Creative Copyright: Tailoring Intellectual Property Policies and Business Strategies for Creative Content Industries in the Digital Age

Bhamati Viswanathan

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CREATIVE COPYRIGHT

Tailoring Intellectual Property Policies and Business Strategies for Creative Content Industries in the Digital Age

Bhamati Viswanathan
S.J.D. Candidate 2015
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CONCLUSION
INTRODUCTION

A. The Creative Content Industries and Disruptive Innovation

Creative content industries are complex ecosystems,¹ in which various aspects -- legal, commercial, technological, and cultural -- are contiguous with, and contingent upon, one another. Changes to such highly entwined systems resonate throughout the industry, and may result in profound alterations that are irreversible and possibly costly, both in measurable economic terms and in incommensurable cultural and normative dimensions. When disruptive innovation in the form of new digital technologies emerges, it can pose formidable challenges to the already fragile ecosystems of creative industries. The obvious and often-sought response is to call for increased protections of the creative properties that rights-holders generate and own. But advocates for enhanced intellectual property rights are liable to overlook or discount both the costs and the deeper effects that entitlement shifts can exert on creative content industries. While disruptive innovation places creative production at risk, merely expanding rights may strike at the heart of creativity itself. It is essential, therefore, to ensure that the cure is not more deadly than the condition it seeks to correct.

1. What Is Disruptive Innovation?

Many creative content industries have confronted the disruptive innovation of digital technologies, throwing their markets and profitability models into disarray. Clay Christensen, whose pioneering work sets forth the theory of disruptive innovation, ² describes it as an

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¹ The analogy drawn between cultural ecosystems and natural environments came to the fore in the 1990s, and its acceptance among legal scholars is in large part attributed to the efforts of James Boyle. See James Boyle, The Public Domain: Enclosing the Commons of the Mind, Yale Univ. Press (2008); see also Deborah Tussey, Complex Copyright: Mapping the Information Ecosystem, Ashgate (2012).

innovation that helps create a new market and value network, and eventually disrupts an existing market and value network, displacing earlier commercial paradigms, technologies and systems. A hallmark of disruptive innovation is that it does not merely represent a new technology, but rather comprises an innovation that changes an entire market. In other words, these are innovations that can improve a product or service in a way that is unanticipated by a market, typically first by designing a product or services for a different set of consumers, which eventually results in prices being lowered in the existing market. Critically, in Christensen’s terms, it is not the technology alone that is disruptive, but rather the business model that the technology enables that creates the actual disruptive impact.

Christensen’s theory of disruptive innovation has been applied a wide range of industries, including American steel mills and


3 Disruptive innovation stands in contrast to a sustaining innovation, which does not create new markets or value networks but rather only evolves existing ones with increased value, which allows firms within its purview to compete against each other’s sustaining improvements. *Id.*

4 A sustaining innovation is typically an innovation in technology, whereas a disruptive innovation will change entire markets. *Id.*

5 Christensen makes the distinction clear by outlining what he calls the “technology mudslide hypothesis”. This, as he recounts it, is the overly reductive idea that an established firm fails because it doesn't keep pace technologically with other firms. On this analogy, firms are akin to climbers who are seeking to find a footing on uncertain ground, and whose continual effort must be sustained just to keep upright. This relentless effort is all-demanding, and any cessation in effort -- due, for instance, to a complacency stemming from a long period of profitability -- will precipitate a sudden and rapid downhill slide. Christensen argues that this hypothesis does not adequately reflect how firms and markets truly function. He argues that well-run firms are indeed aware of innovations in the industry, but they are unable to pursue adaptive changes for several reasons: (i) their business model is predicated upon continuing in a given course; (ii) their profitability is predicated upon consistency, and changing course is uncertain to sustain or contribute to current profitability; and (iii) the development of adaptive business tactics and practices may consume resources that are needed for sustaining innovations, and likewise needed to compete against current competition. In sum, Christensen argues that a firm’s existing value networks is liable to discount, or to place insufficient value on, the disruptive innovation, which prevents the firm from pursuing adaptive strategies. At the same time, start-up firms may inhabit different value networks, up to the point at which their disruptive innovation is able to invade the more established value network. At that point of invasion, the established firms are not readily able to fend off the new entrants, or may weakly attempt to parry with an imitative attempt at innovation. This delayed strategy, however, is more likely to reward latecomers, however established they may be, with a mere ability to survive, rather than a means to grow, compete, and thrive. See CHRISTENSEN, THE INNOVATOR'S DILEMMA *supra* note 2 at 47.

