VIRTUAL REALITY, APPROPRIATION, AND PROPERTY RIGHTS IN ART: A ROUNDTABLE DISCUSSION

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INTRODUCTION

One of the most interesting debates in the copyright community today is over the issue of art appropriation. Appropriation art—art which intentionally copies the work of others—challenges the foundation of copyright law. It has long been assumed that it is necessary to reward authors with copyright, else they would not create. Even those who contend that the ultimate purpose of copyright law is the public good—as opposed to being for the benefit of authors—agree that economic remuneration in the form of property rights is a necessary condition to that end. The necessary scope of those rights, however, is disputable.

Appropriation artists argue that the copyright system inhibits their creativity by preventing them from doing what has always been done in art and literature—freely using the works of others as building blocks. That is, if spurring creativity is the purpose of the copyright law, it should be flexible enough to accommodate those artists whose expression necessarily depends on using prior works. In contrast, some copyright scholars and commentators maintain that allowing appropriation artists to freely copy is anti-competitive and infringes on the original author's property rights.

These opposing viewpoints are represented by the two artists on the panel: Jaron Lanier and John Carlin. Lanier, an inventor of virtual reality technology, takes the more traditional position, arguing that without the full range of copyright protection, artists like himself would be less likely to invest their time and effort in creating new works for public consumption. Carlin, on the other hand, supports the right of appropriation artists to use copyrighted expressions and symbols in their attempt to imitate and criticize reality.

The other distinguished panelists helped to define and explain these two opposing positions in the following discussion on appropriation art. [Eds.]

VIRTUAL REALITY, APPROPRIATION, AND PROPERTY RIGHTS IN ART: A ROUNDTABLE DISCUSSION*

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JOHN CARLIN[2]
ROCHELLE COOPER DREYFUSS[3]
MARCI A. HAMILTON[4]
PETER JASZI[5]
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JARON LANIER[7]
MARTHA WOODMANSEE[8]
RUSS VERSTEEG[9]
DIANE ZIMMERMAN[10]

Virtual reality is user-interfacing technology that tracks the kinetic movement, changes, and reactions in the body of an operator using devices that provide comprehensive and exclusive sensory excitation (in the sense that perceptual input from outside the system is excluded as much as possible). The technology simultaneously

* This transcript is the product of a Roundtable discussion on Property Rights in Art. The discussion concluded an all-day symposium on Copyright in the Twenty-First Century, sponsored by the *Cardozo Arts & Entertainment Law Journal*. Unfortunately, the first few minutes of the audiotape on which this transcript is based were accidentally erased. The *Journal* apologizes to the participants, particularly to Mr. Lanier who began the discussion.

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allows information and commands to be input back into the system as effortlessly as possible. Virtual reality can be thought of as total sensory immersion in the input and output of a computer system: everything one sees, feels, and hears comes from the computer, and everything the user does goes back in. It's an interactive illusion. Some of the devices currently being developed include gloves, complete field-of-vision "viewers" or "head-mounted displays," dual-source sound systems that mimic the effect of three-dimensional sound, body suits, magnetic field trackers, prosthetic and robotic devices and holographic projectors. [Eds.].

GORDON: Virtual reality sounds like a potential challenge for copyright in that you have something that looks like reality, feels like reality, and tries to be as close as possible to reality. One question the new technology raises might be this: if it is that much like reality, is it copyrightable? Is it a work of art, or is it somehow too close to the real thing—a fact, as it were, that needs to be let free for the public to use at will?

I wondered if any of us have thoughts about whether the very true-to-lifeness of virtual reality can create any copyright problems.

WOODMANSEE: How does virtual reality differ from where a text exists? It is surely not this piece of paper. It is what is instantiated on the piece of paper, so I don't see the difference.

LANIER: I will show you why it is different. An interesting question is: How do you make up the content of a virtual world? The hard way to do it is to program it in the conventional sense, by having a computer program that generates that world. In fact, that is so hard it is not feasible. So, the way it is done is through the use of visual tools in which you build a world. Some are like sculpting, where you go in and sculpt things, and others you move around to train them how to move. The point is you make this world come alive.

These tools have become rather easy to use, and recently elementary-school children have been learning to use them to put their dreams into virtual reality. In the next generation we will have a large segment of the population that has been trained from when they were little to make the stuff and they will be very fluid at it. We will see this future generation going to a virtual world and spontaneously creating stuff, perhaps creating it together.

This is what can lead to post-symbolic communication where people can communicate by directly creating the objective world instead of using symbols to refer to it. This is a hard idea, but one that I think is very profound.

GORDON: Are you saying that these little kids, wearing the gloves, are actually using symbols to create other symbols, but they perceive it as using real mud to create real mud pies.

LANIER: No. Virtual mud is not a symbol for mud; it is an experiential objective object just like real mud.

DREYFUSS: Suppose in a virtual world you want to have a ball hit a brick wall.

LANIER: That is a frequent request.

DREYFUSS: So there must be something that says when the ball hits a brick wall it comes back at a certain angle and so forth. Those are based upon physical principles someplace.

LANIER: If you choose them to be. Actually achieving physical principles is not a practicable goal, because science is never complete. So there are a series of ever more accurate attempts to summarize what the physical world is. Therefore, the kids playing with a ball wouldn't be very good. When we simulate an internal organ at Dartmouth, we try to make it very real. But it certainly is never complete. There will always be differences between virtual reality and the actual world. In fact, most of what happens in virtual reality is not an attempt to mimic the physical world at all. Most of what happens in virtual reality is very imaginative and really bizarre; it has very little to do with physical reality.

JASZI: Your description raises an issue about the relevance of copyright law to the domain you are describing, which is this: As we all know, the model that we work on in copyright law is essentially an individualistic model. We look for authors; we try to identify them; and we like it when we can find *one* per work. If necessary, grudgingly, we may acknowledge that a given work is the result of the efforts of a group of individual authors, provided they can be individually identified as such. It doesn't sound as if that model of cultural production is very relevant to the processes that you are describing.

LANIER: A good solution—which was not required until the advent of these new media, and also would not have been possible without them—is to have a much finer-grain description of the process of creation. For instance, let's suppose that there is some virtual-world object, maybe an animated panda bear that people want to have in their virtual worlds, and let's suppose that it was the result of various modifications made by hundreds of different people. Well, there is no problem at all; in fact, if the clipper chip comes in under the Clinton administration, there would be no choice but to have a rather accurate record of exactly who did what to create that bear. I am sure some measuring system could be designed to record the amount of time spent or amount of per-

centage modification done by all the various individuals. Or perhaps there would be some kind of center to compile this information so that we end up with a microstructured sense of how much each of many people contributed to something.

