A Creative Quandary:
Policy Issues and Options at the Intersection of
Art, Technology and Intellectual Property

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American policy and legal frameworks concerning the treatment of intellectual property are evolving at a dizzying pace in this era of digitization, interconnectivity, and globalization. Technological capabilities are also rapidly evolving, creating both new problems and opportunities for law, policy, entrepreneurship, and creativity. How the forces of policy, law, and technology act upon and respond to intellectual property concerns of the artistic and cultural type is the primary focus of this project. We understand these intersections to be reciprocal and dynamic—that is, they flow in both directions and they are constantly in flux.

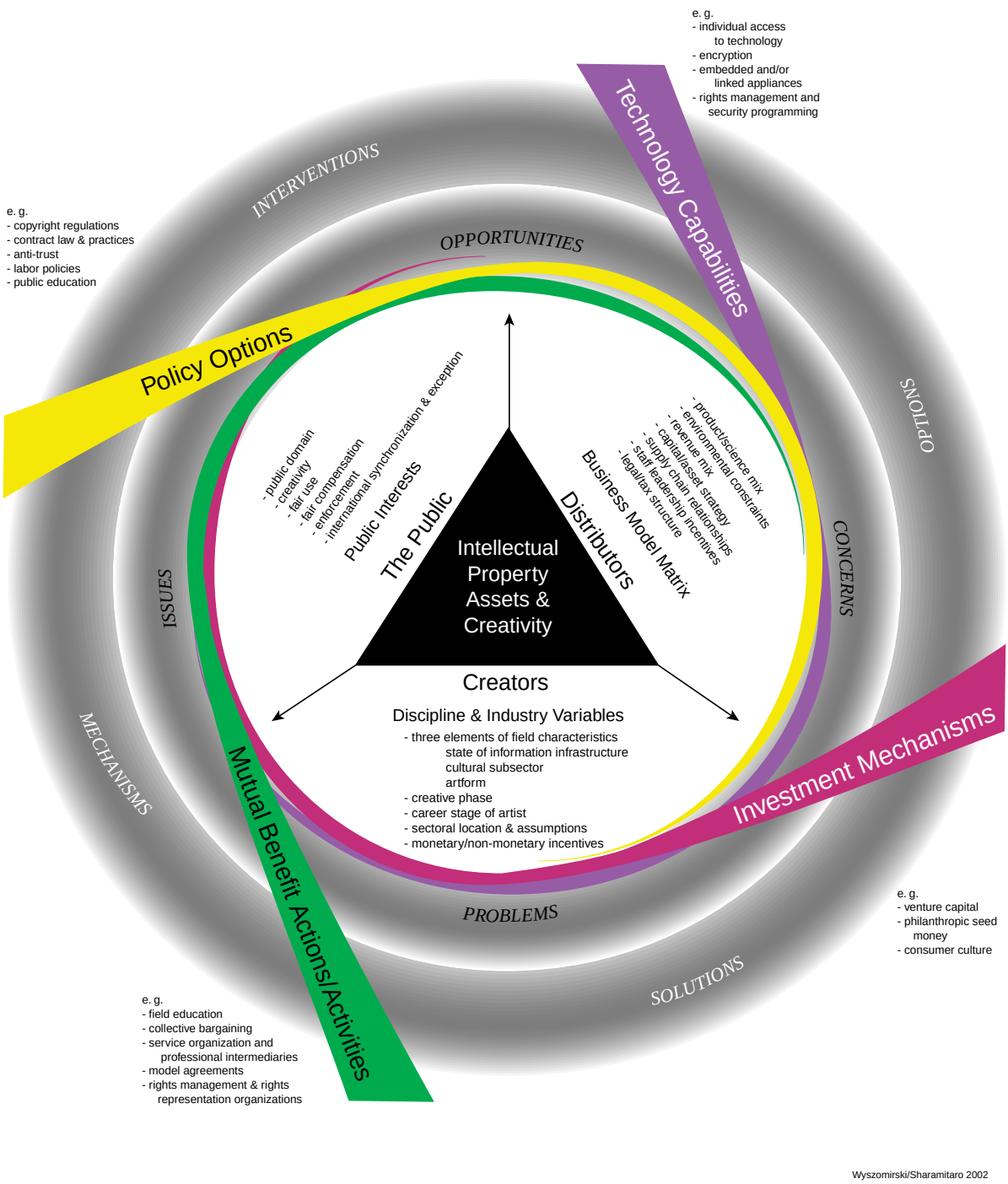
This background paper does not try to present a full analysis of all the policy issues, interests, and considerations that arise at this intersection. Rather, this background paper tries to present an overview of the various interests, actors, and assumptions that characterize this policy arena. It also identifies a selection of intellectual property (IP) issues that are of particular concern to the arts and cultural community. In addition, it introduces a wide range of possible action options that seem to be implicated in addressing these issues.

Our central concern is how the American copyright system's historic goals of fostering artistic creativity, providing a fair and productive marketplace for intellectual property, and protecting the public interests in these processes and products can be effectively adapted to the challenges of the digital era as they are confronted by the arts and entertainment community. It is important to note that, as used here, the term "American copyright system" is much broader and diverse than the web of laws and judicial decisions directly concerning copyright. Rather the "system" includes not only that essential legal framework but also embraces contractual arrangements that manage the assignment and transfer of intellectual property rights, the nature and operation of various business models that engage and develop such property, the industry and professional structures that characterize the creators and distributors of intellectual property, the ecology and politics of the policy systems that manage and impinge on intellectual property issues, and the technologies that are so dramatically effecting the environment in which the creation of and transactions in intellectual property transpire

I. MODELLING THE COPYRIGHT SYSTEM

Obtaining even a superficial overview of this complex system requires a map. Figure 1 presents a model of how I see the various elements of this system relate to one another. Let me briefly discuss this model and also relate it to the organization of this paper.

Figure 1: Art and Intellectual Property: An Action Model for the Digital Era



As illustrated by the central triad, three sets of interests are immediately implicated: those who create IP, those who distribute IP, and those of the public (both individually and collectively). As noted in the model, none of these interests is monolithic. Rather, each is characterized by internal diversity, by particularized concerns, and by different operating assumptions. The next section of this paper – "The Evolving Cultural Bargain"—introduces this trio of interests and some of their basic interrelationships in the IP arena.

The third section of this paper focuses on the interests and characteristics of the creators of intellectual property, with a particular emphasis on the nonprofit arts. This emphasis is not meant to neglect the commercial arts and creative industries. It simply recognizes that the commercial arts have been both active and strategic about advancing their IP interests and in pursuing their technological opportunities. This activism is, in part, a function of the fact that the commercial arts—whether broadcast, recorded, film or print—all operate in a highly technological environment where content is increasingly created, packaged, marketed and distributed in a digital format.

In contrast, the nonprofit arts and individual artists have, in general, been slower to articulate their IP interests and often less capable of taking advantage of technological developments. Furthermore, the issues and concerns of artists and nonprofit arts organizations are not unified. Artists at different stages of their professional careers are both differently aware of their IP interests and more or less capable of protecting their rights and promoting their rewards. Individual artists and nonprofit arts institutions often display a particular concern with securing non-monetary rewards from the fruits of their creativity—such as reputation and attribution. Similarly, various artforms and the institutions that produce them operate at different points along the content spectrum and hold different assumptions about the value of fixing the form of IP assets and of digitally distributing them. For example, the live performing arts regard their spontaneous and ephemeral nature to be an inherent element of their format—fixing them by filming or recording changes the artwork itself. Similarly, the visual arts and museum holdings operate in an analog format; such images may be digitized, but historically they have not been created in that format and the conversion process still represents a major cost in time and money. Additionally, artists and nonprofit arts organizations exhibit varying levels and structures of professional organization and capacity for collective action—some are better organized than others, some have more collective resources and powers to draw upon. Finally, the missions of nonprofit arts organizations often encompass more than one cultural function—creation, production, presentation, education, distribution, and preservation. And they regard most of these functions both as the business they are in and as the public services they provide. All these elements seem to contribute to a tendency among artists and nonprofit arts organizations to regard IP in piecemeal fashion and with scattered attention.

As depicted as the "inner ring" of Figure 1, these issue, problems, concerns and opportunities arise from the core interests and actors of this system. Meanwhile, the "outer ring" and the wedge-like potential action alternatives depict a wide range of policy solutions to IP issue problems. These solution alternatives involve not only applications and possible changes in copyright law, but also a number of other public policy options, technological approaches, public and private investment mechanisms, and collective action activities of associations. Furthermore, all of these solution alternatives must be considered within a political environment in which myriad government agencies and legislative committees (as well as various courts) have segmented, but often overlapping jurisdiction, thus making the tasks of both advocacy and policy formulation extremely complicated. In the fourth section of this paper, the discussion to suggests the dimensions of this political complexity, including some examples of advocacy coalitions. Section five then introduces each of the categories of potential action alternatives that seem to arise in the intellectual policy arena. Action alternatives may intersect the "ring" of issues and opportunities at any point and with regard to any of the three core interests.