automobile manufacturing. In the case of creative industries, it is equally relevant, and offers a powerful scope for investigating recent upheavals that are roiling diverse creative economies.

2. Disruptive Innovation and Three Creative Content Industries: Case Studies In Change

To better understand the effects of disruptive innovation on creative content industries, as well as to approach crafting a framework for solutions to its myriad challenges, I begin this Paper with a detailed examination of three creative content industries: fashion, music and education. This situates the nested issues that disruptive innovation raises in a concrete context, while allowing a more granular exploration of industries that are at various stages in their development and change and that have widely varying levels of protection. Extrapolating from these industries allows us to identify what content industries fear and, equally importantly, what they should fear or at least take into consideration. The three industries are particularly instructive in the exploration of technological change and its effect on creative markets in part because they are situated at various critical points in the timeline of disruption.

The fashion industry is currently facing challenges from the kind of widespread copying, appropriation and dissemination that digital technology makes readily possible. As a “low-IP” or “negative space” regime, however, it does not rely on copyright in its arsenal of strategies and tools with which it can respond to such incursions.\(^7\) Interested parties in the industry have recently lobbied for legislative change that would grant copyright in some fashion design, thereby enhancing protection across the board.\(^8\) But while legislation has been proposed, it is currently stalled and remains controversial, demonstrating that industry responses to disruptive innovation are still at their inception.

The educational sector is at a midpoint of change, in which certain scholarly activities and output, such as scientific research and discovery and other patentable work product are

\(^7\) It does however, have trademark protection against illicit counterfeiting.

established subjects of institutional propertization and control.\(^9\) Other pedagogical activities and output, however, such as courses and course materials, have not historically been propertized, and are subject to debate over the copyrightable nature of the work and the allocation of ownership in such copyright grants. The advent of the Internet has brought these concerns to the fore, as online education has made forays into the educational sector by enabling the production of massive open online courses (MOOCs), introducing for-profit education providers in what has traditionally been a not-for-profit sector, and potentially making possible to unbundle courses from degree-bearing programs or specific institutionalized boundaries, as well as to allow the provision of potentially profitable ancillary services and products. These profound changes call for an orderly allocation and management of rights, such as agreements between online course providers and universities for the provision of courses; agreements within institutions formally allocating copyrights and related rewards in courses among institutions, departments and faculty; and other mechanisms for ensuring that courses may be propertized and, if possible, monetized.

The music industry stands at a more mature point in the disruptive innovation cycle. The advent of the Internet in the music industry is well-known, as it has unfolded over the last two decades with marked consequences.\(^10\) Digitization has enabled widespread changes in consumer practices and preferences, such as a proliferation of peer-to-peer file sharing\(^11\); increased consumption of individual digital tracks via online music providers that offer licensing rather than sales of content; accelerating consumption of music via online streaming sites rather than traditional sources such as radio broadcasting; and significant increases in user-generated content (UGC) enabled by digital technologies such as computerized sound editing, content sharing sites, and rapid broadband allowing enhanced online content streaming.\(^12\) In the wake of these changes,

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\(^11\) Some of this peer-to-peer activity has been found to be illicit, as in the cases of Napster and Grokster. Although it must be noted that online music sharing sites survive, such as PirateBay, BitTorrent, and so on, there are also legitimate sites that attempt to screen out copyrighted content.