Let me mention why I think that is important. If you use electronic mail a lot, you will see there is a much less frequent use of quotation than in normal text. People will include a little bit of the last message or include a little bit of a third person's message. You wind up with this conglomerate text, where there is much more preparation than in any other sort of rendering than I've seen before.

JASZI: I find that a very attractive solution, but it may not be such an easy one for us to accommodate into structures of copyright law. It involves saying these hundred people, the first hundred who did something, are collectively the makers of the thing, while those who come after are infringers.

DREYFUSS: You have to figure out what you regard as the creative element, what are the things that you actually value the most. Then you have to ask whether those activities *can* be affected by legal rules. The point is to structure a system that targets its rewards to those activities that are the most valued and most susceptible to encouragement.

GORDON: It would be interesting to hear from somebody on the copyright side of the table who believes that creativity should not matter at all.

VERSTEEG: Yes, you have raised a couple of issues in my mind about copyright, one of which is the notion of originality, and where one would fix the point of originality in virtual reality given that virtual reality is some kind of interesting marriage between technology and art. The *Feist*[11] case recently has taught us that there are two prongs to originality: that the work be independently created, and that it have some "spark of creativity," whatever that means.

I, for one, have been an opponent of defining originality in terms of creativity. I have advocated, rather, that we fall back on a line of Second Circuit cases where you really are trying to distinguish variations. To what extent do the authors' variations bring you something that is distinguishable from what was seen before, or to what extent is it merely trivial?

It seems to me that with virtual reality, you have so many potential authors, as Peter has suggested, that one of the problems is

[11] Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282 (1991).

trying to decide just whose creativity or whose variation are we going to reward.

LANIER: Well, let's suppose for a second we accept the concept of creativity. I think we have to acknowledge that a great deal of creativity in society, in general, goes unrewarded and unacknowledged and that, in fact, most of what happens in society is not really done in any formal way. There is not a formal record of it, and not a formal contract about it. The difference in the network is that all of a sudden it begs for some sort of formality, because there is a kind of a discreteness in the record-keeping function that is built into what happens.

VERSTEEG: One of my problems with creativity, as a kind of benchmark, is that I don't know what creativity is. I am always frightened when I think about Justice Holmes's statement about judges not deciding aesthetic merits.[12]

GORDON: Judges are not well fit for making aesthetic decisions.

VERSTEEG: Right. It makes my skin crawl when I think some judge is going to sit back and say, "It doesn't look creative to me." Rather, I would like to find some sort of objective measure of creativity.

LANIER: I would tend to side with you on that because I think that the law serves us best when we are dealing with very subjective things close to the soul, like creativity and freedom. It has a way of limiting itself. My favorite phrase in American law is "the pursuit of happiness," because it is sort of a mystical thing. It says there is this wild territory out there in which we are going to let you do whatever the hell it is you want to.

I think what you have to do is just acknowledge that it can't be perfect, and then come up with some sort of objective benchmark that doesn't screw people up too much.

ZIMMERMAN: But a benchmark for what? What is not totally clear to me is exactly where you think the need for protection kicks in here. In some ways it sounds almost as if what you would be protecting, if you protect the various contributors to the ongoing creation of this virtual reality experience, is somewhat akin to protecting life or at least a live performance, and I am not sure whether we ought to do that. I mean, we don't protect creativity in the abstract, assuming that we even know what creativity is. In an

[12] Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903) (articulating the idea of aesthetic non-discrimination).

intellectual property system, we protect creativity only as it is embodied in something that is in a fixed form.

I am not sure what the "fixed" thing is that would need protection here. We also need to ask if we *need* copyright incentives to induce people to play in the playland of virtual reality. Otherwise, what is the purpose of such protection?

LANIER: What we are doing is creating an easy opportunity for many more people to be creators and to potentially be rewarded for that. Perhaps one way to create some sanity is to be more precise in defining what the responsibilities of a creator are, if the creator is to receive rewards for his creation. Otherwise, if anything one does in a computer-based media that is recorded becomes deserving of the protection accorded to traditional intellectual property, you will have insanity. There must be some responsibility that goes along with the reward. The creative contribution must be limited to things that are somewhat more sane, more quantifiable.

ZIMMERMAN: Why do we want to give them a reward at all? Why isn't creation its own reward?

LANIER: Because we live in a capitalist society. It is very simple. It's a practical issue.

ZIMMERMAN: But we live in a capitalist society where not every addition to some creative work is rewarded and assigned an intellectual property right. It seems to me that you're proposing a system in which many people whose minimal contributions or additions or changes would not receive protection under our current copyright system would now receive protection, simply because they are working in virtual reality or on the Internet system. I am not quite sure I see the logic.

LANIER: The reason we need to reward those people is because the things that they do are of such importance that if they are not rewarded it would not be in the public interest. In the future these creative portions of technological developments will be so critical that if there isn't some way to establish protection and incentives for the creation there will be too many downsides.

As an example, right now in terms of American competitiveness, coming up with goods and interfaces is something that Americans are better at than anybody else, and there's been virtually no demonstration of capability in that area from Japan. There is no mechanism by which they pay for appropriating our innovations in that area. That is a situation that has to come to a head eventually. It hasn't quite yet, because it is vague and hard to define, but it will eventually.

GORDON: One of the things that has surprised me is that our representative artist seems to be propertarian, whereas many lawyers who think they are defending the rights of artists tend to talk about the needs of second-generation artists to build on what came before, without necessarily paying all the time. It would be interesting to hear the views of John Carlin, who's also immersed in the art world. John?

CARLIN: I think that addresses why Jaron is taking that position. Basically, you are approaching it from the perspective of process and technology, not content, and you want to protect the system, the program. What I will talk about is the content; while you are talking about the process, the technology. And there is a place where they become analogous.

I would like to step back and confront this other perspective which Wendy just articulated. In most instances we look at what contemporary visual artists are doing in terms of the content of their work, and the fact is that they feel compelled to borrow from other artists—to appropriate, as we call it. The foundation of what you are talking about in terms of the need to protect the creator, and what I want to talk about in terms of the artist's need to borrow or steal, however you see it, is identical. They come from the same source, and that is a shift in how people relate to their environment, which is characteristic of the late twentieth century, compared to, say, the nineteenth century.

GORDON: Can you give us some illustrations?