II. THE EVOLVING CULTURAL BARGAIN

On the one hand, the copyright system is often thought of as having struck a classic bargain and balance between the interests of IP owners and the interests of the public. Many feel this balance has been upset to the detriment of the public interests in recent years. On another hand, much of the discussion of IP in the digital era focuses on the economic dimensions of the cultural bargain—that is, on the financial rewards of creativity and the management of IP assets. The magnitude and potential value of these potential rewards has increased enormously with the spread of the Internet and the proliferation of digital appliances and applications. Nevertheless, creators and owners of IP—as well as the general public– also have important non-economic interests at stake. Hence, both these themes – the character of the cultural bargain and the non-economic stakes involved bear further discussion.

FROM A TWO-PARTY TO A THREE-PARTY BALANCE

Artists and cultural organizations (both nonprofit and commercial entertainment corporations) are important generators of intellectual property. These same "actors"—plus heritage groups — are also stewards of vast stockpiles of even more content in the form of collections, archives, and repertoire. Copyright lawyers sometimes talk about an inherent two-party "cultural bargain" between specific private interests and the general public interest. However, copyright policy has long engaged the interests of a more diverse set of constituencies. Three constituencies are now distinguishable: content creators, content distributors, and the public interest. Early on, there seems to have been an assumption that creators/inventors/authors would be the owners of copyrights and that the general public had not only a collective interest but also individualized interests as users and consumers of intellectual property. Thus, the cultural bargain was said to be struck between creator/owners and the public/users.

Certainly, the "bargain" changed when it became possible to mass-produce intellectual property for a mass market. As a consequence, content creators and content distributors became distinguishable (although at times overlapping). In order to better develop and distribute intellectual property, content distributors often acquired ownership of intellectual property from their original creators who might not have sufficient resources or knowledge to profitably develop their creations. Similarly, the public had interests in individualized consumer access to and choice in intellectual property as well as a collective interest in free access to works that entered the public domain and to a system that fostered creativity. In the process, the distributors emerged as essential to the realization of the bargain itself and as a third party in addition to the original parties of the "cultural bargain" (creators and the public). Thus, in an era of mass distribution and global communication, the role of distributors, publishers, presenters are key to connecting artist with audience, product with user, process with public interest. Without such "middlemen" the public's ability to access intellectual property as well as the creator's ability to secure rewards for his/her labor would be severely constrained. Similarly, without these distributors, development and dissemination of intellectual property would be limited and, in turn, hinder the promotion and progress of science, creativity, and the arts.

Although some might argue that the "new" party—the intellectual property distributors—were merely middlemen, they could instead be viewed as full partners in the cultural bargain. Not only do they bring additional capital into play by virtue of their investment in acquiring ownership rights to the intellectual property created by others, but they also add value through the marketing, mass production, and broad distribution systems that they build and operate for the development and dissemination of intellectual properties. Distribution organizations may be based in the nonprofit or the commercial arena. While all add value and extend the distribution of intellectual property, they bring a variety of perspectives, priorities, and resources to bear in policy debates and development deals. For example, all have an interest in "fair use" but they each have different understandings of what is considered, in fact, to be "fair." Similarly, while both expect a fair return for their efforts, nonprofit organizations

expect both economic (secured both in the marketplace and through philanthropic support) and non-economic returns. In contrast, for-profit cultural enterprises emphasize the pursuit of economic rewards earned exclusively in the marketplace.

Thus, the original two-party "cultural bargain" evolved into a 3-way bargain in which both private interests (creators and distributors) claimed rights and expected a "fair return" for their efforts while the public interest would be served in exchange for a temporary grant of monopoly of copyrights to the owners of intellectual property. From this perspective, the economic incentives and returns inherent to copyright laws have been crucial to the implementation and adaptation of the cultural bargain for more than two hundred years. Similarly, the recognition of a third party to the "bargain" meant that a new balance had to be struck—one in which the interests and rewards of a third party (the distributors) had to be accommodated within the system. From some vantage points, this re-balancing sometimes seemed to be struck at a cost to either or both of the original parties—with creator interests or the public interest seeming to sacrifice to the apparent gain of the distributors. From other perspectives, the addition of a third party served to increase the capacity of the system to produce more returns and more choices, thus expanding the pool of benefits available to all three parties. And sometimes, the rapid pace of change in business conditions, markets, or technological delivery systems temporarily upset the balance, thus requiring a period of adjustment and adaptation. Consequently, assessments of the state and legitimacy of the cultural bargain often depended on the character of ones interests, timing and the state of change.

A Bundle of Economic and Non-economic Interests. The "cultural bargain" concerning intellectual property engages non-economic interests as well as economic ones. So let's try to unbundle non-economic interests from economic ones.

What are the interests of creators and authors? Certainly providing a fair economic reward for their creative labor is an important interest, but there are also important non-economic interests at stake. Creators have "moral" interests in protecting their reputations as they are affected by the uses, integrity, attribution, and conservation of their works. Authors/creators also have a strong interest in the circulation or exposure of their works—indeed they may even consider this more important than economic rewards. How are such non-economic interests protected when artists create intellectual property as works for hire? or when they assign, sell, or license their economic rights to others? Creators also have an interest in the use of the intellectual property of others—through quotation, incorporation, satire and parody, etc. When does such use infringe on the rights of other owners? As multi-media production increases, how are economic as well as non-economics rights shared among creators? What are the rules and mechanisms for treating disputes among joint owners? How do individuals balance their interests as creators with their interests as users? And how can policy support or impede this balancing in ways that advance a public interest in stimulating creativity?

What are the public interests? Legal perspectives on copyright seem to focus on two interests. The first is a general concern in promoting creativity as a public good that supports progress, the pursuit of happiness, and the generation of new intellectual assets and resources for the nation and its citizens. The second is a concern for assuring broad, public access to the fruits of creative labor. If assuring such broad access requires an investment in converting content into digital information, what is the extent of public responsibility for the cost of such conversion? How can non-economic but fair use for teaching, research, and scholarship be maintained while also protecting fair economic return for copies? If browsing has now become virtually tantamount to acquiring content, then how can access for users be protected while simultaneously preserving the economic interests of content owners? Furthermore, content users who purchase a piece of intellectual property whether in the form of a book or a CD or a videocassette have the right of personal use but are constrained from copying or reproducing

such items for either resale (piracy) or as gifts. If such violations of first sale activity govern the transactions between content users and content distributors, then how are the transactions between content creators and content distributors to be treated with regard to uninvented forms of duplication or distribution?

Perhaps there are other general interests, such as protecting intellectual property as a means of protecting freedom of expression or in assuring the range of choice and the privacy to enjoy such intellectual and cultural goods. Are individual user rights ever in conflict with general public interests (e.g., with regard to access to pornography or obscenity, the expression of blasphemy or hate groups)? What is the public interest in preserving knowledge and cultural heritage as national/public patrimony? What qualifies for such preservation and why?

What are the interests of distributors? Certainly, they are entitled to a fair return on their investment—both in content production and in development and distribution systems. Some might argue that in the era of mass production, marketing and distribution of artistic and cultural properties, content owners/developers acquired a large, perhaps disproportionate share of the economic returns. As technology raises new questions about the necessity of a large and expensive distribution infrastructure, is the economic share of these parties fair? What happens to content owners who don't have the resources (whether financial or technological) to produce digitized content or to build or access global distribution systems? What happens to the public interest and to user interests that may be neglected because of such inadequacies? Is technology giving content creators more options to develop and deliver their intellectual property directly to content users in markets both domestic and international? How long is a fair term of copyright monopoly? and what constitutes enough "original input" to merit a new grant of copyright?

Clearly, non-economic interests of the various IP constituencies add new issues and considerations into the policy mix and would seem likely to change the political dynamics of the policymaking process. It is the task of policy to establish rules and standards that balance these various interests in ways that are accepted as fair and effective. This raises a number of thorny questions and may require answers that allow for variation according to field variables and the target phase of the creative process:

- How are economic and non-economic interests to be weighed and balanced? Does harm or loss have to be demonstrable or potential?
- How do technological advances change the economic stakes and returns? Does it equally affect each party? Does the shift from mass production to digital networking increase or diminish the function of "middlemen"? Are the costs of adapting to cutting edge technological capability prohibitive to content creators? In converting content into digital information? to individual users? For users in different countries?
- Is a general "cultural bargain" fair to the interests of all parties in different types of cultural expression and intellectual property? or does the bargain have to be adjusted from one premised on authorship to visual images, performance and/or multi-media? As one moves from one creative form to another, does the role of content distributors change or is it the potential for investment return that changes? What are the implications for business modeling, for policy interventions, and for creative planning and programming of these variations?
- Is the investment/return balance different depending on the type of intellectual property involved—whether art, entertainment, or heritage?
- Is the investment/return balance different depending on what phase of the creative process is the target—creation, distribution, performance, preservation?