\(^12\) Olufunmilayo Arewa, *Youtube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. Rev. 431 (2010); Urs Gasser, *iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media - A Case Study*, (Berkman Center for Internet & Society
industry participants are struggling to formulate a successful response: music producers are wrestling with an ongoing decline in revenues derived from recorded music; music providers, delivery services, and technology companies whose products carry and disseminate content, are competing to secure market dominance in various markets and media; and music intermediaries such as collective management organizations are striving to strengthen and streamline music rights management; to facilitate cross-licensing; to empower original composers; and to expand revenue streams for rightsholders.

B. Analysis of Challenges Posed by Disruptive Innovation to the Creative Content Industries

Understanding the dilemma that creative content industries face begins with an examination of the challenges that they confront, some of which are endogenous to their industry and culture, and others of which are exogenous and may stem from larger factors such as economic shifts, changes in end-user populations, innovations in complementary fields (such as improved logistics, communications, and infrastructure), and so on. Many of the more obvious changes are evident in the commercial and competitive pressures that creative industries face, such as losses of primary revenue sources due to technological innovations and the accelerating pace of technological adoption by savvy end-users, some of whom may seek to subvert commercial practices or co-opt properties for their own purposes and without due remuneration.

But other, subtler forces are also at play. Creative fields are undergirded with a deep-rooted substructure of norms, or shared cultural tenets and practices, that are integral to the operations and sustainability of creative environments and endeavors. These cultural or norms-based arrangements not only serve to bolster intellectual property rights and business practices, but in some instances may stand in their stead. In the fashion industry, this may be evinced by longstanding practices of apprenticeship, homage, and attribution, characteristics that recall an earlier lineage of fashion guilds and latter-day quasi-guilds. In the education industry, reputational capital, built through scholarship, research and discovery, and in some cases

mentorship are strong evidence of the prevalence of norms. Academic freedom, the overriding and elemental principle of professional autonomy in scholarship and teaching, is another such norm. Further, a strong support of collaborative and interdisciplinary work, ongoing efforts to share fundamental research, data and information, and increasing efforts to participate in open access sharing of key resources, likewise express the prevalent norms of higher education. These contribute to an understanding shared by many commentators of the university as a kind of commons, in which resources are shared, managed, worked and reaped communally and with a view to both self-interest and the interests of the greater good. In the music industry, similar community-wide practices abound, such as formal exchanges in concerts, orchestras and chamber music groups, jam bands and sessions, formal or informal apprenticeships with master musicians, and so on. Sampling, musical quotation of prior works, tributes, and other acts of homage likewise express norms of reputation and attribution, some of which persist without the formalization of ordered rights.

In all of these cases, cultural and norms-based practices and principles not only supplement legal policies and business behaviors but at times may actually do the work that formalized arrangements might otherwise have executed. In this Paper, I examine some of the functions that normative approaches undertake, and emphasize that their functionality may not readily be replaced by more the formalized apparatus of intellectual property entitlements or the operational mechanisms of business tactics and strategies, and thereby highlight their incommutable importance to the ecosystems of creative industries.

C. Analysis of the Advantages and Disadvantages of Changing the Business Model versus Changing Intellectual Property Entitlements