CARLIN: I first want to ask what are the broader theories, what may be different about how we relate to our environment as opposed to individuals at different moments in human history. In one sense you can say that throughout history humans have struggled to create virtual realities through art. What Jaron is defining as virtual reality, or what you have trademarked or copyrighted as virtual reality, or has been appropriated from you, is just the latest in a series of artistic movements trying to replicate the environment in which we live, in a recognizable and stimulating way.

What I plan to do is go back to the nineteenth century, and argue that the nineteenth-century landscape paintings which people bought for their homes because they wanted to replicate the experience of walking through the Catskills was a version of virtual reality for them. Obviously it is not identical, but there are similarities.

LANIER: Try the thing some time and tell me if it is the same thing.

CARLIN: I have tried it; of course, it is different, because we

are not nineteenth-century thinkers. In the twentieth century our needs and desires—in terms of the stimulation of technology to create emotional and physiological effects in us—are different. I am not saying that this is true; I am postulating this.

In the nineteenth century, there was a form of representation subsequently labelled mimesis. Successful art was about copying something that existed in the real world. The degree to which that copy was accurate was an important measure of the skill of that artist. So Renaissance perspective, chiaroscuro, all of those artistic methods we now take for granted were developed as technological devices.

When you get to the twentieth century, and this is an argument I've often used to support appropriation, there is a shift from a mimetic basis of reproduction to a semiotic basis of reproduction. We no longer look at nature as something external that exists, that there is a physical tangible nature out there from which we reproduce objects. Instead, we consciously compare sign systems.

GORDON: I'd like to ask a question for purposes of clarification. I understand what you began saying. Aristotle said the soul of art is imitation. But then you drew a dichotomy between natural reality and a reality of sign systems that I don't think is very clear. Artists have always thought it their proper province to imitate their own internal states, or to imitate the way people interact. Neither of those things are "out there" in the sense of being purely natural and uncreated by humankind. Thoughts and social interactions are clearly creations of someone's conscious or subconscious or behavior with someone else. Hasn't there *always* been what you call a semiotic content? Can you make the distinction clearer?

CARLIN: Yes. Now we know there was always semiotic content. For example, medieval art was based more on obvious symbol structures then Renaissance art, which were also symbols, but symbols that replicated reality in a way that we find more recognizable, because we were educated in this Renaissance sign-system manner. We were taught that kind of rhetoric, that kind of vision; our camera lenses are ground in a particular way to create perspective art.

Semiotics has always existed. It is just that what twentieth-century artists, particularly those who appropriate, are trying to do is call attention to it. These artists make the point that what we are doing is exchanging signs as we try to describe reality, rather than actually depicting something that exists out there.

GORDON: Could we trouble you for some slides?

CARLIN: I'll give you some examples, go low-tech. Unfortunately since these slides were put together for another purpose they are in sort of random order.

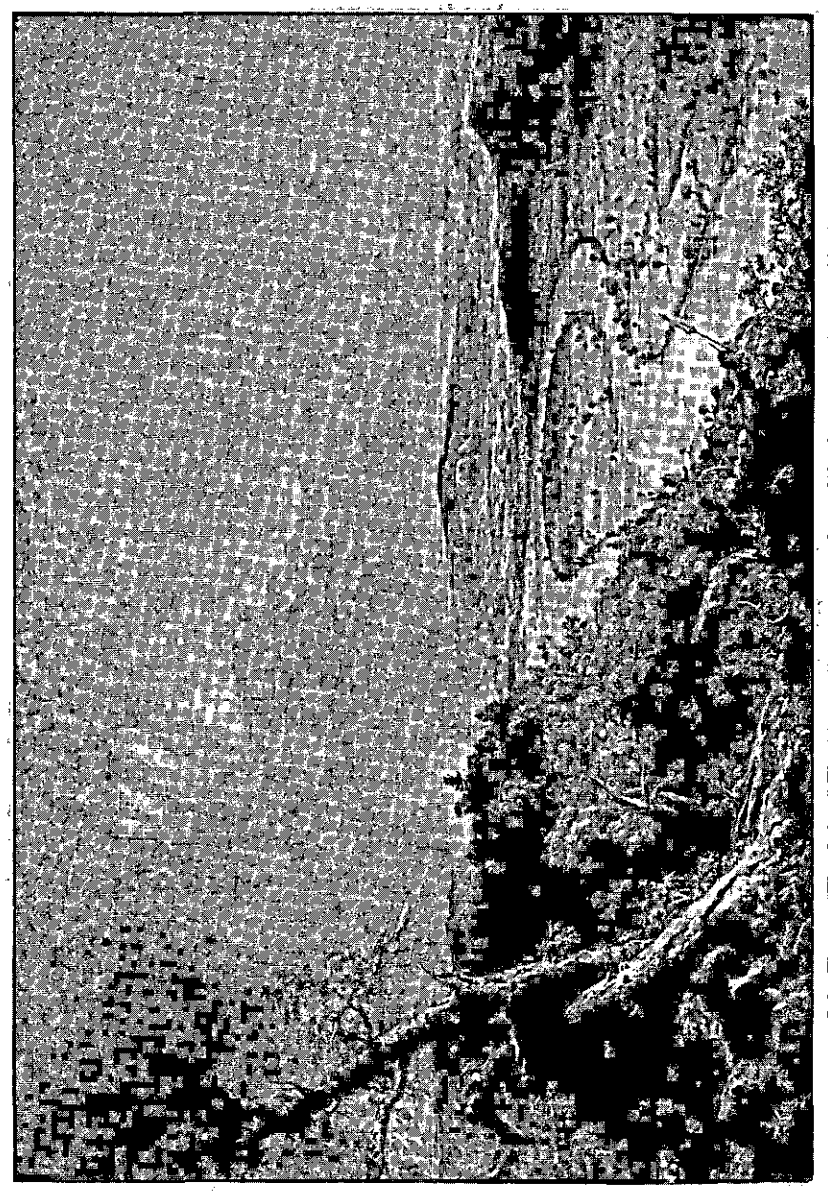
First we have Andy Warhol, the patron saint of twentieth-century appropriation; and semiotic art. But, where I really want to begin is by looking at classic landscape paintings. This is perhaps the most famous landscape painting in the nineteenth century, Thomas Cole's "The Oxbow," which is in the Metropolitan Museum of Art in New York. This is obviously a painting of something that existed in the real world. There was this particular oxbow in the Connecticut River, near Northampton in Massachusetts. If we had more time and this were an art history class, I would talk about how this is, in fact, a very rhetorically overdetermined painting, and that it is in fact a painting more about how to create and read landscape painting than a depiction of nature. But to the nineteenth-century observer it appeared to be an objective copy of a famous tourist site. In fact in the nineteenth century there was the general idea that nature was landscape.