Public policy attempts to protect, balance, or advance the interests of content creators, content distributors, and the general public. Fair and effective intellectual property policies are an important (but not the sole) vehicle for managing these various interests. The character and the interests of each of the three constituencies are neither static nor unitary. They can also be misperceived. For example, the average citizen may presume that creators of cultural content retain ownership of newly generated IP. But it is equally—if not more—likely that creators sell, assign, or license their ownership rights to other individuals and organizations (e.g., publishers, producers, recording and broadcasting corporations) that then develop, market, and distribute such intellectual property. Furthermore, members of each constituency may easily find they have multiple, and sometimes competing, interests. That is, content creators are often content users, while content owners can also be content creators.

In an era of globalization, does the potential scale of necessary financial capital and delivery systems require substantial assets of the content owners and distributors? Or does internet technology allow creators effectively to be their own distributors? Similarly, the investment costs of digitizing existing stores of intellectual property for easier access and distribution via technological mediums would seem to require either the resources of private content developers or public underwriting. Do technological advances significantly facilitate the ability of content creators to connect directly with content users, thus diminishing the role of distributors? Self-publishing and MP3 music dissemination are two examples of this potential.

The forces of globalization, digitization, and interconnectivity compound one another with yet to be seen results. What has become clearer in recent years is that the efforts, returns, trade-offs, and stakes involved in an intricate and variable cultural bargain are shifting as technology confronts all the interests and decision-makers with "the digital dilemma." These, in turn, have implications for the political dynamics and policy debates surrounding intellectual property issues.

III. TECHNOLOGY AND THE ARTS: A CREATIVE QUANDARY

The technological environment in which the nonprofit arts must function today and in the immediate future is dramatically different than just a decade ago. The pace of change in the areas of information, networking, and telecommunications is dizzying. Although it is common to project the likely consequences of such technological innovations for the commercial arts and entertainment industries, or for banking, finance and insurance services, the dawning of the information age is also propelling a rethinking of many administrative and financial assumptions for nonprofit arts organizations as well as shifts in the legal and policy frameworks within which they operate.

In part, such rethinking is simply inescapable. Everyone—and all sorts of organizations, business, government, and nonprofits—lives in a very different and more digital world than just ten years ago. For example, when Bill Clinton became president eight years ago, few artists or arts organizations had an email address, there were perhaps 50 websites, digital information was largely a subject for scientists, and few homes owned a personal computer. Today, the best-seller nonfiction lists are populated with books about digital assets, digital capital, and a digital society. There are over 20 million websites and 48% of Americans send or receive email PCs are as ubiquitous in the home as VCRs and indispensable in corporate, government and academic offices.

On the one hand, nonprofit arts and cultural organizations are making dramatic strides to adapt to the information age. A few examples will help illustrate the dimensions of both the challenge and recent changes. According to the American Association of Museum's 1999 survey, 77.8% of its members had websites and most of those who didn't either had plans to launch a website in 2000 or were considering establishing one. (AAM, 2000:37) The presence of websites rose into the 90 percentiles for large museums as well as for living collections and natural history and science museums (with

large art museums not far behind at 85%). As with the digital revolution in general, this is a global phenomenon. According to one source, more than 10,000 museums in 120 countries can now be reached on-line—and more join the list every day. (Shapiro & Miller, 1999) Similarly, Opera America reported that while few American opera companies had websites two or three years ago, now most of their members have established a presence on the Internet. There are now three on-line classical music websites offering live, streaming media transmissions of orchestral concerts from around the world. Individual public broadcasting stations are building or expanding on-line stores. In June 2000, the PBS website rolled out a new version of its on-line store—one that featured 1,500 videos books and CDs.

Despite such advances, many nonprofit arts and cultural organizations continue to be ill-equipped, only partially networked, and all too often lack interactive and/or sophisticated websites. For example, a seven-state exploratory survey conducted by the National Assembly of State Arts Agencies found that 34% of the arts organizations that responded had only one or no computers, with an equal proportion reporting that all or most of their computers were donated. (Note: The implication is that donated equipment is likely to be somewhat older and/or exhibit compatibility problems with newer, purchased machines and software.) Seventeen percent of the responding arts organizations in these seven states reported having no internet access, while 46% reported that they did not have a website. While a majority of arts organizations (59%) reported using their websites for information about work or to post schedules of events, only 10% used their websites to sell artworks or merchandise and a mere 6% could handle ticket sales on-line. Generally, organizations with smaller budgets were less likely to have internet access and websites. (Barsdate, Martin & Pope, 2000) Clearly, the equipment and trained staff necessary to improve the technological capacity of nonprofit arts organizations age will continue to be a challenge for the sector for years to come.

On the other hand, technology—especially when combined with intellectual property considerations—presents the nonprofit arts and culture sector with more than an equipment and interconnectivity challenge. Rather the nonprofit arts and culture sector finds itself in a multi-faceted creative quandary over how to adapt to an information-driven, networked, digital era. While other sectors of the American economy and society confront issues of intellectual property and technology (including science and engineering or the software industry), this combination is perhaps most potent for the arts—both nonprofit and commercial. The commercial arts and entertainment industries have extensive financial resources and technological expertise, which allow them to aggressively pursue and protect their interests.

In contrast, the nonprofit arts—both professional and traditional—often find themselves feeling like "poor relations" unable to match the marketing, distribution, production, or advocacy resources of the commercial arts sector. Furthermore, nonprofit arts and cultural organizations cannot confine their focus to the goal of advancing their economic interests while accommodating technological change. Rather, nonprofit arts and cultural organizations must—in good faith to their individual organizational missions and to the sector's civic responsibilities-be concerned with advancing and protecting a variety of non-economic interests. These include public interests in access, fair use, and preservation; the moral and creative rights of artists; and intrinsic concerns for the integrity and authenticity of specific artworks and intellectual properties. Paradoxically, such non-economic interests seem likely to increase the financial costs incurred by nonprofit arts organizations for a number of reasons. They involve goals that are neither market-driven nor market-supported. Concerns for authenticity, integrity, and attribution are likely to prompt added requirements for technological protections. As a recent report from the American Association of Museums noted:

The ability to attract 'virtual visitors' to 'virtual display cases' allows museums to offer previously inaccessible images and to increase exposure in electronic formats. However, increasing virtual display decreases virtual security." (Shapiro & Miller, 1999:10)

And finally, the digital economy and the information society, requires all participants to constantly reinvest to keep up with the state of public expectations, the practices of their peers and competitors, and the pace of technological innovation.

First, let's look at the conjunction of technology and intellectual property as it concerns that arts and culture sector. Artists, arts organizations, and cultural corporations are important generators of intellectual property. In the information age, intellectual property has become a key economic resource. Today, US creative industries constitute the second largest export sector of the nation (outranked only by the defense equipment industries). Nonprofit arts and cultural industries are implicated in these phenomena in many ways. They are generators of new intellectual property: sometimes these ideas get developed by commercial entertainment industries, other times these ideas and artworks constitute alternative aesthetic choices for the cultural consumer. Non-profit arts and cultural organizations (including heritage groups and institutions) are also stewards of vast stockpiles of cultural content in the forms of museum collections, historical archives, and performing arts repertoire. Such content might be called the "raw material" form of intellectual property—resources that might be converted into digital assets for the information age. But at present, and unlike their "cousins" in the commercial arts and entertainment, the nonprofit arts are content rich but data poor.

Thus, for nonprofit arts and cultural organizations, the creative quandary is at least five-fold. (Wyszomirski, 2000) First, although they have substantial intellectual property assets, these assets have to be managed effectively. Many require conversion into digital formats if they are to be fully developed in the information age. Indeed, according to the National Academy of Sciences report, The Digital Dilemma, information in digital form, computers and internet access constitute the necessary elements of the information infrastructure. (National Research Council, 2000)

As the term "infrastructure" implies, these would seem to be necessary prerequisites for effective engagement in the information age and for potentially successful negotiation of the "digital dilemma". But, if as Professor Tom Linehan of Ohio State University has observed, "the arts are content rich and information poor," then the arts confront serious and gapping inadequacies in their informational infrastructure. Indeed, the nonprofit arts might be arrayed along of spectrum that runs from information-poor to information-rich, from the live performances through printed and recorded artworks to digitized art as illustrated in Figure 2.

In a general sense, the nonprofit arts tend to array along the left side of the spectrum of content resources–that is, being information poor with content existing in ephemeral and fixed formats. In contrast, the commercial arts and entertainment industries tend toward the right side of the spectrum of content resources–that is, being information rich with content increasingly being converted from fixed formats into digital and/or being created in digital formats. Thus, at this point in the digital age, the nonprofit arts tend to be information poor, while the commercial arts tend to be information rich. The museum community is probably at the forefront of nonprofit art organizations in the effort to digitize its collections—that is, to turn its content into information.

