agreements, an independent creator will enter into individual contract negotiations with an institution, such as a recording company or publisher, for the production and distribution of his/her works. The producing/distributing organization may add

substantial value to the music artist’s works, and is usually better able to package, market, and distribute the work to mass or niche markets.

At this Assembly, many creators expressed significant concerns regarding what they perceive as the disparities in bargaining power between them and larger producing and distributing organizations. One participant suggested a “relentless drift” of power to corporate entities. The disparities in power, it was said, resulted in contractual arrangements by which all rights were acquired, thereby causing original creators to lose control over their artistic output. As a result, this output may become less available to the public, and to its creators to exploit further. Another concern was expressed that aggregations of copyright ownership in a few hands may constrain the development of new avenues of expression.

To address these concerns in part, individual creators discussed the merits of being able to organize individuals, in order to undertake group negotiations with publishing, producing, and distributing organizations. This Assembly discussed whether and to what extent legal constraints arising from the antitrust laws presently prevent individual creators from being able to engage in collective discussions, whether the antitrust laws should be amended to permit such activities, and whether participation in such mechanisms should be mandatory or voluntary. The applicability of existing licensing mechanisms, such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI), were discussed as potential models for collective licensing.

Individual creators expressed yet another concern with respect to

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their ability to engage in negotiations with larger, for-profit organizations: the increasing concentration of these organizations in the media sectors is seen by them as reducing their bargaining position and decreasing their ability to distribute their works to the public. In this regard, some participants felt that further examination from an antitrust perspective of the structure of these industries in the arts sector might be timely.

This Assembly also discussed other aspects of rights transfers that inhibit the creation, dissemination, and use of artistic works in a digital age. Older contracts often do not contemplate or expressly provide publishers and distributors with the right to use creators' works in digital formats, such as e-books, digital packaged media, and electronic databases. Publishers and other distributors may find that they do not have and are unable to clear the rights needed to make works available through these new media. To the extent, however, that creators have retained these rights, they may be able to participate more directly in these new modes of distribution.

Participants at this Assembly raised a related concern with regard to some union agreements, which, in the interest of protecting artists, may inhibit the transformation of creative works into new media that would make them more accessible to the public. In particular, this Assembly identified problems with respect to the recording of live theatrical or other performances for anything other than very limited archival purposes.

Finally, participants discussed various situations in which the copyright law expressly provides that copyright holders must license their works on the basis of prescribed economic terms. In these circumstances, Congress determined that such statutory licenses should be made available to address particular structural problems, such as transaction costs in negotiating for licenses (cable television) or potential abuse of monopoly rights in withholding works from competitive distribution (mechanical licenses for musical works). This Assembly discussed the extent to which a statutory license could be established, for example, to ensure that copyrighted works that are part of our nation-

al artistic heritage would be made available at a reasonable price or in situations where works had otherwise been locked up.

MORAL RIGHTS

To supplement and enhance the rights available to artists under copyright law, some participants at this Assembly suggested that U.S. law should include an additional right, perhaps based on the European concept of "moral rights." Such rights, which already exist to a limited extent for the visual arts under the Visual Artists Rights Act of 1990, would not be as freely alienable as copyright rights, and could not be waived. Others suggested that establishing such rights might result in impairing the legitimate uses of artistic works.

THE INTERNATIONAL ENVIRONMENT

Participants in this Assembly noted that networks and other technological means for the distribution of copyrighted works are now, as a practical matter, global in scope. Participants recognized, therefore, the critical importance of copyright holders being able to enforce their intellectual property rights in territories outside the United States.

[MECHANISMS]

A web of implementing informational and administrative mechanisms—some public and others private—are essential to the functioning of both the intellectual property system and to the operation of copyright businesses and industries. These mechanisms may be directed toward protecting and advancing public and private interests associated with copyright and intellectual property. They help shape the environment for and feasibility of business models and the attainment of economic rewards from commerce in intellectual property. And they can help creators, businesses, professions, disciplines, fields, consumers, users, and the general public respond to environmental changes that impinge on established assumptions, relations, expectations, and activities involving intellectual property. These mechanisms include:

- information systems for registering the ownership of intellectual property rights;
- organizations dedicated to the clearance, licensing, and distribution of fees associated with the use of intellectual property rights;
- relevant public information resources;
- entities actively engaged in preserving, archiving, and expanding the collection of intellectual properties in the public domain;
- groups that give effective voice to and represent the various parties in intellectual property debates; and
- sources of technical expertise and financial support that assist creators, creative industries, for-profit and not-for-profit arts organizations, and users of intellectual property to adjust to a rapidly changing digital environment.

In recent years, a new awareness of intellectual property rights and issues, as well as growing expectations with respect to the potential value of such rights, have spurred a search for new, expanded, or improved mechanisms better to support the operation of the U.S. intellectual property system. Furthermore, given the rapid and significant changes occurring

in technology, law, and the arts sector itself, this search for better intellectual property mechanisms is occurring in an environment that is complex and uncertain. Insufficient information, fear of possible liability, perceptions of

exclusion from pertinent rule-making arenas, and very different levels of resources that different parties can bring to bear, all factor in to this complex environment.