By way of contrast, there is no such thing as that natural landscape in the world that we grew up in. Instead there is something closer to a "signscape." The simple parable that I use when I talk about this in a copyright-law context is that if you are a nineteenth-century painter, and you painted what is out there like Thomas Cole, you didn't inadvertently suck up any copyrighted material. But if you are a twentieth-century artist like Warhol, and you want to do landscape painting, if you want to paint what is out there, you will infringe on somebody else's copyright, because the environment is so polluted with protected imagery.

Next, let me step back and try to show where some of this comes from. This is a Pablo Picasso collage "Still Life with Chair Caning" from 1912. What is interesting about this work is that collage is where the whole notion of appropriation begins. One could postulate that art was no longer about rendering in drawing, or through drawn forms, things that were seen through the eye, but actually ripping things out of the world, like signs that existed in the commercial world, and then recontextualizing them through art.

Ironically, you can't quite tell this through the reproduction, but what looks like the chair covering is in reality not a painted chair covering. It is actually a commercial piece of wallpaper that Picasso bought and incorporated into the work, and the rope around the canvas is again a real piece of rope.

The most famous artist to raise collage into a conceptual program was Marcel Duchamp. This slide is from a cute little French



Cole, Thomas "The Oxbow" The Metropolitan Museum of Art, Gift of Mrs. Russell Sage, 1908 (08.228)

book called *The Illustrated Life of Marcel Duchamp.* This shows him buying a bottle rack in a hardware store in Paris which he then exhibited as a work of art without changing it in any way. His most notorious appropriation was adding a mustache and goatee to the Mona Lisa, and giving it a title which in French means, "She's got a hot ass." In fact, what makes this interesting—especially considering the earlier discussion about multiple authorship—is that Duchamp didn't even add the goatee. It was added by another Dada artist, Picabia, when the reproduction was sent in to a magazine for reproduction.

Various Dada artists like Raoul Hausman or Hannah Hoch, shown here, extended the use of collage: the use of commercial imagery, of creating work out of fabricated bits and pieces that exist out there in the world and repositioning and recontextualizing them.

To show the currency of that style, here is a piece by Barbara Kruger from the late Eighties that takes magazine drawings and changes their meaning, and a piece by Sue Coe using Dada collage in the political context for which it was originally developed.

Most of this style of Pop art can be traced to a somewhat obscure artist named Eduardo Paolozzi, an Italian-born artist who grew up in England. Interestingly enough, Paolozzi was the art professor of John Lennon and Stu Sutcliffe when the Beatles were just lads. Out of the magazines left behind by American servicemen after World War II, he started to create these collages using a lot of commercial imagery in them. In fact, the word "pop" appears in this piece of his, helping to give a name to the movement. Paolozzi is in some ways the "missing link" between Dada and Pop.

Paolozzi's colleague, Richard Hamilton, did perhaps the most famous sort of manifesto collage of early Pop art where, again, the word "pop" appears in the piece. This is actually a collage of all of these elements which are borrowed from various other people's original work: paintings, commercial imagery, photographs, magazine illustrations, etc.

Next, just some famous examples of commercial appropriations: Jasper Johns Ballantine Ale cans, a silkscreen painting by Rauschenberg using Coca-Cola bottles, and a more recent version of the same thing. Here we have Andy Warhol's Coca-Cola bottles. One of the interesting issues with Warhol is that they weren't just single appropriations; he appropriated in series, and he tried as well as he could to make them look like the real thing. He didn't want them to look different. He didn't want them to have a spark

of originality. He wanted them to look like what he was appropriating.

Next, an early work of Jeff Koons which was literally a billboard ad for Dewar's Scotch that he bought from the printer and exhibited in an art gallery. And, again, Jeff Koons doing something very similar to what Marcel Duchamp did by buying a bottle rack. These are commercially bought vacuum cleaners exhibited in an art space.

I think that's about it, since we don't have much time.

GORDON: Thank you very much.

CARLIN: That should give you some raw material to discuss. But in terms of whether it is appropriate and justifiable for artists to appropriate, looking at it purely in terms of visual art trivializes the larger underlying questions. It is not just about whether Jeff Koons can appropriate Art Rogers or a character from Garfield. It is much more what Jaron was talking about before—this whole idea of culture coming to grips with creating new forms of communication. That is the larger question, and that is where the idea of mimetic and semiotic comes back. The reason it throws copyright law into such disarray is that the principles of copyright law are based upon nineteenth-century notions of representation such as originality and self. At least in my mind they are based on a misreading of Ralph Waldo Emerson and this whole idea of American naturalism which has been attributed to him. The semiotic argument, whether by Baudrillard or Foucault, is that there are different fundamentals that our society is now being based upon in terms of communication.

What Jaron is doing in terms of technology—which I think is very similar to what the artists I spoke about in terms of content were doing—is really trying to come to grips with not only how we communicate with each other, but how we can improve it. That is really what artists and scientists need to do together. They need to realize that the world is changing around us, and ask how can we improve our lives, how can we improve communication? How can we use technology, not as pure entertainment, and not as a way of increasing capital, but as a means of enriching our lives, or to further pursue happiness (to go back to what Jaron said)?

Fundamentally, we are on this planet for sixty to eighty years. What do we do with it? We must find some meaning and significance, and find where our cultural identity is, so that we are not wasting our lives by living in the past. We live in a world that is fundamentally new, and we are trying to come to grips with it. We may not be able to, because we are so close to it, but that is what

the value of artists has always been: they give us a glimpse into what the future might think about us. They give us conceptual perspective, not just visual perspective, because they tend to be on the front line—and they are taking risks and are committed to doing innovative things. So their ways of challenging copyright law, in terms of what needs to be protected because it is a form of creation, or what doesn't need to be protected, because the artist needs to comment on it—these to me are identical positions. They are two sides of the same coin. These are the gray lines, the tattered, frayed edges of where the law has to determine what are the theories and how do theories of culture shift, that then can be fed back into the law. Then the law isn't just a materialistic, reactive process, but is something that seeks to understand the society in which it exists better.

JONES: A form of collage which is similar to that which you have described, is the music in rap compositions, not the words of these compositions, but the music. This form of musical expression can be produced only by using a major technological advance: the sampler.