Figure 2: The Content Spectrum in the Arts

Content Resources:	*Information poor*	.....	*Information rich*
Artform:	Live Performances, Folk art traditions	Paintings, Books, Analog Recordings	Museum Digital Image Collections, Electronic Arts, Entertainment Industries
Content Format:	Ephemeral	Fixed	Digitized

While the exact dimensions of this conversion are not readily at hand, we know that visual and literary artists and arts organizations including museums, galleries, and publishers are working to convert their stockpiles of content fixed in analog formats into digital formats as well as to transform their production, marketing, and distribution practices in ways that take advantage of technological progress. While the situation of each performing art— orchestral music, chamber music, theater, dance, and opera—is different, all essentially start with ephemeral content and face not only conversion but aesthetic issues concerning the fixing of their content in any format. Similarly, the folk or heritage arts seldom have digital resources. Their content is often handed down personally through an apprentice system, may be preserved in collections that are not digitized, sometimes they are not even recorded systematically. Whatever the precise state of digitization is in the various artforms, it seems plausible to say that this major infrastructure ingredient is in relatively scarce supply among the nonprofit arts.

Even without digitization, the task of managing intellectual property assets raises new challenges for nonprofit arts organizations. On the one hand, it becomes a factor in labor agreements—such as the recent contract agreement involving the American Federation of Musicians and many of the nation's most major symphony orchestras, opera and ballet companies that covered both the transmission of live performances through "streaming audio" technology and pre-recorded audio files that listeners can download. (Kozin, 2000) On the other hand, the internal squabbling over who controls the rights to the choreographic repertoire of Martha Graham has seriously threatened the very existence of the Martha Graham dance company and school—an example of the unanticipated consequences of trying to manage (but mis-managing) the intellectual property assets of an American cultural icon. (Dunning, 2000;Carvajal, 2000)

Second, any large-scale digital conversion is likely to incur significant financial costs which most nonprofit arts and cultural organizations are not in a position to absorb. Furthermore, commercial arts and entertainment companies think and can act upon intellectual property and technology concerns as though they are investments—and substantial investments, at that. In contrast, nonprofit arts organizations have no way to recover the financial costs they have to incur to manage their intellectual property in a digital age in which the pace of technological change requires constant updating.

Third, digitization and technological accommodation raise fundamental issues for the nonprofit performing arts—including music, theater, dance and opera. These issues concern aesthetics, management and marketing. Aesthetically, going digital can divorce the live experience from some of its key elements: immediacy, immersion, fresh invention, physicality, ritual and social interaction. (Taylor: 2001) Thus for many in the live performing arts—most of which are situated in the nonprofit sector—a key question is whether their rather ephemeral performances should be transformed into any fixed format and whether the resultant piece becomes something other than the original. Managerially, going digital has profound implications for creative control. As Andrew Taylor (2001) points out: "Creative control by the author or artist, the carefully crafted stewardship of great works by arts organizations, and the context of a cultural work torn from its intended means of conveyance, the cultural integrity of ritual or celebratory express...are all issues that lose their foothold in the information age." And in terms of marketing, there seems to be a competing push-pull dynamic currently at work. There is a "pull" of looking to new, technologically-based intermediaries who can help arts organizations reach potential consumers for efficiently and conversely help direct web-surfing consumers to cultural offerings.[1] Meanwhile, there is also a "push" of trying to developing a new marketing role for

[1] One example of this is the website culturefinder.com which was started up in 1995, grew to a $5 million a year broker selling $3 million worth of tickets each year for thousands of performing arts organizations and events around the country, becoming a sort of one-stop shopping site and information provider for cultural consumers. However, even at this scale, culturefinder.com was losing money and announced that it would attempt to transform itself into a nonprofit organization. See Tedeschi, 2001.

nonprofit arts organizations—that of cultural experience broker—a role that is more involved and interactive with the audience that the traditional presenter role. (Taylor, 1999; Pine & Gilmore, 1999)

Fourth, accurate digitization and media-distributed art from nonprofit arts and cultural organizations is likely to require new technological innovations—technologically, this is both a problem and an opportunity. For example, in the case of dance preservation, the ability to use digital techniques literally required the development of movement capture and motion sensing technology and the refining of computer imaging techniques before they could be used to record dance choreography accurately and usefully. Conversely, each time a new information format emerges it raises new challenges for preservation in cultural fields such as film, video, dance or oral history. Thus, nonprofit cultural organizations face the dual challenge of evolving from one technology-based information format to the next in order to keep their creative edge and to compete effectively in the world of e-commerce, while simultaneously preserving, maintaining, and facilitating public access to a legacy of cultural resources that are fixed in older technological mediums.

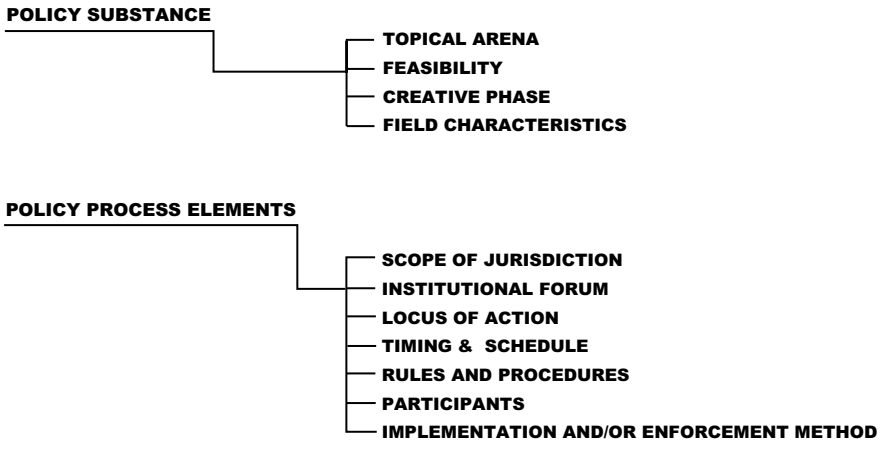
Fifth, the nonprofit arts and cultural organizations seem to bring a different cost-benefit calculus to questions of technological innovation than is common among the commercial arts. Nonprofits often adapt applications belatedly rather than at the leading edge. They tend to focus on financial costs rather than possible benefits and revenues attendant to technological change. They often consider only a few uses of technology rather than a wide range of possible applications. They often seem inclined to regard the internet as an information, rather than an interactive, medium.

IV. THE POLICY CONUNDRUM

Public policy at the intersection of art, technology, and intellectual property is a complex mix of subject matter and process variables. (See Figure 3)

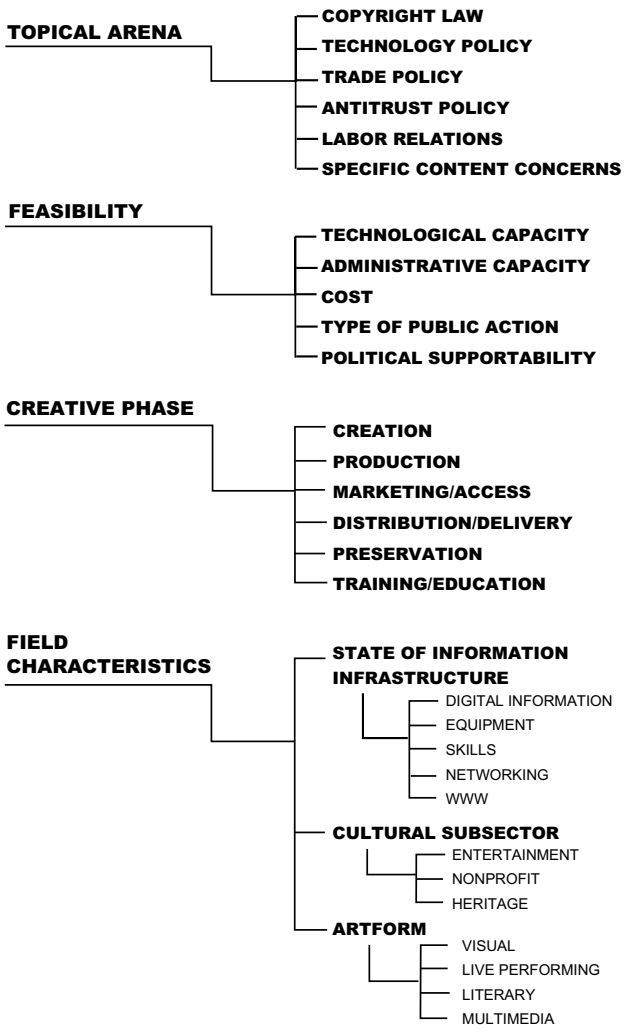
Substance itself is multifaceted and may vary according to at least four major dimensions: topical arena, feasibility of action intervention, creative phase, and cultural field characteristics. These dimensions are displayed in Figure 4. While feasibility considerations present themselves in any policy arena, here the range of topical arenas as well as the impact of both creative phase and field characteristic variables introduces the potential for multivariate interests and effects. Relevant public policy action may occur in many different topical arenas, including copyrights and patents, trade, telecommunications, and technology as well as around specific content areas such as the arts, humanities, education, museums, and historic preservation. The substance of policy may differ with regard to artform: visual, live performing, literary, or electronic media as well as according to the cultural subsector involved (commercial, nonprofit or heritage). It may also vary depending upon what facet of the creative process is involved: creations, production/presentation, marketing/access, distribution/delivery, preservation, or training/education.