On the one hand, intellectual property creators, owners, and users want such mechanisms to be quick, easy, and fair, but on the other hand, they also want them to be flexible and accommodating of dif-

There is no central location where a potential user can go to identify who owns and/or manages the rights to a specific artistic work.

ferent kinds of rights, uses, and users. Although technology has often given rise or urgency to the need for better intellectual property mechanisms, technology also presents a means or the potential to address many of these needs.

These mechanisms are generally provided by a variety of organizations that perform various tasks:

- the U.S. Copyright Office;
- intellectual property registries and licensing organizations (such as ASCAP, BMI, the Copyright Clearance Center, and the Publication Rights Clearinghouse);
- labor unions and guilds that negotiate collective bargaining agreements and litigate to secure appropriate wages, working conditions, and rights for their members (such as the American Federation of Musicians [AFM], the American Federation of Television and Radio Artists [AFTRA], the American Guild of Musical Artists [AGMA], and the Dramatists Guild);
- political advocacy coalitions (such as the Creative Incentive Coalition and the Digital Future Coalition);
- professional and service organizations that inform and educate their members about legal, political, and international developments concerning intellectual property (such as the American Association of Museums, the Directors' Guild, OPERA America, the Recording Industry Association of America, and the Theatre Communications Group);
- technology application service providers that design the software systems to manage intellectual property rights (such as Digimarc and RightsLine);
- limited partnerships designed to provide a specific service (such as MusicNet, Pressplay, MovieLink, and Movies.com); and
- collaborative initiatives (such as the Consortium for Interchange of Museum Information [CIMI] or the National Initiative for a Networked Cultural Heritage [NINCH]).

Under the Berne Convention, the U.S. Copyright Office cannot require the “formalities” of registration. Hence, compulsory registration or recordation of transfer is not a possibility for establishing a comprehensive information system on copyright information. Thus,

much complexity and uncertainty surrounds the apparently basic task of identifying and locating the current owners of intellectual property rights. Indeed, this task can be so daunting that potential users have been known either to give up and abandon, or change, projects for which they were seeking intellectual property rights. Potential users have even resorted to good-faith infringement, hoping they will not subsequently incur penalties or liabilities. Meanwhile, the holders of unfindable intellectual property rights are losing money through lost fees.

Media, entertainment, and other for-profit arts organizations often hold and manage the rights for large portfolios of intellectual property. However, many of these organizations do not have publicly available inventory lists; and even within a single corporation, multiple divisions and subsidiaries may each administer different rights and different properties differently. Similarly, many not-for-profit arts organizations, such as museums, lack any or all but rudimentary inventories of their portfolios of intellectual properties. Some works registered before the mid-1970s are literally filed on index cards.

A combination of private companies and membership associations may co-exist within a given art discipline, where each organization manages the rights of many owners, each of which is independently registered with one organization. In the field of music, performance rights are managed through ASCAP, BMI, and other performing rights organizations. The mechanical rights to these same musical works require separate clearance. New technology has raised the issue of combining both mechanical and performance royalties, further complicating a licensing solution. In other fields, there is no collective management society to manage the rights of individual creators. This has been the case in the illustration field until quite recently.

There is no central location where a potential user can go to identify who owns and/or manages the rights to a specific artistic work, or to find out how various of these rights might be managed by different arts organizations. Nor are the “inventories” or repertoires of each of these organizations cross-indexed to one another. The same fragment-

ed and uncoordinated information system exists in every art form—music, visual arts, literary and text works, and audio-visual materials. It is ironic that one can go to a major bookselling website like Amazon.com and locate virtually any book in print and most music CDs produced in the United States in order to purchase a copy, while at the same time there is no comparable web site where the owners of the intellectual property rights inherent in those books and recordings can be identified and easily contacted to secure a legitimate right to copy, perform, re-purpose, or use a work or parts of it in another way.

Such an uncoordinated and antiquated system for locating intellectual property rights-holders creates business, legal, and access problems. Historically, solving these problems seemed impossible. There seemed to be little interest or resources to build a single, centralized registry at enormous cost. Today, however, technology may be on the brink of providing a “virtual” solution—allowing separate copyright industries, corporations, and licensing collectives not only to post their own repertory on-line but also to institute on-line registration and licensing. Technology might even allow the convergence of many individual registries into a combined, virtual informational directory where “the rights story” and the rights-holder(s) could be identified and potential users could follow links to specific licensing managers.

A related concern is how to facilitate the use of copyrighted works when the rights-holders simply cannot be found. Are such works doomed to a reclusive life—often unavailable to the public, not part of the public domain, but unusable in part or for repurposing? One possible mechanism for handling this problem might be the establishment of voluntary guidelines as to what would constitute “due diligence” or a reasonable effort to locate the rights-holder, that would provide some safe harbor from liability for the potential user.