I am concerned that with copyright law we give control to some artists and thereby prevent other artists from using these new technologies to create collages or new works. This concern arises not only in the context of musical works, but also with respect to visual works. The new technologies permit a new kind of photography that is created by collecting different pieces and combining them together. The result is very different from what could have been done thirty years ago.

What I find disturbing is the notion that these older ideas we have about copyright and control by the creator may, in fact, prevent people from using new technologies to produce new forms of aesthetic expression.

CARLIN: Jazz artists did something very similar. Charlie Parker appropriated Gershwin all the time. There are ten Parker compositions which can be traced to "I've Got Rhythm." They were appropriated in very similar ways to the way rappers are currently doing it.

JONES: In some ways I agree with you John, but I think that the rap musician is doing something different. He or she is taking individual pieces of preexisting works and making a collage; the jazz musician more often than not is simply making a referential statement to a single piece, or perhaps two or three pieces. In contrast the rap musician, the mix master, can create a musical composition which might make reference to twenty, thirty, eighty, or one

hundred twenty different works. This is a very different kind of creation.

CARLIN: The importance of that difference is that they want that theft to be apparent. That is the tension, that is the danger, it is the excitement of the work.

If I could extend the lecture that I was giving, I would talk about that kind of appropriation and about music videos. I would talk about the fact that almost everything in our culture is appropriated; it's just that most people get away with it, because it is called ripping off somebody's style. A friend of mine designed *Pee Wee's Playhouse*, and then for ten years after you could turn on MTV or Nickelodeon and see that design—which is not protectable—copied and used. But he did invent something. It was something that was new.

What I think is so exciting, and should be protected in terms of these master mixes, is the fact that they are forcing the issue. They are not burying those samples, and that, to me, is what is so new and exciting, it is something unique about the world that we are living in. Don't suppress it, understand it, create space for it.

LANIER: Music is very interesting because the way things work in music is that, even prior to the advent of samplers, you can do a cover or a rerecording of any tune that is published. But when you do that, you take on the responsibilities of a publisher. You have to list who you appropriated, and you must compensate them. To me there is something very nice about it, both because it spreads around the compensation, and because it is honest and revealed.

The nice thing about the art slides we saw was that everybody was in on the joke. That is also generally true in rap music, where the people are informed about what is going on and realize that appropriation is going on. The thing that worries me about the potential future is stealthful appropriation or just confusing appropriations. So I think when you appropriate, you should, as you do in music, have the responsibilities of a publisher.

JONES: I don't think it is the case that when the musician uses a sampler to produce a work, at the end of the process he or she necessarily is aware of precisely what elements were sampled and where the elements came from. This is especially true if the sampled pieces have been altered or changed.

However I do think there is certainly a general acknowledgment that pieces have been taken. Further, often when there are identifiable pieces, there is an acknowledgment of the specific pieces. Very often on the back of an album cover you will see citations to those individuals whose works have been used. But even

when one sees acknowledgements to specific authors, I don't think it is correct to say that all of the samples have been acknowledged, or that the sampler could tell you the origin of all the various samples that have been used.

LANIER: So far as I can tell in rap culture, if the sources are identifiable at all, people know. Anything that remains identifiable is there either to be ridiculed or to be praised.

GORDON: I would like to pull together a few themes that we have been drawing on all day. Then I know Martha had something to say about the whole issue of how our notions of art and culture play into our notions of copyright.

First of all, Jessica Litman suggested earlier today, that people don't want to get something for nothing. That contention is worth discussing in an art context, which is often by its nature rebellious. Perhaps some artists *do* want to get something for nothing. Perhaps that is part of the statement inherent in appropriation art and some rap music: "Sure, we make a profit, and sure, it wouldn't hurt us very much to pay you for a part of it, but normatively we think we should have a right to do this against your will."

In other words, part of what may be going on is a battle for authority between different authors. This may make it harder for people to say they are willing to pay for what they have gotten.

Second, in the real world, there isn't a perfect and costless machinery of justice. Even if an artist were willing to pay, trying to negotiate contracts to allow sampling from a number of prior songs could very well stall production of a new song.

So part of the conflict between, let's say, authors of a first generation and authors of a second, is the result of practical considerations like these transactional barriers, and part of it may be insoluble, built into the artist's conception of her mission.

Martha, I hope we haven't gotten too far away from where you wanted to go.

WOODMANSEE: I just wanted to ask whether John would characterize the cut-and-paste mode of creative production as essentially what has always gone on in the arts. I would, coming from literature, and I would add that it is only for the past two hundred years that people have been trying to cover it up. Unfortunately, copyright law emerged together with the cover-up. It has taken its key categories from this cover-up, and thus imagines that there could be something that is *really* original, *really* creative, something that has a *true* "spark of creativity," and is genuinely "transformative," to use Judge Leval's terminology. But in fact in two thousand years of creative production, people have generally valued the fact

that they were cutting and pasting—that they were dipping back into their traditions, and adding a little here, a little there.

CARLIN: That's why I suggest that copyright law is based on a certain mindset that may not be universal or trans-historical. That is a very interesting way of looking at it, in the abstract rather than in the particular, where it is very difficult to ever get to that point.

GORDON: If there were a post-structuralist legislature that would translate for the rest of us how our copyright law would look once we came to this recognition of our dependence upon a semiotic universe—and how our law would be changed by our recognizing the fact that we are always building on each other, and that every text we write is incredibly indebted to texts that came before, either by incorporation or by rebellion—what would this legislature produce? That is, what do we do with the post-structuralist vision if we are persuaded that it is all true?

JASZI: One possibility is that the answer to that question lies somewhere in history: we need to look back and see what we did before, before the moment of the author, and build on that.

Jaron's description of this transformative technology reminds me of another transformative technology: moveable type. It sounds like the way in which virtual reality is literally going to provide a substitute for language, and thus change our whole understanding of our cultural environment, is a lot like what happened with the rise of print. There was a legal response to the rise of print which at first was essentially a regulatory response. People realized that there was a marketplace there that needed to be protected to some degree; there was a little problem with transgressive speech which needed to be taken care of too. And what we got were the early copyright laws which were not based on proprietary notions at all, but on regulatory notions.

Earlier, Wendy, you said it was anomalous that now we are wondering about what place art has in the scheme of copyright law, which was created for art. I don't think it was created for art. I think it was created to regulate the book trade, and then later on art slipped in and the whole thing got very thoroughly aestheticized.

GORDON: Touché.