Figure 3: The Pieces of the Policy Puzzle



Furthermore, different fields, different artforms, different creative phases can exhibit very different conditions in the state of their informational infrastructure. Some—like the live performing arts—tend to prize ephemeral form and content. Others, such as visual art and literary organizations, tend to have fixed, but not always digitized, content. Yet others have converted the productions of new creative activity into digital format that requires no additional step of digitization. However, many cultural content creators and presenters still operate under pre-digital conditions and within an ephemeral content paradigm, thus putting themselves "behind the curve" of policy debates and entrepreneurial strategies that presuppose a developed informational infrastructure and a self-awareness of one's interests in such applications as e-commerce or information networking.

Figure 4: Policy Substance



Similarly, the policy process concerning intellectual property issues and the arts is a maze comprised of many institutional, agency and committee forums of activity; of national, intergovernmental, and international jurisdictions; of public and private actions and inactions; and of competing, complimentary, and diverging interests and goals. Clearly, the complexity, inter-dependencies, and unpredictability of this matrix of issue substance and policy process constitutes a policy conundrum—a puzzle with no definitive or persistent solution, but one that requires nimble political and analytical skills, informed speculation and experimentation, a high tolerance for ambiguity, an instinct for policy timing, and the prospect of fluid coalitions. Subsequent discussion will focus on two elements of the policy conundrum: policy process complexity and the variety of possible action options.

POLICY PROCESS COMPLEXITY IN THE INTELLECTUAL PROPERTY ARENA.

Considerations of process engage politics and can occur in a variety of institutional settings (executive, legislative and judicial), the particular locus of action within these institutions can be both multiple and varied, and the scope of policy jurisdiction may be national, intergovernmental or international. (See Figure 4) Public policy actions that effect intellectual property may take the form of legislation, executive order, administrative rule, judicial decision, or international agreement. Stakeholders and government actors as well as specific policy networks may focus on any one issue or may be engaged in a range of issues, may seek to advance one of any number of goals or public purposes, may employ a variety of advocacy strategies, and may promote different approaches to policy implementation and/or enforcement. Hence, understanding process requires knowing which Congressional committees and subcommittees have jurisdiction; which agencies, departments, task forces, and international organizations have the authority to make, apply, and evaluate policy. It also involves knowing not only the official decisionmakers but also the

non-governmental stakeholders—what private corporations, nonprofit institutions, professional and trade associations and advocacy coalitions of such interests are active and influential participants in policy-making. It includes attention to aspects of the how decisions and policy are made such as schedule and timing, rules and procedures. All these factors, plus political considerations like who the individual decisionmakers are, the character of partisan and ideological configurations, and the resources and skills of various interest groups feed into the processes of formulating specific issues, the trajectory of decision-making, and the feasibility of particular policy options.

The complexity of this policy process is clearly demonstrated by even a preliminary discussion of, in the first instance, the scope of jurisdiction, the forums and loci of action for intellectual property issues and, in the second instance, on the diversity of non-governmental participants in these policy deliberations.

Clearly, IP involves both national and international actors both as a matter of trade policy and agreements as well as of copyright treaties and subsequent legal synchronization among countries. Relevant decisionmaking forums not only engage national institutions but also send national representatives to international forums such as WIPO and WTO. The globalization of business, communications, finances, and travel are pushing the interrelationship of national and international policy systems with regard to IP. The post-Cold War era has seen more open economic and communication connections as well as more muted ideological and military conflict. Both developments have contributed to the increase and diversification of international interactivity and a growing awareness of the interdependence of national and international authorities.

In the United States, all three institutional branches of the national government make decisions that interpret, enforce, and establish policies that concern or interface with intellectual property. The courts are very active in interpreting, applying, and sometimes stretching current intellectual property law to new technological and market circumstances. Both the legislative branch and the executive branch have multiple points of engagement with IP issues that involve a number of executive and regulatory agencies as well as Congressional committees and advisory entities.

For example, at least seven House committees and four Senate committees were engaged in IP issues during the 106th Congress. These included

a. Banking and Finance
b. Commerce (especially subcommittee on Telecommunications, Trade, and Consumer Protection)
c. Government Reform (especially subcommittee on Government Management, Information and Technology)
d. International Relations (especially subcommittee on economic policy and trade)
e. Judiciary (subcommittees on Crime and on the Courts, Intellectual Property)
f. Science (especially subcommittee on Technology)
g. Appropriations (various subcommittees)

In the Senate, the Committees include Commerce, Science and Technology; Finance; Foreign Affairs; and Judiciary. There is a Congressional Internet Caucus. The Registrar of Copyrights is a division of the Library of Congress. Congress created an Advisory Commission on Electronic Commerce (ACEC) to study federal, state, local and international taxation issues associated with electronic commerce.

With regard to the nonprofit arts, it is worth noting that the Congressional committees identified above differ from those that the arts community is accustomed to dealing with—specifically the Committees on Labor and Education in each chamber as well as the Appropriations Subcommittee on Interior and related agencies. Thus, the legislative terrain is both unfamiliar and complex for artists and

nonprofit arts organizations and the associations that represent their interests in Washington. In contrast, commercial arts and entertainment interests tend to be broader advocacy portfolios and networks of contacts that include many of the committees, subcommittees and special legislative organizations concerned with intellectual property.

Many committees were quite active on a number of issues. For example, in the 106th Congress, the House Subcommittee on Telecommunications, Trade, and Consumer Protection considered the following list of issues:

-WIPO/Consumer Access to Digital Entertainment
-ICrave TV and Webcasting
-Encryption
-Domain Name Privatization
-Internet Access Charges
-Spamming E-mail
-Satellite Home Viewing
-WTO 2000
-Internet Sales Taxation

To date, federal policy attention has been focused on broad issues, such as privacy, taxation, encryption capabilities. In contrast, the impact of the Net and the particularities of broad issue concerns for specific sectors have not yet attracted the same level or coherence of public attention. (Simon, 2000:395-6). Certainly most of these broad interests have been a direct concern of the commercial arts and entertainment industries. Conversely, although individual artists and nonprofit arts organizations have seldom articulated a direct interest in such issues, it is not difficult to see how many of these could have a bearing on their interests, especially in the long term. Furthermore, the absence of an articulated position may stem from inadequate attention rather than from an informed decision. Policy decisions regarding broad issues will establish a framework of assumptions, expectations, regulations, and practices that will help shape subsequent policy debates across the entire arts and culture sector as well as across various sectors of the economy. Hence basic decisions occasioned by issues arising from banking or healthcare or education may have significant implications for the arts and culture in the future.

An exploratory search of the THOMAS website illustrates that the legislative complexity is not simply a matter of committee specialization but also of issue multiplicity. A THOMAS search for legislation introduced in the 106th and the 107th Congresses under the headings of “intellectual property”, “copyright”, “e-commerce”, “digital rights”, as well as “anti-trust” discovered 45 items. Table 1 presents a picture of these pending bills according to thematic category and Congress. Not included on this table are a number of targeted trade agreements that covered intellectual property were approved with Caribbean Basin countries, Southeastern European nations, Chile, Singapore, Korea, Pacific Rim nations, as well as trade sanctions more generally.