There is also a need for basic information about the copyright systems in other countries—as potential models in the United States and as mechanisms for identifying, clearing, and receiving royalties from the use of intellectual property rights abroad. Other countries have created copyright information portals that provide a wealth of infor-

mation for both the general public and for more sophisticated users. For example, the Australia Copyright Council maintains a web site where information sheets on frequently asked questions and copyright practices pertaining to a bevy of specific artforms and interests can be found. Furthermore, the site provides links to over two dozen societies that are members of the Council and that manage rights for specific kinds of creators.

Another concern involves the process and costs of capturing ephemeral artworks such as dance, theater, or opera performances and preserving existing analog recordings that are deteriorating. Not-for-profit performing arts organizations may not fully appreciate the value of digitization and can seldom afford the related costs. This may necessitate a role for philanthropy. For a wide range of analog media collections in both a not-for-profit and for-profit context, the cost of digitization can be prohibitive without innovative partnerships. In one example of an innovative partnership, Microsoft and the Warner Music Group entered into a joint agreement, which allowed for the digitization of a limited set of Warner Music Group assets, thus making them available to the public in Windows Media format on a Warner Music Group website.

Another question is how the inclusiveness of the public domain might be actively expanded rather than simply regarded as a passive and residual repository. Some are currently exploring the idea of transferring the notion of a nature conservancy into the copyright realm. Current examples include the Creative Commons and the Knowledge Conservancy.

Finally, the variety of intellectual property mechanisms, of relevant laws affecting intellectual property, and of labor and other contractual agreements means that many kinds of public policy activity may have a significant effect on the arts. The demands of monitoring such policy debates—let alone of developing information and positions and organizing into coalitions to advance those positions and so as to provide a voice for artists and smaller arts organizations in policymaking—present tasks often beyond the resources or expertise of any sin-

gle individual, entity, discipline, or industry. While there are examples of coalitions in the intellectual property arena, these have seldom included broad participation across the arts sector and have tended to be issue-specific rather than providing an ongoing forum for policy development and discussion.

Copyright and other laws and policies (including those in the areas of trade, labor relations, telecommunications, anti-trust, and contract) affect the private rewards that accrue to creators and copyright owners, as well as the broader public interest. Forums, coalition building, and other mechanisms that bring relevant and representative voices to the policymaking table, particularly those of individual creators and smaller arts organizations (for-profit and not-for-profit), are lacking.

[BUSINESS MODELS]

The creation, development, distribution, and archiving of artistic content have long been the result of a complex network of business models. While the term “business model” has become a hazy shorthand

for a variety of things, this Assembly focused on the term as a system of choices to enable businesses—not-for-profit, for-profit, from sole contractor to multi-national—to meet missions and market goals in sustainable ways.

The choices inherent in a business model include those related to an interactive bundle of strategies—as they drive product/service mix,

In the arts sector, a primary element of the relevant business models...has been the production, acquisition, aggregation, archiving, packaging and distribution of intellectual property.

revenue mix, legal/tax structure, supply chain relationships, capital/asset mix, and staff/leadership incentives. Businesses in all their forms seek goals of market, money, and mission. They do so within the framework of laws, contracts, markets, and mechanisms. And, some businesses seek to adapt their environments by actively pursuing changes to this framework.

In the arts sector, a primary element of the relevant business models—not-for-profit and for-profit alike—has been the production, acquisition, aggregation, archiving, packaging, and distribution of intellectual property. Art museums gather and steward large volumes of art in many forms. Recording labels aggregate the intellectual property of recorded performances, as well as the underlying intellectual property of songwriters and composers, and distribute it through various means to a marketplace. Performing artists and organizations gather the intellectual property of composers, designers, choreographers, and technicians, and present it to an audience. The variety and vitality of a multitude of business models in a multitude of marketplaces—for-profit and not-for-profit—undergird the advancement of the arts as a part of the cultural experience.

In a changing cultural, economic, and technological environment, the capacity in the 1990s of artists and arts organizations to respond to markets was critical for not-for-profits and for-profits alike. For not-for-profit arts institutions, this response was traditionally local, as audiences ultimately came to the exhibition or performance. With the arrival of digital capture and distribution, old assets acquired an apparent new value if distributed externally online. Moving from a local to a diffuse market meant a significant change in the traditional model, the impact of which is seen in pilot projects that explored the new online opportunities (the Kennedy Center's Millennium Stage Internet broadcasts, the Art Museum Image Consortium, Connecticut's CTArtsConnectEd, and others).

While for-profits, not-for-profits, and individual creators entered this new world with similar challenges, they faced different realities. The available business model choices either enabled an active explo-

ration of new ideas or discouraged it. All participants saw before them large investments of time and money, but only market-based projects seemed to hold the true potential for future revenue—although even these often proved unrealizable. Sustainable not-for-profit models in relation to earned and contributed income have yet to be widely developed.