JASZI: Unfortunately, the process of aestheticization is ongoing and the somewhat troubling development in the aestheticization of the doctrine of fair use that we were hearing about from Judge Leval at lunch today is an example of that. Perhaps what we need to do, in our postmodern legislature, is to think about the differences between property and propriety, and between rights

and regulations, and at least consider the possibility of moving back from a proprietary rights-based model to a model based on notions of the regulation of propriety.

GORDON: By "propriety" do you mean something that relates to customs within a particular artistic community or industry?

JASZI: That would be one source or notion of propriety, certainly. Clearly there are things we want to see happen in terms of achieving the proper balances between reward and creativity. Maybe we can't make those things happen any more with proprietary models, and maybe we have to start over.

ZIMMERMAN: Maybe we can and maybe we can't, but it seems to me that one of the useful things in this kind of discussion is that it forces you back to first principles. What function do we want copyright to play? If you look at copyright law historically we had a clearer idea than we do now, I think, 150 years ago of what we thought copyright was supposed to do for us, which was essentially to prevent outright piracy. The idea was that you couldn't engage in wholesale copying or borrowing. But we weren't very concerned about people taking little pieces and transforming them.

GORDON: There used to be no right prohibiting people from translating your work, no right prohibiting people from dramatizing or even abridging your work. All these activities were legitimate.

JASZI: Those are good things.

ZIMMERMAN: That's right, those uses were viewed as good things, things to encourage. As technology developed and ways of exploiting works increased, the notion that an author ought to have control over those various new modes of exploitation took over and led us further and further away from asking hard questions—control *over* what, and *for* what? What do we want to protect, and why do we want to protect it? How do we tease those values out, so we can identify the right things to protect out of all the places along the way where you could possibly locate tolls on the turnpike from creation to use?

These new technologies strike me not so much as outdating our current system of copyright but rather as pointing out the very important fact that we have to think hard all over again about the basic reasons for granting copyright protections. Otherwise we risk losing our way in the details of the technology.

VERSTEEG: I agree that technology and our judicial reaction to technology are certainly changing the way that we look at copyright. This entire discussion raises, in my mind, two things, and

one is that reality is probably relativistic in many ways. I am reminded of the morning that my five-year-old daughter came down the stairs and had a glass of milk, and she waved it in front of my face and said, "Daddy what's this?" "I don't know," I said. She said, "it is past-your-eyesed milk." I realized that her sense of an audiophonic reality was different from my sense, if you pardon the expression, of a visual reality. I know what the word looks like and how it is spelled, but she knows what it sounds like when she hears it. Probably all of her life, up to that point, she had always heard "pasteurized," thinking it had something to do with your eyes.

By the way, her brother, not to be outdone, said, "Knock, knock." "Who's there?" He said, "Cow." I said, "Cow who?" He said, "Cowafornia." It is the same kind of thing, where someone's audiophonic sense of reality is different from their visual sense.

Copyright law, in part, has to deal with the problem that technologies present us with new forms of communication. One thing that this discussion made me think of is the way that courts have begun reacting to these technological changes. For example, with virtual reality, and the way that John talks about nineteenth-century landscape painting being that version of virtual reality, if you will. One of the differences is that clearly the painting is fixed in a tangible medium of expression, and we are all happy knowing that is copyrightable. Whereas with virtual reality or with video games that create almost a joint authorship it is not so clear that that is fixed in a tangible medium. Several courts have said, yes, it is, but we are not quite sure how. And, similarly, there is a case just recently holding that information suspended in a computer's random access memory is fixed enough for purposes of copyright.[13]

So here we have, in one sense, copyright creating a Procrustean bed that could have computer copyright law cut visual artists off at the knees. I am not sure.

CARLIN: Well, of course that nineteenth-century stuff was fixed in the way that the eighteenth- or nineteenth-century mind that created the law saw as working. So on one level, yes, that is more fixed, because the law was created to deal with that kind of representation. But you can also say that there is something very fluxional about it. Thomas Cole, whose slide I showed, invented that type of landscape painting; it didn't preexist him. Then you have hundreds of people who commercially exploit that idea of a landscape painting, and have fine careers and are in museums for doing so. So there *is* the idea of a landscape painting that doesn't

[13] MAI Systems Corp. v. Peak Computer Inc., 991 F.2d 511 (9th Cir. 1993).

preexist his work. It is only fixed because it seems fixed to us today. Certain artists were thought to be crazy in their day. Thomas Eakins, for example, never really sold a work of art in his day, never had an article written about his work. We now look at him as representing that era in American life. But his neighbors and his peers thought it was a mockery of their lives. They thought his work was horrible. "We're not like that, we don't look like that," they said. But now we think that that's what they looked like.

HAMILTON: I would like to get back to a theme which has been implicit in our discussion. I get the sense not only here, but in the literature, that there are those who think that a work built on a number of other works is somehow new to the copyright scheme, and that it is unusual; and that it is going to break the copyright scheme in some sense. I happen to think that that's untrue, and that it provides a false problem. Copyright, from the beginning, has never protected the entirety of any work.

We have been fighting since *Baker v. Selden*[14] about what it means to separate out the parts that are unprotected from the parts that are protected. The time-tested problem of works building on other works is at the heart of the problem of knowing what to copyright and what not to copyright. I want to echo Diane's concern that this is not the artist's concern. This is an issue the legal people must figure out. The question is: what is it that we value? I think we value, for as yet unexplained reasons, the post-post-structuralist value of some modicum of change, of differentiation, of non-trivial movement. In other words, the opposite of stasis.

GORDON: But who decides what is "non-trivial?"

HAMILTON: If you are unwilling to say that *anyone* can make that decision, then you are basically arguing against any copyright protection for anything, and I don't think that that's where we want to be.

GORDON: Well, I think that the slippery slope argument is a little overstated. I don't think raising the question leads to the elimination of copyright.

I did want to interject a different kind of answer to Diane's questions. You are talking about what is valuable to protect, as if what we have to worry about are the particular things.

HAMILTON: I disagree with that.

GORDON: Well, then, please assume I was using you then as a straw man or a straw woman. Some scholars do indeed seem to

[14] 101 U.S. 99 (1879).

focus on the works that copyright protects, without seeming to notice the way that protection affects wider aspects of life as well. One of the things we should worry about is protecting ways of life and ways of dealing. For example, one of the ways of looking at the importance of the First Amendment in our system is that it allows us to reconceptualize ourselves; it gives us a space within which to back up and try to take in all the things around us, reformulate this reality, and then spew it out again and test it against the world. Ed Baker, for example, is well-known for discussing this kind of a notion.