The 106th Congress considered at least nine bills on IP, including the Encryption for the National Interest Act, the IP Protection Restoration Act, the Internet Integrity and Critical Infrastructure Protection Act, and the IP and Communications Omnibus Reform Act. Clearly, there are significant commonalities among the issues dealt with in the telecommunications and trade arena and those of the intellectual property/copyright arena. Although not specifically dealing with the IP interests of artists and the nonprofit arts community, such bills nonetheless may be of concern to the arts community because they help establish the rules and foundation upon which subsequent IP decisions will be made. Similarly, if one scans the issues that came up in the 106th Congress concerning “copyright” one finds only one item of direct concern to the arts—the Artists Contribution to American Heritage Act—in the midst of

Table 1: 106th and 107th Congresses and IP Issues: Proposed Bills

	Intellectual Property	Copyright	E-commerce	Antitrust	Digital Rights
106th Congress	American Inventors Protection Act of 1999	Artists' Contribution to American Heritage Act of 1999	Electronic Commerce Enhancement Act of 2000		
	Anticybersquatting Consumer Protection Act	Collections of Information Antipiracy Act	Electronic Commerce Technology Promotion Act		
	Domain Name Piracy Prevention Act of 1999	Congressional Research Accessibility Act	Electronic Commerce Extension Establishment Act of 1999		
	Encryption for the National Interest Act	Copyright Compulsory License Improvement Act			
	Intellectual Property and Communications Omnibus Reform Act of 1999	Digital Theft Deterrence and Copyright Damages Improvement Act of 1999			
	Intellectual Property Protection Restoration Act of 1999	Domain Name Piracy Prevention Act of 1999			
	Internet Integrity and Critical Infrastructure Protection Act of 2000	Intellectual Property Protection Restoration Act of 1999			
	Technology Transfer Commercialization Act of 1999	National Recording Preservation Act of 1999			
	Trademark Cyberpiracy Prevention Act	Satellite Home Viewers Improvements Act			
		Satellite Copyright, Competition, and Consumer Protection Act of 1999			
107th Congress	Madrid Protocol Implementation Act	Artists' Contribution to American Heritage Act of 2001	Consumer Privacy Protection Act	Antitrust Modernization Commission Act of 2001	Music Online Competition Act of 2001
	Intellectual Property Protection Restoration Act of 2001	Twenty-First Century Distance Learning Enhancement Act	Internet Freedom and Broadband Deployment Act of 2001	Export Administration Act of 2001	
	Intellectual Property and High Technology Technical Amendments Act of 2001	Internet Tax Fairness Act of 2001	Cyber Security Information Act	Children's Protection Act of 2001	
		Technology, Education, and Copyright Harmonization Act of 2001		Give Fans a Chance Act of 2001	
		Art and Collectibles Capital Gains Tax Treatment Parity Act			

a set of general issues concerning copyright financing, damages, licensing, consumer protection, trade, accessibility and anti-piracy.

In the first session of the 107th Congress, the activity continued with regard to issues of copyright, intellectual property, and e-commerce. E-commerce issues continued to be broad and general: consumer privacy protection, cyber security, and broadband deployment. Similarly, intellectual property action focused on amendments to the 1946 Trademark Act needed to implement international conventions, remedies for copyright infringement, and technical amendments concerning IP and High Technology. Activity related to copyrighted works seemed to focus on educational concerns or tax issues. The educational bills concerned distance learning and educational use exemptions. The general tax bill was the Internet Tax Fairness Act, while two others call for changes in the taxation of creative and scholarly works donated by their creators and the treatment of capital gains derived from art and collectibles. In addition, digital rights was the subject of the Music Online Competition Act of 2001 and four bills with implications for intellectual property concerns or digital rights appearing in the topical arena of anti-trust. These included not only a bill concerning the establishment of a potentially wide-ranging Antitrust Modernization Commission, but also the Children's Protection Act (which sought to exempt agreements relating to voluntary guidelines governing telecast material, movies, video games, internet content, and music lyrics from antitrust laws), as well as the Export Administration Act and possibly the Give Fans a Chance Act (concerning antitrust exemptions to the broadcasting agreements of professional sports leagues).

In contrast, if one uses the same THOMAS database to call up legislative items under the categories of "culture", "cultural heritage" or "arts", very few of these issues appear. Imperfect though this might be as an indicator of engagement by the arts community with IP, copyright, e-commerce issues, or digital rights, it nonetheless suggests that many IP policy issues are working their way through the federal government that could prove to be important—whether directly or indirectly—for the arts. Thus IP policy might be regarded as analogous to tax policy—that is, an arena to which the nonprofit arts community must learn to be more attentive.

The executive branch is similarly complicated. In the Executive Office of the President alone, there are four agencies involved in technology and intellectual property—the Information Infrastructure Task Force, the Commission on Critical Infrastructure Protection, the Office of Science and Technology Policy, and the Office of Management and Budget—in addition to the active interest of the Office of the Vice President under Al Gore. There is also the U.S. Trade Representative as well as the Federal Communications Commission and the Federal Trade Commission. At least three cabinet departments —Commerce, Justice, and Treasury—are engaged in IP issues through a variety of specific bureaus or divisions. The Secretaries of each of the three cabinet departments as well as the US Trade Representative were members of the Congressional Advisory Commission on E-Commerce. Beginning in 1997, an inter-agency Working Group on Electronic Commerce became active and the Group published its first annual report in November of 1998 covering pertinent legislative developments, U.S. accomplishments on the international scene, and important private sector actions such as industry agreements and technological developments. (Simon, 2000: 298-291; Dept of Commerce, 1998) If one looked deeper, many more agency points of engagement would emerge.

NON-GOVERNMENTAL POLICY PARTICIPANTS

The report, The Digital Dilemma, noted that the diversity of stakeholders involved in intellectual property issues acted as an obstacle to policy progress. From one perspective, stakeholder diversity may refer to the multiplicity of decisionmakers involved as well as the plethora of issues (each of which tends to engage a variable cast of decisionmakers). This diversity is clearly illustrated in the foregoing discussion of legislative and bureaucratic players and by the range of issues with which they are contending.

Another dimension of stakeholder diversity concerns private and/or nongovernmental actors. These participants in the copyright policy system include private corporations, transnational organizations, interest groups and advocacy coalitions. These private actors not only play an important role in influencing the formulation of public policies but are also active in what might be called private policymaking. One example of a broad industry effort at private standard setting and policymaking is the Secure Digital Music Initiative (SDMI). Formed in 1998, SDMI is a group of about 200 companies and organizations representing information technology, consumer electronics, telecommunication, security technology, the worldwide recording industry, and Internet service providers interested in the development of a "voluntary, open framework for playing, storing and distributing digital music." However, some report that the forum is finding it difficult to attain a consensus among its three primary constituent groups (computer makers, consumer electronics, and music companies) and has missed deadlines even as music file-sharing and circulation proliferates on the Internet through entities like Napster. (Costello, 2001).

Examples of more limited partnerships – those designed to distribute music online—include both PressPlay and MusicNet. (Richtel, 2001) PressPlay is a joint venture of two recording companies – Sony Music Group and Vivendi Universal. It deals directly with individual consumers, offering on-demand streaming and downloading service, structured as subscription plans with variable fees. These plans contain a preset number of streams and conditional downloads that subscribers can use each month. PressPlay monitors the usage and can interdict excessive use. (www.pressplay.com) It is also making licensing deals with Yahoo and MSN.

The second example is MusicNet – a partnership of Bertelsmann, EMI Records, and AOL Time Warner. It licenses its technology platform to companies that want to sell digital music subscription services under their own brands. This has been characterized as a wholesale model whereby other online music services can set their own prices and subscription terms. The MusicNet site was launched on December 4, 2001. (www.musicnet.com)

Both the PressPlay and MusicNet ventures have been accused of engaging in anti-competitive practices that may effectively allow them to illegally dominate the distribution of music on the internet. The US Justice Department is conducting an antitrust inquiry and the European Commission is also investigating these services.

Alternatively, partnerships may develop between private and public policymakers—like the one that underwrote the original development of AARPNET (the precursor of Internet). Such public-private partnerships may devise complimentary and/or distinctive policy strategies to deal with issues that may exceed the power, expertise, or resources of either sector alone. As individual companies develop software security techniques, these might evolve into standard business practice and information management procedures. If this happens it could obviate a need for public regulatory policy. Currently, a new breed of company—security and rights management application service providers like RightsLine and InterTrust—are developing and offering media and entertainment corporations new software, services, and training in customized systems designed to manage and protect IP assets. (Note: More information about these can be found in Section VII of the Background Volume) Conversely, if such privately developed systems become too restrictive of public access to information, they might invoke a countervailing public policy response.

The role of transnational organizations—whether multinational corporations or quasi-nongovernmental organizations (quangoes) – is increasingly evident. For example, The World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) are quangoes that have significant and growing roles with regard to intellectual property policy formulation, mediation, and enforcement. There are also international federations of rights management societies. These include the International Federation of Rights Representation Organizations (IFRRO) which is primarily

concerned with text-based and published work and CISAC, a collective of nearly 200 member societies from 100 countries that is active in establishing standards to identify and track musical, audio visual, and textual works.

Many trade, professional and service associations are expanding their activities with regard to intellectual property and sometimes adopting new technologies to help them do so. For example, the websites of talent unions, such as SAG (Screen Actors Guild), include pages with downloadable copies of their standard contracts as well as versions of digital rights agreements. Thus, SAG provides its members with online copies of its Internet agreement and an Interactive Media Contract. The Directors Guild of America also provides copies of various agreements including those pertaining to live and taped television, cable, experimental, and internet mediums along with additional information in an online "Creative Rights Handbook." This site also offers links to articles and press releases on IP issues and to pertinent GAO information such as its statement on the residual rights of directors and actors and its study of motion picture reuse legislation.