For most players, the promise of reduced distribution costs was offset by large investments in preparing digital assets, and in acquiring necessary technology, licenses and/or clearances. For almost all of the not-for-profit arts, online projects offered early promise of revenue, but ultimately created only another operating expense. The provision of necessary capital was also constrained by lack of a future demonstrable return and risk-averse philanthropy.

Many of these same apparent opportunities, challenges, and problems were faced by the for-profit sector. But for the most part, the for-profits were better versed in distribution, had more flexible business models that could be changed or could absorb change, and had access to venture capital in the explosion of venture capital availability in the 1990s.

Assembly participants outlined numerous examples of how long-standing business models were challenged, confused, or confounded by digital technologies. The examples ranged from the specific to the broad—from complex licensing systems in recorded music to translating experiential culture to an online world. As in the pre-digital age, not all models were built solely on economic incentive—some were built for love of the activity, some for mission, some for a compulsion to create, some for creative control. Examples of models were offered as follows:

- A start-up providing a digital archive of scholarly journals for not-for-profit libraries and universities has established a sustainable business through its not-for-profit status, its emphasis on the public interest, and its variable membership, access, and subscription fees.
- A for-profit entrepreneur has secured rights to cultural programs from public television, and launched an online distribution system to a niche audience of theater and performance enthusiasts.

- A major national museum has provided free and licensed access—through multiple distribution channels—to a digitized catalog of its collections, including streaming media and K-12 education materials. The licenses result in a low-level revenue stream that covers some of the costs, but the primary goals include extension of mission and encouragement of greater museum attendance.
- A for-profit aggregator of online learning opportunities has leveraged the desire of major institutions to expand into the digital realm. The model gains both fees and content from a range of content partners, and sells the result to online distributors and directly to lifelong learners.
- An online aggregator of digital audio streaming rights has bundled high-fidelity on-demand playback, Internet radio options, contextual music information, and editorial selection functions into a subscription service for the connected marketplace.
- A not-for-profit experimental theater company has exploited production software developed as part of its creative process, by forming multiple for-profit entities to protect, license, and market its intellectual property.

Conclusions reached by this Assembly were as frequently based on the absence of models as on the existence of models that may or may not have shown promise. Some participants suggested promising concepts for business models with respect to software and rights management.

It was further suggested that:

- Issues of perceived value made new models in all industries hard to develop and negotiate. As one participant stated, “It is the false expectation of financial gain that keeps things locked up.”
- The advancement of the Internet and digital technology accelerated the speed of access and consumption of all types of works. As audiences grow hungry for immediacy, breadth, depth, and quality of content, established businesses on both the for-profit and not-for-profit side appear as yet unprepared to respond. For example:
 - o A full and comprehensive accounting of inventory in a museum or commercial film studio is an important step in making such content available. While developing such an accounting will always be a goal—often set aside for more pressing business issues—the opportunity to account for and track the holdings would be a herculean task without the use of digital technology. And, the capacity

to use and pay for the use of such technology varies widely.

- o While more flexible contracts with creative professionals would have been useful to make a variety of content available, such contracts are today driven by more immediate imperatives and traditional understandings of values and rights.

This Assembly recognized the rich ecology of business models driving the arts sector—public, private, for-profit, not-for-profit, professional, and amateur. The concern was that not all participants in the artistic enterprise were in a position to be knowledgeable about and pursue relevant business models and not all models were equally enabled to adapt to the online world. The concern was that these imbalances could threaten the public interest.

[EDUCATION AND ENGAGEMENT]

Assembly participants described a rapidly changing technological environment that is altering how art gets created, how the public receives information about it, how artistic products are owned, and how they are distributed. The public interest is served by having artists, artists in training, authors, educators, researchers, and arts organizations informed about intellectual property, so they can adapt to change and continue to enrich the storehouse of the artistic heritage. Audiences and consumers will benefit by understanding the rules governing their use of art, how they may adapt it, and where they can find it on the Internet. Artistic works—their production and their accessibility—will be affected by the digital environment and the laws, mechanisms, and practices that are emerging from it.

Many citizens lack basic information about the copyright system itself: what constitutes rights, who manages them, where one goes to secure and to clear such rights, and what are the meanings of recent legislative actions and judicial rulings. Copyright education should include an understanding of how intellectual property issues are intertwined with labor agreements and where there is room for accommodation, and how international forces influence the character and enforcement of copyright within the United States. Artists, arts organ-

izations, audiences, and even some smaller for-profit creative enterprises need more education to understand these influences and to participate more actively in the public policies and private practices that affect them.

ARTISTS

For artists, authors, and other creators, there are significant differences between being an independent contractor (self-employed) and being an employee, and one's rights under each circumstance. There are also some differences between creating a work and actually owning it. Individual artists may experience the effects of unequal bargaining power on the retention of their copyrights. Information about the pros and cons of selling rights and of all-rights contracts is important to making choices that will affect artists' livelihoods.