Part of what may be going on is that if we want a particular kind of way of life, one that allows people as much self-determination as possible, it may require some degree of freedom from propertarian control. That is because one activity that both helps us to make this connection with reality and allows us the ability to have distance from it, is the activity of recreating what we experience, to have reality come through our own mouth or our own paintbrush. That gets us into the issue of whether a liberal democracy should take sides about what ways of life are best, but I think, at least by implication, the First Amendment might commit us to such a position.

JASZI: Jerry Reichman said something pertinent this morning about the problems of rights in new technologies.[15] I took part of his message to be that in trying to apply the law to those problems, we have gotten some distance away from an earlier vision of copyright as an aspect of innovation policy or competition policy. It seems to me that this problem affects this discussion here as well. When you say, Marci, that we value the increment that represents triumph over stasis, to my mind that is a rather obscure and aesthetically loaded statement. I wonder whether we couldn't find more straightforward ways of saying what we value in innovation.

I wonder whether we couldn't decide that it would be desirable to see the National Information Infrastructure or the phenomenon of virtual reality do, and then, in a sense, work backward from that identified goal to the characteristics of a legal system that would produce the desired result. I'm afraid that instead we always seem to reason forward from dubious aesthetic categories.

HAMILTON: Well, since those are my categories, I will defend them for a minute. You are implying that I am stuck in nineteenth-century conceptions of what is valuable. On the contrary, I think that twentieth-century sociologist Niklas Luhmann is probably the

[15] Jerome Reichman, 13 CARDOZO ARTS & ENT. L.J. (forthcoming 1995).

most interesting thinker on the notions of stasis and change in society. Deconstruction supposedly took us into the sphere where there is no fixed meaning and where no meaning is better than any other meaning. Luhmann's response to that in his general systems theory is fascinating. He argues that as a matter of fact, with respect to the way in which we operate within the world, we have many different and overlapping spheres of understanding and knowledge. Each of those overlapping spheres of understanding and knowledge are intensely autopoetic; they are self-referential, they are self-generating and they are self-creating, but none of them ever remains in a point of stasis. They are changed by their interactions together, and by the interactions of the larger environment that we have not yet named, but which is part of the creation of the system.

Now, if that is true, then the fundamental question for post-structuralism and for the post-deconstructive era is: how do you understand change? So when I am talking about trivial variation, I am trying to identify what we mean by "change." If stasis were the defining moment of reality, then we don't need copyright. We wouldn't need it because we would not be able to judge the differences between works.

GORDON: Can you explain what you mean by "if stasis is the defining moment for copyright"?

HAMILTON: If all we are is an interpretive community, to use Stanley Fish's argument, and we are all sharing similar perspectives on everything, then we don't need copyright, and we shouldn't have copyright, because everything should be equally shared. But I don't think that that is an adequate description of reality. We don't all live in the same interpretive community.

GORDON: And even if we did, though, some people contribute more than others or disagree with each other.

HAMILTON: So it is possible to have evaluation of differences.

GORDON: If you have evaluation of differences, I don't know where you are going from there. Speaking as a lawyer trying to understand the post- and post-post-structuralist positions, I really have to ask to be brought down to earth.

Let's say that we do believe that change matters and that the way individuals define themselves is in their relationship—as they move and change—to a background of cultural conditioning or cultural interpretation. If change matters, then one of the things we want to protect is change.

HAMILTON: Right, and change is identifiable.

GORDON: So you agree with Russ VerSteeg?

HAMILTON: Completely.

GORDON: Russ would say all that matters is change, and we should protect change. Therefore, instead of inquiring into creative spark, as the Supreme Court wants us to,[16] we should inquire into variation from reality. But if the essence of art is to imitate reality, doesn't that end up destroying what is at the core of at least some pre-nineteenth-century notions?

DREYFUSS: If the essence of art is truly to imitate reality, if the world of art is for the world that Peter and Martha describe, there would not be any copyright cases, because each artist would be perfectly pleased to have every artist use their work.

In actual fact, 2 Live Crew is currently suing somebody else for using one of 2 Live Crew's songs. So, in actual fact, artists talk like this only when they are taking the art, and they all perceive a need for copyright when they are talking about their own works.

The fact that Jaron wants protection for virtual reality is to me one of the key features of what he said, because it means that in actual fact people aren't going to work in this world, they are not going to produce unless there is some level of protection.

I would like to talk about what we value. None of those things are going to happen unless there is an incentive structure. You can talk about romance or, as Peter does, of getting rid of the romance, but the romantic people and the non-romantic people both act as if artists don't care about copyright. In actual fact, they sue. That's why we have lawsuits. They are not all brought by Acuff-Rose. Some of them are brought by the artists.

CARLIN: Once you get into the system, you get addicted to it.

GORDON: You get addicted to the suing part.

ZIMMERMAN: I don't think that's true.

GORDON: What is the inconsistency?

ZIMMERMAN: I think there is a conflict that must exist in any artist who has ever thought about suing, which is the conflict between her own desire to use the work of others freely and her desire not to have her own work used by others without some tariff being paid, and possibly some genuflection to her authorship along with the tariff.

It seems to me the role of copyright law is not really to ask the artist what the artist thinks ought to be protected, but to stand back and, as a society, say, how do we get the best mix for all of us out of this deal? We need to convince you, artist, that we value what you

[16] *See Feist*, 111 S. Ct. 1282.

do, but we must also protect your, and our, ability to produce and enjoy new works as well.

In my view one of the things that has happened increasingly in copyright law is that we are finding ourselves thinking more and more about what the creator should receive for her creation and less and less about how we ought best to distribute intellectual goods for the productive use of everyone.

Just as an interjection, one reason that I am worried about losing a handle on fixation, for example, is that however crude a tool it may be, it has served a limiting function that helps clarify what can be freely used, what building blocks are available.

WOODMANSEE: We still need to provide an incentive for people who are creating works that are not fixed or tangible.

ZIMMERMAN: But we have to think very carefully about how to structure such incentives. If we depart from old lines that served us well, we ought to be able to articulate very clearly how the new lines we are drawing better serve the underlying conception of a balance between creators and users.

WOODMANSEE: I wanted to read one short passage from Wordsworth, one of the inventors of the vocabulary of originality, creativity, and genius, just to indicate the kind of investment, the baggage carried by, these terms. They are, manifestly loaded terms. They can't be used descriptively, but only evaluatively.

