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## Open Discussion of Presentation by Professor Wendy J. Gordon

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## OPEN DISCUSSION

THE CHAIRMAN: Comments?

PROFESSOR REICHMAN: I have a question that came up in Amsterdam. Actually, I know one of the other things that is going on—one of the other elements besides personality theory is the winner-take-all lottery or the prospecting function of copyright law. Kitch talked about the prospecting function of patent law; I think it goes on in copyright law, it is part of my theory. And then, in Amsterdam, Ian McKaay, who is working up a general theory of information, also quite independently started talking about the winner-take-all effect as a counter to risk aversion in regard to a general information law. Part of the problem is, you do not know what you are doing when you start innovating or creating, and that is the difference about intellectual property. It goes back to some things that were said by—

PROFESSOR GORDON: Can I slow you down for a second? The first thing you were talking about was the Kitch theory. That I think makes a lot of sense. Let me just outline Kitch's theory as it applies here for the people who have not read it.

It is true that copyright protects some things which are very easy to make. And a policymaker informed about prisoner's dilemma would be surprised by that because the prisoner's dilemma analysis suggests one should protect where a *high* cost of creation makes engaging in creativity a risky occupation. Patent law has the same surprising pattern—it protects even accidental discoveries. Again that does not seem to match the prisoner's dilemma model where you have a high cost of creation. One explanation sometimes proffered for these aspects of the law—well, I do not suppose anyone has made it formally, but it is latent in the Kitch literature—is this: Even though you may not need to encourage investments in *creation* in a case where creation is easy, you may want to give legal rights to encourage investment in the exploitation of the product. For example, if you cannot give somebody a patent for something created by accident, then they will not have an incentive to develop it and this wonderful accidental discovery may fall by the wayside.

I probably understand that and I think that that is a very good point, but I do not understand where you were going with it.

PROFESSOR REICHMAN: For sure, the market determines the value and we do not know the value in the artistic—I am talking about artistic—yields, and, therefore, there are risks in the dissemination that are overcome by the lottery or sweepstakes effect. In this sense, the artistic creator prospects—explores—the public's taste in the pursuit of

a lucky strike. He knows he is going to lose on most of his investments in literary and artistic work, but he also knows that the payoff will be big if he makes a lucky strike because he can extract the payoff from all uses of the work. This is the long run incentive. The artist and his investors are competing in this very strange market where they may possibly win a very big payoff. Now, I think that any one of these theories by themselves are insufficient, but I do not think that you can marry the prospecting function to personality and it makes some very interesting results—even though personality is not dependent on the prospecting function. That is why McKaay struck upon—

**PROFESSOR GORDON:** Ian McKaay?

**PROFESSOR REICHMAN:** Ian McKaay. He is thinking about it in terms of general information, then, but I think it will explain a lot about the interest to disseminate, to exploit in the artistic area.

**PROFESSOR GORDON:** I take all of these comments by way of friendly amendment, because the point is not that prisoner's dilemma answers everything, but that the clearer we are about that particular argument—which is so dominant in intellectual property discussion yet remains unidentified—the clearer we are about how it needs to be supplemented or what its flaws are.

Just to mention one flaw that Dennis [Karjala] mentions implicitly in his paper. He talks about the value added effect—the creative person whose costs of copying, however great they are, turn an existing work into something that is really wonderful. Prisoner's dilemma only captures the two parties' interests. It does not necessarily capture the societal interest. So all of these things are ways of building a much more complex model than the one that prisoner's dilemma analysis can capture.