Assembly participants pointed out that most art schools, conservatories, colleges and universities that train artists and arts administrators fail to give them real-world skills in intellectual property, rights, and contracts, although some limited training sessions are being offered by labor unions, conservatories, and other not-for-profit organizations.

Artists would profit from better training in these matters earlier in their careers. Artists should also know what they may and may not do with others' works when they adapt or use ele-

ments of them to create new work. Information about the clearing of rights, and liabilities when one fails to do so, will become more necessary in a digital environment. Artists are also citizens, and should participate in the discussions about intellectual property legislation and

For almost all of the not-for-profit arts, online projects offered early promise of revenue, but ultimately created only another operating expense.

mechanisms that will encourage or inhibit the production, availability, and preservation of art.

ARTS ORGANIZATIONS

Organizations that produce or present art also do not receive regular intellectual property information or education. What defines the public domain? What threatens it? Those are questions with consequences for arts organizations. In dance, classical music, opera, and theater, where each performance is ephemeral and unique, organizations do not yet see the digital performance as another way to reach audiences. Many still need to understand the differences between using digital media for performance, audience outreach, marketing, and development. Some recent national labor union agreements have provided more local flexibility in what some companies can do, but these agreements are not yet widely known.

"Aggregating" interests—whether joining forces in portals, Web sites, or representing their own interests—is seen by some as a loss of identity, rather than an effective way of reaching more people. Nonetheless, ways may be found for arts organizations to benefit from forms of aggregation. And, many who represented not-for-profit arts institutions, large and small, at this Assembly, expressed the need for a "greater voice" and a "seat at the table" where decisions are being made on intellectual property matters that affect them.

AUDIENCES, CONSUMERS, AND CORPORATIONS

Participants expressed the fear that many users of arts products now expect that these might be free for the taking. These users may not know anything about the economics of the arts or of earning a living as an artist. Why copyright exists, the concept and practice of "fair use," and why it is important to have a healthy, not shrinking, public domain are subjects for new public education efforts. Some for-profit creative enterprises are active in educating students and the public about the value of copyright protection. Relationships should be encouraged that assist smaller independent companies and not-for-profits to learn about technology from the larger for-profits who also

could advise on techniques for digital rights management.

Audiences may not understand why they have access to some cultural materials and not others, and what is at stake when artworks owned by corporations are not made available. The users, or consumers, also need to know what they may and may not do with copyrighted works. Informed members of the public should have a stronger voice when policies about intellectual property are being made. The Internet was

Organizations that produce or present art also do not receive regular intellectual property information or education.

described as “a clutter;” it is hard to find art, information about art, and digital art. More information on where to find things will both build audiences and enhance creativity.

There are a number of entities that could become more active in educating their constituencies and the broader public about these issues. Corporations, trade associations, and labor organizations each have a role. So do service organizations that work with artists and arts organizations, including museums, performing arts companies, and artists’ collectives. A neutral convening organization also could be helpful.

Not everyone who participated in the discussions was able to be present at the final plenary session at which the following recommendations were adopted. It should be understood that there was considerable controversy about some of the recommendations, and various participants do not support several of them.

[RECOMMENDATIONS]

FORUMS

Artists, policymakers, and representatives of arts and educational organizations, for-profit creative enterprises, other corporations, labor unions, users, and others with intellectual property concerns should meet in or establish a voluntary independent forum or forums to discuss, facilitate agreement on, and implement, as appropriate, solutions to:

- (a) standards of “due diligence” or “standard practice” in the good-faith effort to clear or secure rights to intellectual property, so as to facilitate progress, in harmony with copyright law, in curating, marketing, and preserving existing works and creating new works; and
- (b) the special intellectual property problems involved in creating multidisciplinary art forms and media, as these problems impact the balance of public availability and private protection.

Such a forum or forums should also generally continue conversation and education among all the parties with respect to issues of public importance in the debate on copyright in the digital environment.

CENTERS FOR INFORMATION AND ANALYSIS

Empirically based studies are essential to exerting an impact on policy discussions. Centers of study should be identified or established to analyze, among other things:

- (a) the effects of disparities in bargaining power on the ability of independent creators to retain copyright;
- (b) the desirability and feasibility of adopting standards and best prac-

- tices for analog and digital preservation of intellectual property;
- (c) the desirability and feasibility of legal changes that would make fair use an affirmative right under copyright law (as opposed to a defense);
 - (d) the impact of union agreements on the digital distribution of content; and
 - (e) potential mechanisms or legal responses, other than suit, to resolve disputes as to infringements resulting from good faith use of copyright.

COPYRIGHT CONSERVANCY

Foundations, corporations, individuals, and government should support copyright conservancies, analogous to nature conservancies, to build a body of public domain work through, for example:

- a collection of copies of works already in the public domain;
- purchase of copyrighted works for donation to a conservancy; and
- donation of copyrighted works and rights by creators or owners, with possible tax deductions.