In contrast to the SAG and Directors Guild sites the Dramatists Guild of America website offers information to its members about IP issues and has publicized a symposium it has conducted on how dramatists' work should be protected during developmental workshops. In another variation, The National Writers Union website hosts the Publications Rights Clearinghouse, which acts as an agent for writers in licensing secondary rights of their previously published articles, collects copyright fees, and distributes royalties.

In addition to such well established rights management organizations like BMI, ASCAP, and the Copyright Clearance Center, new associations are constantly being added to the compliment of rights management, collecting and licensing societies across the globe. These include the Artists Licensing Group, the Art Museum Image Consortium (AMICO), and VISCOPY (Australia). New interest groups also keep developing such as the Digital Media Association, which represents online music start-ups.

Furthermore, in an apparent response to the growing complexity of the intellectual property policy-making process, these interest groups have begun to band together into advocacy coalitions such as the Coalition for Networked Information, the National Initiative for a Networked Cultural Heritage, the Creative Incentive Coalition, or the Digital Future Coalition. A brief look at a few of these examples will serve to illustrate the phenomenon.

NINCH – National Initiative for a Networked Cultural Heritage. This is a "diverse nonprofit coalition" of approximately 70 educational and cultural institutions and associations representing the arts, humanities, archives, libraries, museums, and social sciences organized "to assure leadership from the cultural community in the evolution of the digital environment..." and to fostering "the process of networking and maintaining our cultural heritage online." NINCH evolved from a 1993 collaborative project of the American Council of Learned Societies, the Coalition for Networked Information, and the Getty Information Institute; it became an independent organization in 1996. Art members include the National Assembly of State Arts Agencies, the American Association of Museums, the American Association of Art Museum Directors, the Art Museum Image Consortium, and the Dance Heritage Coalition. Approximately 40 university libraries are members; other library members include the Council on Library and Information Resources, the New York Public Libraries, the Online Computer Library Center, and the Library of Congress. Humanities members include professional associations such as the American Historical Association, the Modern Language Association, and the College Art Association are members as well as individual archives (e.g., Chicago Historical Society), and university-based institutes for the humanities and technology (e.g., at the Universities of Maryland and Virginia). NINCH engages in extensive educational activities for its members such as the series of Copyright and Fair Use Town Meetings. Rather than engage in explicit political advocacy, NINCH serves as both a clearinghouse

and disseminator of information and news about intellectual property issues, copyright law, and information technology the cultural heritage community as well as a convenor for the exchange of experiences and perspectives.

DFC – Digital Culture Coalition is a group "committed to striking an appropriate balance in law and public policy between protecting intellectual property and affording public access to it. It was formed in the mid-1990s in response to the release of the Clinton Administration's "White Paper on Intellectual Property and the National Information Infrastructure" which recommended changing copyright law to "increase the security of ownership rights for creators or motion pictures, publishers, and others in the proprietary community." Members of the DFC felt that such changes would severely limit the ability of educators, businesses, libraries, consumers and others to take advantage of the benefits of digital networks. Members—which are mostly associations – number approximately forty groups representing the humanities, education, libraries, writers, computer industry, and consumer and public interest groups. Among the last three categories are the Computer and Communications Industry Association, the American Committee for Interoperable Systems, the Consumer Federation of American and the Consumer Project on Technology as well as the Alliance for Public Technology, the Computer Professions for Social Responsibility, and the Electronic Frontier Foundation. Other coalitions are also part of the DFC such as NINCH, the National Humanities Alliance, the Consortium of Social Science Organizations and the American Council of Learned Societies. Major issue concerns include database protection (e.g., the Collections of Information Anti-Piracy Act), UCITA (the Uniform Computer Information Transactions Act), and the Digital Millennium Copyright Act (DCMA).

CIC – Creative Incentive Coalition represents America's computer software, video, movie, television, publishing, and recording industries interested in strengthening international copyright laws and preventing IP piracy. In 1996, the CIC lobbied for ratification of two international copyright treaties with provisions that included restrictions on the manufacture or distribution of products and services that break through encryption or unscramble coded signals — "anti-circumvention" devices that it considers a threat to Internet copyright protections. This prohibition was opposed by the Digital Future Coalition, which argued that a ban on these devices would limit citizens' ability to access and use copyright materials. A September 1997 report published by the Center for Responsible Politics noted that members of the Creative Incentive Coalition made just over $201,000 in PAC contributions in the first six months of 1997 and spent $6.8 million on lobbying expenses during the same period. (Shecter, 1997)

Clearly, the number and diversity of nongovernmental actors in the copyright policy system is great and growing. Furthermore, individual organizations are banding together with other like-minded groups into rights management associations, international federations, advocacy coalitions, collaborative initiatives, project partnerships, and common cause alliances. Many of these groups coalesce around specific issues – sometimes forming different alliances to support different and even opposing positions. Specific interested parties may join more than one alliance, may join new coalitions as they emerge, and may migrate from one alliance to another as issues evolve or new issues arise. Such a numerous and fluid set of nongovernmental participants certainly adds to the size and complexity of the already complex formal policy process concerned with intellectual property.

V. A VARIETY OF ACTION OPTIONS

It would seem only natural that such a complex policy system would give rise to a number of different kinds of possible action options. These options might be grouped into five general categories;

-copyright and intellectual property law,

-technological capabilities,

-business models and investment mechanisms,
-collective action activities,
-other implicated policy arenas.

While one can conceive of each of these clusters as being distinct, there are inevitable crossover and compounding effects. Change is occurring rapidly in each cluster area, and that change may be independent of interactions between and among clusters. Furthermore, it has been suggested by commentators on each cluster area that change is so significant and fundamental as to approach paradigm shift. Thus, we seem to be dealing not just with changes in degree but changes in basic assumptions and long-standing contextual conditions. Hence, the pace, multiplicity, and significance of change across all four action clusters makes analysis and projection very speculative. A change in assumption – like the recent downturn of dot-com businesses – can radically call into question an entire stream of thought about e-commerce business models and expectations. In addition, this section of this background paper is, at this time, also speculative in the sense that my thoughts are still quite formative. Hence the following discussion will only briefly sketch some issue and questions that, at this time, I think might constitute important parts of a more developed analysis that will evolve from a fuller digestion of the February and April 2001 mini-Assemblies on art, technology and intellectual property.

COPYRIGHT AND INTELLECTUAL PROPERTY LAW

This cluster of action options has attracted considerable attention both domestically and internationally and it has resulted in considerable new statutory and case law. These are the subject of considerable discussion and analysis in Michael Shapiro's background paper for the Assembly. Certainly if the emphasis is on intellectual property, the action option of first recourse is likely to involve copyright and intellectual property law—its adequacy, how it might be revised, how it might be better enforced, how and where it strikes a balance among various interests, and how domestic and international forces interact. Such questions keep the courts, key Congressional committees, and executive agencies engaged in an extensive issue agenda. In addition, the Copyright and Patent Office has held hearings and made rulings –and continues to do so—on various attendant issues and their differential applications in different fields and/or for different categories of users.

These policymakers also benefit from an extensive and ongoing discourse that bubbles within the private sector. Collectively, law schools and think tanks and interest group associations convene numerous and regular discourse on this cluster of issues and possible action options. An innovative virtual think tank is the Future of Music Coalition, which is primarily concerned with educating musicians as well as the general public about critical issues that are shaping policy debates in the music/technology space. FMC has held two annual Future Of Music Policy Summits in Washington DC. It employs a full time lobbyist, and maintains a content rich website. (Pareles, 2002; www.futureofmusic.org) Recurrent themes in many of these conferences include

- *the expanding extent of copyright coverage*—both as to duration and types of content along with the proliferation of exemptions and a perceived need to devise adjustments for different types of works and different types of users.
- *the erosion of public domain* —is seen to arise from the expansion of property rights and a focus on protecting those rights in the digital age. Any contraction of the public domain is seen as limiting fair use and public access to the free flow of ideas.
- *the entanglement of intellectual property law and contract law* — the entanglement obscures the fact that many problems raised under the banner of intellectual property are in fact a matter of contracting practices. If the focus were to shift to contract law, would this raise new options for legal revision and/or business practice?
- *the search for stronger, more reliable implementation options*—often focuses on a movement to-

ward actual or virtual compulsory licensing of intellectual property or the development of stronger enforcement of existing intellectual property laws—both domestically and internationally.

– *revisiting the cultural bargain with an eye toward restoring the rights and role of individual intellectual property creators*

TECHNOLOGICAL OPTIONS

This cluster of options is sometimes referred to as "technological fixes." The general emphasis here is on the technology aspect of our intersection of art, technology and intellectual property. Simplistically, the implicit logic here holds that technological change has created many of the problems that we now face and that further technological advances can play a big—perhaps dominant—role in solving those problems or at least in producing technologies that can be used to mitigate them. This is more appropriately the domain of individuals far more technologically sophisticated than myself.