At the very time Wordsworth was theorizing that poetry ought to be original, he was intervening in copyright legislation. This was during the first decade of the nineteenth century in England. Wordsworth wanted copyright in perpetuity for the following reason:

> It requires much more than [fourteen or even twenty-eight years] to establish the reputation of original productions, both in Philosophy and Poetry, and to bring them consequently into such circulation that the authors, in the Persons of their Heirs or posterity, can in any degree be benefited, I mean in a pecuniary point of view, for the trouble they must have taken to produce the works.[17]

He goes on to say that to benefit writers, the originality of whose works forces them to look to posterity for recognition, copyright would need to extend beyond the term that was being contemplated at the time. He believed that only writers who cater to

[17] Letter from William Wordsworth to Richard Sharp (Sept. 27, 1808), *in* THE LETTERS OF WILLIAM AND DOROTHY WORDSWORTH: THE MIDDLE YEARS 242, *reprinted in* MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET 145 (1994).

popular taste can be certain of realizing a profit from their investment within fourteen or twenty-eight years. Wordsworth wrote: "The useful drudges in Literature," in other words, the foot soldiers of the spoken or the written word, "flimsy and shallow writers, whose works are upon a level with the taste and knowledge of the age; while men of real power," that is genius, originality, real creators, in the language of copyright law, "who go before their age are deprived of all hope of their families being benefited by their exertions."[18]

This allergy to the utilitarian and popular is the baggage carried by the vocabulary of copyright law. It is a high-cultural, high-art vocabulary.

HAMILTON: Of course, Russ VerSteeg's article[19] directly speaks to this, and says that we have moved far away from the nineteenth-century's romantic notion of originality. Basically, his theory is that we don't use originality in that sense, and we may never have used it in that sense in American copyright law. Basically what we have been using is this notion of trivial variation, which is much more mundane.

WOODMANSEE: That isn't really substantially different.

GORDON: Let me see if I understand Martha's point correctly. She is implicitly suggesting a historical parallel to the field's recent debates over whether data protection and new technologies were going to be the tail wagging the copyright dog. She may admit that copyright originality isn't a very high standard, and she may be suggesting that the reason we protect minimally creative works like advertisements, for example, may be because of an ideology directed at a very different and illusory form of production. Martha seems to be suggesting that our ideology of copyright, and the notion of the really powerful author, may be persuading us to give more protection than is really appropriate.

JASZI: The project of trying to take aesthetics—whether it is nineteenth-century aesthetics or twenty-first-century aesthetics—out of copyright, is not the same project as doing away with copyright. My argument is a somewhat different one. I think it is very close to the point that Diane is making. We might do better with our copyright system if we could look at our purposes and objectives clearly rather than through a kind of aesthetic mist. I find it hard to square the notion that we have moved very far away from

[18] *Id.* at 252, *reprinted in* MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET 145-46 (1994).

[19] Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801 (1993).

old aesthetic categories with the things we heard from Judge Leval at lunch today.

CARLIN: There are two practical things that have been touched upon which fall outside of copyright law and which the law in general isn't protecting, or is overtly attacking. First, some of the best and most important art that is being produced right now is in violation of copyright law; and second, the law is affecting artistic creation in ways that it may not know or understand. I am trying to avoid getting too theoretical, since this is a very practical matter. Beryl touched upon it with rap artists, but it is true with underground film and video makers as well. It is true with artists that appropriate, famous ones like Jeff Koons; but many artists aren't as famous and don't have the capacity to protect themselves in that way. It is one of those things where everybody is doing it. It's out there. Its very fact is of significance. It comes back to when Jaron and I were sort of counterpointing at the beginning. You have this interesting paradox: some of the most interesting things going on are creating new technology, new systems of delivering information, and new understandings of how symbols are passed back and forth among human beings. All that needs to be protected; there must be some sort of economic remuneration so that there is an incentive. On the other hand are artists appropriating and violating copyright law.

Maybe they are really the same thing. They are two sides of the same coin, which is showing you where the fringes of the law are. It's not that the law, in general, isn't working. It *is* working in terms of what goes down the middle of the plate; and it can discriminate between certain things and make adjustments. But there are these two kinds of activities that are both highly valued, and I think we would all agree that some very interesting things—things that we all want to support, not just as lawyers, but as participants in this culture—should be encouraged. Our challenge from the legal perspective is how to make the discrimination in the law, not just on a theoretical basis, but on a practical basis. How can you protect on the one hand, and open the floodgates on the other?

JONES: Much of the conversation concerning new technologies has focused on new devices to create barriers to the use of other individuals' works. It seems to me that much of this information highway and many of the new technologies are being developed with the input of strong interest groups who want to protect the works that are put on the highway and into these systems. While I respect the needs of authors whose works will be put onto these systems, I am also very concerned about the costs that are

going to be established for using works in these information systems. Many individuals who are members of marginalized segments of our culture may not be able to get access to these works. I am troubled by this possibility.

UNIDENTIFIED SPEAKER: But in some ways it should be cheaper. Dissemination is going to be much cheaper; therefore, the part of copyright that is protecting the publisher's investment in dissemination, is presumably going to go away if we have this fairly free information superhighway, once it is already built. Also, the costs in downloading ought to be cheaper, because you will download only what you want, not the things that you don't want.

GORDON: I was just told that although we have started a little late, we will actually end pretty much on time. I would like to ask the panel whether anyone has any crucial last words?

LANIER: I just have a very quick comment on the economics of things. If you look at the transition from LPs to CDs, the margin for CDs is enormously larger. CDs are cheaper to make than LPs, but they are more expensive to purchase. At first that seems like something onerous. And yet what happened is it changed the economics of the marketplace so that we can support a greater diversity of music. I don't think rap would exist without that increased margin, because the increased margin made it possible to sell in retail a larger number of titles. Nobody planned it that way; it was just a fortuitous event.

There are a number of areas in which there is an incremental standard for appropriating from others. In text you can quote someone's work in order to comment on it, but you can't take a chapter from another's book and stick it in yours, there is a standard. Likewise, in music, there is a standard for doing covers.

There is not a standard in visual art. The reason for that is there isn't some sort of notation associated with the creation of visual art that allows for some sort of definition of that standard, but in the network, there is. That's the thing I wanted to point out: this notion of a fixed vessel is no longer needed in order to have a defined vessel. When you have a record of transactions that led to the creation of something, you can have something that is very fluid, very visual, yet you're still able to define what incremental means. That is the difference between the network versus other ways of doing these things. So it should actually make it a little bit easier to come up with the standards for visual art, if they are created within that medium.

HAMILTON: I would like to thank our panelists for their participation and Dean Macchiarola for his enthusiastic support.

GORDON: Finally, I would like to say thank you to Marci Hamilton, the person who put all this together.