LOCATOR SYSTEM, REGISTRIES, AND LICENSING MECHANISMS

A public-private, collaborative effort should be undertaken to develop a rights information locator system. This system would create a “virtual registry” that identifies intellectual property rights in individual works. Initially, such a system could be assembled by pooling information from existing registries, repertory lists, and collection inventories of copyright companies, collecting organizations, and public agencies. Such a system would not be responsible for licensing, fees collection, distribution, or authentication, but would direct potential users to groups and organizations that handle such transactions or could enable new players to do so.

The locator system and existing registries should be encouraged to document rights and intellectual property assets in accordance with common protocols and standards. They should also be encouraged to develop metadata formats and other means of inter-operability. A variety of arts business models could both support and benefit from such

a virtual system. It is expected that this system would immediately reduce the high costs of rights clearance for all participants. It might also ease the burden on libraries, educators, archivists, and others seeking to safeguard the nation’s heritage and present it to new generations.

DATABASES FOR AUTHENTICATION

Because of their susceptibility to manipulation as well as copying, the authenticity of digital works may be questioned. Currently, as part of the process of registering a work at the Copyright Office, a copy of the work may be deposited. Such deposited works, when digital, could be maintained as digital assets in a database. The virtual locator system mentioned in the previous recommendation could utilize information contained in the Copyright Office database to compare any other externally held copy with the Copyright Office copy, as a means of authenticating the externally held copy.

NOT-FOR-PROFIT DIGITIZATION EFFORTS

Public and private incentives should be offered to digitize the intellectual property assets of not-for-profit arts organizations, create databases of such assets, share information on them, and reach audiences with digital work (including performances).

HERITAGE ACCESS

America’s artistic heritage is embodied in the nation’s diverse arts. Given the importance of copyrighted material in representing artistic heritage to the public, mechanisms should be explored that might ease public access in the wake of extended copyright terms. Such mechanisms should strive to lower the various obstacles to the use of copyrighted works for heritage purposes.

STUDIES OF THE IMPACTS OF THE DMCA ON FAIR USE AND THE CTEA ON THE PUBLIC DOMAIN

A quantitative empirical study should be made of the impact, if any, (a) of the DMCA on protecting copyrights in cultural products and access to creative works, and diminishing fair use, and (b) of the CTEA on encouraging creativity and diminishing the public domain.

[GLOSSARY]

This could be done by Congressional mandate or privately, by an independent prestigious entity capable of quantitative economic analysis. There is also a need for analysis of the effect, if any, of the DMCA on archivists' ability to preserve digital works through transfers to new media and, where deemed reasonably necessary, if tools should be made lawfully available to effect such transfers.

EDUCATION

There should be a broad education campaign to raise the awareness of creators, the public, and policy makers about the value of copyright and of the public domain. This campaign should be conducted in coordination with existing efforts of associations and other agencies and should involve and inform creators, especially at the early stages of their careers with respect to these issues.

AUTHORS, ARTISTS, AND OTHER CREATORS

Creators must continue to be a part of the copyright equation. New technology presents many new opportunities and challenges, and creators should share in the value of their creations. To achieve this goal, new measures may need to be implemented, with great sensitivity to the differences among creators, disciplines, business circumstances, and other aspects of the public interest.

Among the measures to facilitate creators being able to share in the value of their creations, the feasibility and advisability of the following should be considered:

- (a) Legal measures that would assure creators a percentage or continuing share of the revenue generated by their works.
- (b) Legal or contractual provision for the reversion of the copyright to the creator where the work has lain fallow for some time.
- (c) Changes in the current provisions for termination of transfers of copyright, for example, to provide for their vesting after a shorter period of time.
- (d) Means by which freelance creators may more effectively negotiate their rights.

All-rights contracts: contracts in which a creator assigns all rights to a work to someone who, as a result, can use the work in any way, in any medium, in perpetuity without further permission from or compensation to the original creator.

ASCAP: The American Society of Composers, Authors, and Publishers, an organization created to license the works of its members and distribute royalties to them. (See also, BMI, below.) Licensees include anyone who wants to perform copyrighted music publicly, including radio and television broadcasters, cable programmers, concert promoters, presenters, performing organizations, public spaces, web sites, and places of entertainment.

Berne Convention: the oldest and the preeminent treaty in the field of copyright. Under the treaty, the seventy-five Berne member countries agree to extend to all works within the scope of the treaty certain minimum levels of protection (such as a minimum term of protection for copyright). A Berne member country also must extend the same treatment to the works of other Berne members as it extends to the works of its own authors. The treaty also establishes shared principles for all signatories including minimum duration of copyrights, the elimination of barriers to establishing a copyright, and protection of the author's "moral rights."

BMI: Broadcast Music, Inc. like ASCAP, a U.S. organization that licenses the works of its members and distributes royalties for public performances on radio or television, in concerts, in public places, and online.

