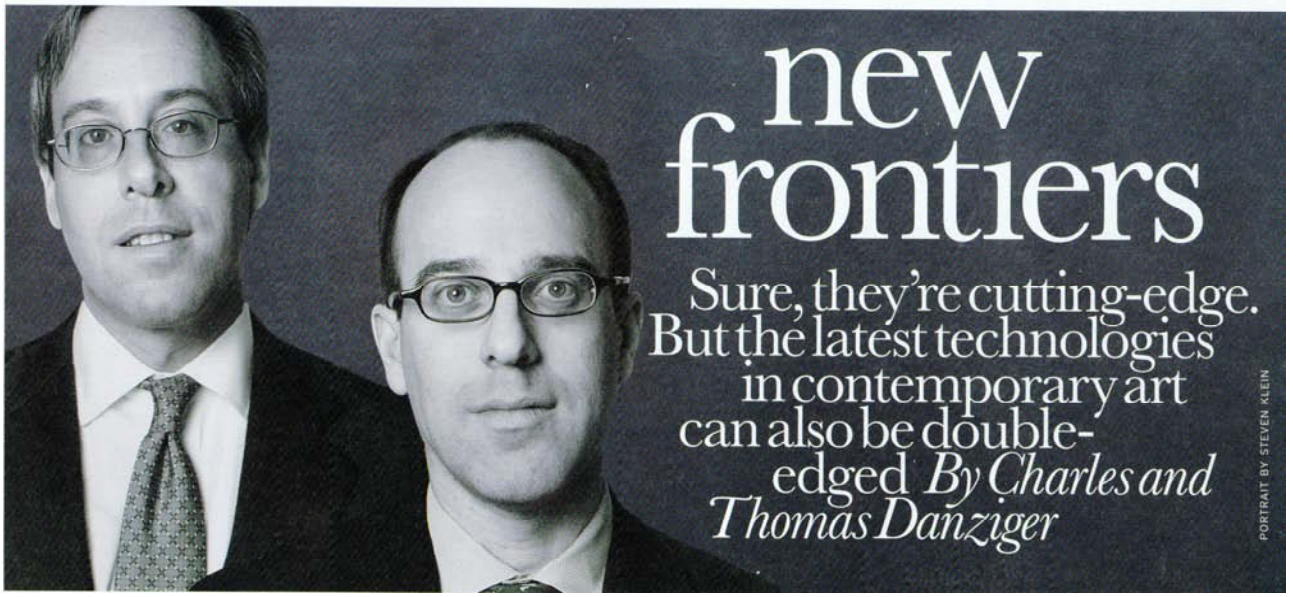

By Thomas & Charles Danziger

Hell. That's what it was like negotiating with an unusually difficult artist for the purchase of Heaven, a multimedia installation composed of cloud-patterned wallpaper, blue fluorescent bulbs, streaming Internet and video. Our client Lili, a collector who had no interest in anything created more than a week ago, wanted the piece installed in her home and agreed to a purchase price of $100,000.

Or so she thought.

"The price entitles you to license Heaven for a limited period of time," the artist declared. "It'll cost you an extra $25,000 to own it outright."

Lili reluctantly agreed.

"And that doesn't actually include the wallpaper," the artist continued. "I store the design in digital format, and the purchase price covers just the electronic file."

"How much to make the wallpaper?" our client asked warily.

"$10,000."

Lili consented, but then phoned us to make sure there were no legal surprises on the purchase. We began by requesting an indemnity from the artist in case Heaven infringed on anyone else's rights. This was of concern because the piece appropriated music and images from various sources. The artist flatly refused, and Lili asked us if this was a problem.

The answer was maybe. If Heaven did infringe on the rights of others and she and the artist were sued, they could assert a "fair use"

defense, which permits one to copy a work in certain, limited circumstances, even if it technically constitutes copyright infringement. According to the 1996 Copyright Act, a determination of fair use involves the delicate balancing of a number of factors, most importantly: (1) the purpose and character of the use, including whether it is of a commercial nature or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or the value of the copyrighted work.