Options in this cluster include the development of encryption systems to protect, maintain, and track digitized information; the development of specialized hardware as a means of controlling and authorizing access to IP; the embedding of expiration dates into IP files that will guarantee limited use and minimize unauthorized duplication. There is also increasing discussion of the implications of open source code as well as trying to operationalize the idea that many IP problems might be addressed technologically if one could devise better means of separating the data/content from the transmission system/means of communication.

BUSINESS MODELS

This cluster of action options focuses on the activities and operating assumptions of private producers, creators and distributors in the emerging e-commerce markets and digital economy. Here the discussion is occurring simultaneously at many levels: system, values and operations. At this point, let me just raise a few questions that I think are particularly pertinent to our discussion.

– *digital appliances and the live performing arts* —as we enter the third generation of the digital age, we face the likelihood that a plethora of digital appliances will be soon be able to deliver digital content to anyone, everywhere, at anytime. Where will this leave the live performing arts? Should they be trying to compete in this 27/7/365 marketplace or does this suggest that they might do better to cultivate their role as 'experience brokers"?
– *attention and intermediation* —as the range and volume of information and content choices grows, consumers face a growing problem of finding things of interest and then judging their worth and/or integrity. Conversely, content providers face a growing problem of attracting and holding customer attention. These twin problems are giving rise to business models premised upon the need for mechanisms, services, providers of disaggregation and reaggregation—hence the role of new intermediaries who search, sort, and otherwise facilitate the connection between content choices and potential content consumers.

Attention may also be a matter of adapting old practices. For example, after considerable attention to the process of "branding", some are now raising questions about whether branding itself fits the interactivity character of Web-conducted business. Thus, while some see branding as a mechanism that helps corporations attract consumer attention and that helps consumers sorts through information overload, others see branding as a one-way communication or broadcast of information at consumers that inhibits the building of business/consumer relationships.

– *from old business models to new and nascent business models* —All sorts of businesses are contending with a need to learn new ways of conducting business in the digital economy. This may pose a double challenge for arts and cultural organizations that operate on a nonprofit basis. On the one hand, many nonprofit arts and cultural organizations engage in significant market-based revenue-generating activities.

Earned income is an important—and in the last decade, an increasingly important—component of the finances of museums, dance, theatre and opera companies, symphony orchestras, etc. In these activities, nonprofit arts and cultural organizations face challenges similar to those of commercial arts and entertainment corporations. They must figure out how to adapt or replace current business models to a new environment.

In addition, nonprofit arts and cultural organizations operate on organizational models that are fundamentally different from those of commercial businesses. To over-simplify, commercial businesses operate on a for-profit business model; nonprofits do not. As Kotler and Scheff (1997) note

> …nonprofit organizations seem to emphasize sustainability and maximal programming flexibility through a combination of earned and contributed income and many seek to limit market income in order to preserve donative appeal. (p.54)

They go on to identify eight possible nonprofit business models that are commonly found among nonprofit arts organizations. These range from models designed to maximize surplus (in order to accumulate funds for a big project) to usage maximization (designed to induce high attendance figures to demonstrate appeal and public interest to donors and public funders) to partial cost recovery (designed to run a manageable deficit in order to better solicit donations) to producer satisfaction maximization (to emphasize the artistic vision and preferences of the artistic director with allowing the organization to survive financially.) Clearly, each of these is a different business model and all are quite different from a generic for-profit business model.

Thus, nonprofit arts and cultural organizations must both adjust their earned revenue business models as do commercial arts organizations, but they must also adjust their nonprofit business models to the digital economy as well. This second challenge is likely to be as daunting as the first—and one that cannot simply accept digital economic thinking as a usable guide. For example, in their book, Digital Capital, Tapscott, Ticoll and Lowy (2000) propose five web-business models. They presume that each of these models can be premised on nine basic features (or assumptions). Yet some of these basic features are—at best—problematic for nonprofit arts and cultural organizations. Two features stand out in this regard. The first is an assumption that business models in the digital economy will find businesses/organizations to be "customer-centric"—that is, "highly responsive customer-fulfillment networks"…that "closely monitor and respond to individual customers."(p.21) Yet, nonprofit arts and cultural organizations are product-centric. A second problematic assumption of businesses in the digital economy is that they are "bathed in knowledge"—that is they collect and have ready access to extensive and up-to-date information about their operations and their customers and that they are equipped to exchange such information "instantaneously among all participant who 'need to know'…" Yet few nonprofit arts and cultural organizations have such information or the mechanisms and personnel to facilitate such sharing. Indeed, nonprofit arts and cultural organizations are notoriously information poor.

COLLECTIVE ACTION ACTIVITIES

This cluster of options includes a variety of different mutual benefit activities that interests in the copyright policy system can engage in privately. These activities may be directed toward providing services to a group's members, formulating and providing information on model agreements and contracts that protect or advance member's IP rights, association activities to improve field awareness and information about IP issues, or the negotiation of collective bargaining agreements for a union or guild's members. In some instances these activities may be financially supported, at least in part, by public funding. Public policy may also establish incentives or constraints on the activities of such collective action. For example, antitrust provisions are frequently identified as obstacles to the ability of both individual artists as well as major entertainment corporations to engage in certain kinds of collective endeavors. Organizing for such collective action is not only occurring on the national level. Increasingly, national groups in different countries are in communication with and

formulation reciprocal agreements with those in other countries. Furthermore, transnational federations of these national groups are also forming.

OTHER IMPLICATED POLICY ARENAS

Throughout this paper policy arenas other than copyright law have been identified as being implicated in the copyright policy system. Certainly, licensing and other contracting practices are essential to the functioning of many IP businesses and to the implementation of much copyright law. As the discussion of the complex policy process indicated, trade policy and telecommunications regulation frequently exert powerful—although indirect—effects on IP issues concerning the cultural policy community. Although such policies will, inevitably take the form of law (whether statutory, case, or administrative), they are subject to and premised upon different values and principles than copyright and intellectual property law. For example, U.S. trade policies build upon a desire to protect and enhance U.S. competitiveness in the global marketplace rather than upon a desire to balance property rights and public domain rights of American citizens.

In addition to contract law, trade, and telecommunication policy, at least three other policy arenas have been mentioned as being implicated in the copyright system. These include

- *tax policy*—e.g., the possibility of putting a tax or tariff on recording equipment that might then go into a pool from which IP owners might be paid royalties OR the consideration of a tax on e-commerce that would be distributed to the states thus providing a mechanism for taxing commercial transactions on the Web in a way that is analogous to in-person, by-mail, and by-telephone activities
- *anti-trust regulation* – was raised by some as an obstacle to the ability of IP-based business corporations to cooperate in establishing standards that would facilitate technological "fixes" or legal enforcement. Under current anti-trust principles, such cooperation can be regarded as collusive and is therefore prohibited.
- *collective bargaining and labor organization regulations*—were also raised as an obstacle for independent and free-lance creators of intellectual property that puts them at a systemic disadvantage when negotiating with media distributors and the entertainment industries. Here the call was for reform of collective bargaining practices and representation that would enhance the leverage of creators, especially in contract negotiations involving intellectual property rights.

CRITICAL ISSUES and CHALLENGES

The foregoing discussion of the evolving IP policy system would seem to yield six major challenges for the arts and cultural community:

1. SPEED: IP policy is fast moving and active on a variety of "fronts"
2. MANY LINKAGES: IP policy is linked with a number of other policy arenas (including contract law, communications policy, privacy policy, and First Amendment policy as well as trade, labor and antitrust policies).
3. SCOPE: IP policy operates at many levels. Domestically, it is both a matter of public and private policy-making as well as of national and state action. Increasingly, the American intellectual property policy system is influence by and linked to international policy-making.
4. INTEGRATION: IP policy issues require diverse analytic perspectives and potential policy solutions must satisfy multiple feasibilities.
5. INFRASTRUCTURE READINESS: The nonprofit arts generally lack an adequate information infrastructure to effectively identify, represent, or advance their interests in IP policy-making. In contrast to the for-profit arts, the nonprofit arts are not as technologically proficient in the creation dissemination or preservation of their intellectual property in the digital environment.

6. CUSTOMIZATION: Even though nonprofit arts and cultural organizations may be responding to conditions and circumstances shared with the for-profit arts and entertainment industries, the two facets of the cultural sector are likely to have different priorities and capabilities. As action options are developed to address specific IP issues, these differences need to be accommodated whether as a matter of policy, law technology or business.

When viewed through the lens of the action model and the matrix of policy substance and process, the IP policy challenges facing the arts sector come into sharper focus. In other words, the arts are in a quandary that finds them simultaneously challenged to renegotiate their "cultural bargain," manage the "digital dilemma," and tame the policy conundrum.

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