CIMI: a consortium for the Computer Interchange of Museum Information, CIMI members include major art and historical museums that work together to establish common standards for the creation and sharing of digital information among cultural organizations.

Copyright Act of 1976: the most recent general revision of the federal law protecting creative expression in the United States. Since

Congress enacted the first copyright law in 1790, there have been four general revisions and many amendments of the copyright law. For example, the Copyright Act of 1976 was amended by the Digital Millennium Copyright Act of 1998 (discussed below).

Copyright Clause of the Constitution: Under the Copyright Clause of the U.S. Constitution, Congress is authorized to protect the creative works of authors and inventors for limited periods of time “to promote the Progress of Science and useful Arts.” (Article I, Section 8)

Copyright Clearance Center: a private U.S. nonprofit organization that operates licensing systems for the reproduction and distribution of copyrighted materials in print and electronic formats worldwide.

Copyright Office: a unit of the Library of Congress, the Copyright Office acts as the official registrar of copyrights in the US. The Copyright Office also administers U.S. copyright law, provides technical assistance to the Congress and the White House on copyright issues, and administers “Copyright Arbitration Royalty Panels” that set rates and distribute royalties under Congressional compulsory licenses.

Copyright Term Extension: the enactment by Congress of laws that lengthen the term of copyright protection. The U.S. Constitution authorizes Congress to establish the term of copyright. Starting in 1790 at fourteen years, Congress has used this authority to extend the term of copyright many times over the years, most recently adding twenty years to the previous duration of copyright in 1998. Today copyright protection begins with the creation of the work and lasts for the life of the author plus seventy years. For corporate works, copyright lasts ninety-five years from publication or 120 years from creation, whichever expires first.

Creative Incentive Coalition: a coalition of U.S. computer software, video, movie, television, publishing, and recording industries, which supported provisions of the DMCA (see above) that restrict the manufacture or distribution of products intended to break encryption schemes on copyrighted works. The coalition argued that strong “anti-circumvention” measures were needed to protect copyrights on the

Internet. These provisions were opposed by the Digital Future Coalition (see below).

Digimarc: a commercial developer of digital watermarking technologies, a tool for digital rights management. (See below.) Digital watermarks embed data in texts, graphics, or videos that allow works to be tracked online as a tool to monitor use for the purpose of assessing royalties, for example, or compared to an ‘original’ for the purpose checking authenticity and integrity of electronic documents.

Digital Future Coalition: a coalition of non-profit educational, scholarly, library, and consumer groups, together with commercial trade associations representing consumer electronics, telecommunications, computer, and network access companies; that opposed the Creative Incentive Coalition’s efforts to win passage of strong “anti-circumvention” measures in the DMCA, arguing that they would use technology to reduce the rights enjoyed by users of published work.

DMCA: the Digital Millennium Copyright Act of 1998, which implemented the WIPO Copyright and Performances and Phonograms treaties (discussed below), amended the Copyright Act of 1976 to address issues related to the distribution of copyrighted works on the Internet and in digital media. The DMCA prohibits the circumvention of certain technological measures (such as passwords and encryption technology) that protect copyrighted works on the Internet and in digital format. The DMCA also clarifies the responsibilities of online service providers with respect to copyrighted materials they transmit.

DRM: digital rights management, a general term for technologies or processes that allow copyright holders to use digital tools to protect, manage, track, or control their property online.

Fair use: legal doctrine that allows use of portions of copyrighted works for certain purposes such as criticism, comment, news reporting, teaching, scholarship, or research.

Intellectual property: property rights in the intangible products or

services arising from artistic, creative, and innovative labor. Intellectual property is protected by a variety of related legal doctrines, including copyrights, trademarks, and patents.

Moral rights: a set of “non-economic” or “personal” rights of authors, artists and other creators in their works. Under the laws of many countries, moral rights may include the right to receive credit for authorship (the “right of attribution”), the right to remain anonymous, and the right to object to the unauthorized distortion, mutilation or other modification of the work (the “right of integrity”). The Visual Artists Act of 1990 (VARA) established for the first time in U.S. federal law a limited grant of moral rights to authors of works of visual art that are unique or have very few copies.

MovieLink: a joint venture launched by MGM, Paramount, Sony, Universal, and Warner Brothers to deliver theatrically released movies over the Internet. (Originally called Moviefly.)

Movies.com: a joint project of Disney and Fox to provide movies on demand over the Internet.

MusicNet: a subscription service created by RealNetworks, AOL Time Warner, Bertelsmann AG, and EMI that offers music over the Internet from three of the five major recording labels.

NINCH: the National Initiative for a Networked Cultural Heritage, a nonprofit coalition of educational institutions and cultural organizations, representing the arts, the humanities, archives, libraries, museums, and others in policy discussions about the evolution of the digital environment.

Pressplay: a fee-based Internet music service created by Sony and Universal to provide access to popular music over the Internet from both major labels and independent record companies.