When we asked Lili who would hold the copyright to the piece, she said that she thought it was included in the extra $25,000 the artist was charging. We cautioned that ownership of a physical work of art and ownership of its copyright are entirely separate, and without the copyright, she couldn't reproduce the work (or exploit any intellectual property rights) without the artist's permission.

Not surprisingly, the artist wanted a lot more money to sell the copyright. As a compromise, we tried persuading him to grant our client a non-exclusive copyright (fairly standard in such acquisitions), so both parties could reproduce it. Sales agreements often stipulate that the artist give the buyer the "non-exclusive license to reproduce the work in any media now known or not yet invented and to display, transmit, publish and otherwise use the copies throughout the world." In Lili's case, she even offered to pay for this limited right.

The artist wouldn't budge.

Lili next asked if she could make an exhibition copy of Heaven since she might loan it to a museum.

"No way," said the artist. "I own the copyright. You can't make copies."

We patiently explained that it is customary in multimedia art for a collector to make an exhibition copy and to store the original work in a safe place. That way, an extra copy exists in case the original is damaged.

"All right," retorted the artist, "but I will make the copy and require payment each time I make one, and each time it's exhibited. At the end of every exhibition, I will destroy the copy."

He then demanded that Lili link up to his server so that it could run the work's Internet component. He insisted on being paid a premium for the time and resources involved in acquiring the necessary server space, maintaining his computer, scanning for viruses and reinstalling the piece if it were hacked. "Of course, I'll decide if and when to actually stream the material for Heaven," the artist added.

"If he's in control of the piece, why am I paying for it?" our frustrated client demanded.

We convinced the artist to agree to broadcast the Internet material for at least 10 years. He remarked that over the course of that period, he might decide to make changes to the work. Lili initially objected to the artist's tinkering with his "original" (an elusive term in the context of new media, where an artwork can be said to originate in different places, such as cyberspace or source code, or involve changing forms), but she ultimately agreed.

We next turned to the question of how to maintain and preserve Heaven—a key issue since certain parts of it would need replacing.

"I don't want you ever installing new types of bulbs in the piece," said the artist, "so you'll just have to stockpile the type I currently use, and when they run out, the artwork dies." He then quoted Dan Flavin, an artist famous for working with fluorescent lights, who said: "My lamps will no longer be operative, but it must be remembered that they once gave light."

We asked if our client could upgrade to new technology in the event that the original technology, such as videotape, became obsolete and the piece could no longer be shown. We assured the artist that he could personally inspect the production quality of the upgrade (and charge Lili for his time). This request was not unusual; in 2001 the Guggenheim Museum set up a Variable Media Endowment to pay for recreating works endangered by technological obsolescence.

The artist considered the request (for about a nanosecond) and said no. "An upgraded original is no longer original."

We persuaded him at least to permit Heaven to be documented in photographs and source code. This way, if the technology changed, Lili could preserve it as a historical artifact, even if she couldn't actually display it. But a few days later, he changed his mind. If and when the technology underlying the piece becomes obsolete, he said, he wanted the sole right to compel Lili to transfer the piece to new technology.

We firmly rejected this idea. Our client might decide that the cost of translating the piece to a new media is simply too great, and she might prefer to archive it.

"OK," he conceded, "but I warn you: if she makes any unauthorized changes, I'll sue to enforce my artist's rights!"

We reassured Lili that although a U.S. federal law, the Visual Artists Rights Act (VARA), does prevent the alteration of an artist's work, it is limited in scope and specifically states that a "work of visual art does not include any… motion picture or other audiovisual work… database, electronic information service, electronic publication, or similar

publication." However, the artist could have a stronger claim in certain foreign countries where artists often receive broader protection. France and Spain have particularly strict laws on artists' rights.

Finally, we asked the artist to provide written and signed instructions regarding how Heaven should be installed in Lili's home. Artists, particularly those who work in multimedia, commonly provide such a plan and often agree that if they don't, they will allow the collector to decide on the proper installation.

Not surprisingly, the artist refused to supply the plan and insisted that he would personally oversee the installation, including making all aesthetic decisions—at an extra cost, of course. In return, he grudgingly agreed to permit Lili to make "reasonable" changes to the installation after his death.

It was a small victory, though our client wasn't so sure that Heaven could wait.