Publications Rights Clearinghouse: a licensing and royalty distributing organization, modeled on ASCAP and BMI, but serving writers seeking compensation for republication of their work.

Public domain: the legal status of work not protected by copyright, either because the copyright term is over or because the work was put in the public domain by the creator. Works in the public domain can be used freely by others without compensation to the original creator.

Public Domain: the legal status of works not protected by copyright. Public domain works include works whose term has expired, works that failed to comply with the “formalities” once required for copyright protection, and works categorically excluded from protection (such as works by federal government employees). Works in the public domain may be used freely, without the permission or compensation of the original creator.

RightsLine: A software vendor that provides applications for digital rights management and licensing-management software for entertainment companies. RightsLine software enables companies to automate the processing of contracts, rights, and transactions.

TRIPS: The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which entered into force in 1995, is part of the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) Agreement. The TRIPS Agreement requires WTO members to comply with the Berne Agreement (discussed above), enhances enforcement of intellectual property rights, and provides for a dispute resolution mechanism within the WTO.

WIPO: World Intellectual Property Organization, the international body of the United Nations responsible for promoting the protection of intellectual property around the world. WIPO administers key international intellectual property and copyright agreements.

WIPO Copyright Treaty (WCT): An international agreement that updates the Berne Convention for the protection and dissemination of creative works in digital format. Among other things, the WCT requires signatories to “provide ‘adequate protection’ against the circumvention of technical measures used by copyright owners to protect their works from infringement,” a requirement that was implemented

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February 7th - 10th, 2002

in U.S. law by the DMCA (discussed above.) The WIPO Copyright Treaty was adopted in 1996 and entered into force in 2002.

WIPO Performances & Phonograms Treaty (WPPT): An international agreement that updates the Geneva Phonograms Convention, addresses piracy of sound recordings and performers' neighboring and moral rights. The WPPT, which was adopted in 1996 and entered into force in 2002, clarifies that the reproduction right of performers and producers of phonograms applies to works in digital format.

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ABOUT THE AMERICAN ASSEMBLY

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Founded by Dwight D. Eisenhower in 1950 when he was president of Columbia University, The American Assembly, incorporated in the State of New York, holds meetings and publishes books to illuminate the issues of United States policy.

The gift of Arden House, Harriman, New York, by W. Averell Harriman, and its refitting as a site for undisturbed consideration of major public questions, were essential to the original American Assembly plan.

AMERICAN ASSEMBLY SESSIONS

At least two national Assembly programs are initiated each year.

- The Preparation: Authorities are retained to write the background papers presenting data and defining the main issues in each subject.
- The Assembly Technique: All Assemblies follow essentially the same procedure. The background papers are sent to participants in advance of the Assembly. The Assembly meets in small groups for four lengthy periods. All groups use the same agenda. At the close of these informal sessions, participants adopt in plenary session a final report of findings and recommendations. This is circulated widely.
- Other Assemblies: International, regional, state, and local Assemblies are held following the national session at Arden House. Assemblies have been held in most areas of the United States.

ARDEN HOUSE

The home of The American Assembly and the scene of most of the national sessions is Arden House, which was given to Columbia University in 1950 by W. Averell Harriman. E. Roland Harriman joined his brother in contributing toward the adaptation of the property for conference purposes. The buildings and surrounding land, known as the Harriman Campus of Columbia University, are fifty miles north of New York City.

Arden House is a distinguished conference center. It is self-supporting and operates throughout the year for use by organizations with educational objectives. The American Assembly is a tenant of this Columbia University facility only during Assembly sessions

THE AMERICAN ASSEMBLY

Art, Technology, and Intellectual Property

Edited by Margaret J. Wyszomirski

BACKGROUND VOLUME

- I. Overview and Introduction to Art, Technology, and Intellectual Property
A Preliminary Report on an American Assembly Project
.....Alberta Arthurs and Frank Hodsohl
- II. Creative Quandary: Policy Issues and Options at the Intersection of Art, Technology, and Intellectual Property
.....Margaret J. Wyszomirski
- III. Looking Backward and Forward: The Arts, Technology, and Intellectual Property--Core Concepts and Critical Issues
.....Michael Shapiro
- IV. Systems Syntax: Building a Common Language for Business Models
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- V. More Than Bit Players: How Information Technology Will Change the Ways Nonprofits and Foundations Work and Thrive in the Information Age
.....Andrew Blau
- VI. Labor Relation Issues and Commentaries
 1. Excerpts from Under the Stars: Essays on Labor Relations in Arts and Entertainment
.....Lois S. Gray and Ronald L. Seeber
 2. Commentary: The Threat to Creators
.....Jonathan Tasini
 3. Commentary:
.....Brad Holland
- VII. Organizing the Management of Intellectual Property Rights: Licensing, Collecting and Security in a Digital Age
.....Margaret J. Wyszomirski

ADDITIONAL READINGS

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.....Center for Arts and Culture