14 Interestingly, peer-to-peer file sharing evinces some of the desire of music lovers to share music and enrich the listening audience, although perhaps not by sanctioned means.
Examining the three creative ecosystems in question has allowed us to extrapolate and identify what content industries fear and, equally importantly, what they should fear or at least take into consideration. The next question is what are the solutions they propose to meet and overcome the challenges identified, and in particular what are the strengths and weaknesses of their proposals. Industries often gravitate to changing business strategies and models to stay competitive and ahead of the disruptive innovation curve. Private ordering solutions, transactional, contractual and licensing arrangements, and other strategies are flexible, specific, and cost effective. However, they do not offer across-the-board changes that can strengthen a struggling industry, and they can result in adverse effects on constituencies that are not well-represented at the bargaining table, such as end-users, start-up ventures, and so on. Recalibrated intellectual property entitlements can promote industry-wide priorities, such as using compulsory licensing to encourage licit creative borrowing, instituting rights to incentivize emerging talent, and so on. But both sets of changes come with costs, such as encroaching on commons-like arrangements, undermining shared norms that guide practices, diminishing the public domain, propertizing intangible and incommensurable creative output, and other possible negative consequences. The advantages and disadvantages of these variable sets of changes are complex, industry-specific, and themselves subject to change. Nonetheless, I offer an optic on the interplay between changing business practices and legal practices for two reasons: first, to alert creative content industries to the high stakes that their choices entail; and second, and perhaps more importantly, to suggest a helpful way to approach crafting a solution that will steer the best possible course among options that will maximize creative returns and sustain the creative ecosystem.

D. Tailoring: The Optimal Solution for Creative Content Industries

Confronted by the fundamental tensions of intellectual property -- which are exacerbated by the pressures of disruptive innovation -- creative content industries are actively searching for new business strategies and enhanced legal protections. However, they lack a basic framework that will enable them to shape pragmatic solutions calibrated to their needs and objectives. This Paper attempts to fill the lacuna by offering such a framework. Having shown that these industries are each uniquely configured and face a highly particularized set of concerns, I argue that they cannot be compelled to resort to a one-size-fits-all solution, such as a uniform expansion of
copyright or a universal change in business paradigms. Rather, a carefully crafted approach is required, in which a workable and tailored solution meets each challenge with a measurable, cost effective, and administrable set of steps. This approach is explicitly designed to maximize creative generation, production, and delivery, while still preserving rights of user access that are essential to ensuring user creativity and enriching the public domain.\textsuperscript{15}

At the outset, tailoring works within the boundaries of intellectual property entitlements, but takes advantage of certain flexibilities that the law affords in order to achieve an outcome that is best suited to the particular contours of a creative content industry.\textsuperscript{16} Some of these measures are afforded by the accommodations that are inscribed in copyright law, such as certain areas of exceptional protection, limitations to exclusivity conferred by the fair use doctrine, compulsory licensing mandates, and so on. Others may be achieved by seeking permissible modifications to


\textsuperscript{16} I begin with accepting the premise underlying patent and copyright law—that creators or innovators must be able to exclude others in order to extract benefits from them to compensate for the costs of creation or innovation. See Mark A. Lemley, \textit{The Economics of Improvement in Intellectual Property Law}, 75 TEX. L. REV. 989, 994 (1997) (“In a private market economy, individuals will not invest in invention or creation unless . . . they can reasonably expect to make a profit from the endeavor.”). I do not go so far as to assert, like some commentators, that pecuniary motivation is the sole, or even primary, motivation to create. See, e.g., TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE 18 (2000). I believe that innovative activity many have many overdetermined motivations; and a rational, selfish actor may innovate without receiving entitlements, and may still confer the benefits of her creativity on society. See, e.g., TERESA M. AMABILE, THE SOCIAL PSYCHOLOGY OF CREATIVITY 14–15 (1983); TERESA M. AMABILE, CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY 153–77 (1996); Bruno S. Frey & Reto Jegan, \textit{Motivation Crowding Theory}, 15 J. ECON. SURV. 589 (2001) (reviewing evidence that intrinsic motivation can be reduced by prospect of external reward). \textit{See also} Julie E. Cohen, \textit{Creativity and Culture in Copyright Theory}, 40 U.C. DAVIS L. REV. 1151, 1198–1204 (2007) (examining creative processes and proposing a decentered model of creativity). As in the case of “economics of prestige,” certain non-pecuniary rewards may also offer sufficient motivation for creative production, even absent formal entitlements. See, e.g., Dan L. Burk & Mark A. Lemley, \textit{Policy Levers in Patent Law}, 89 VA. L. REV. 1575, 1586 (2003) (describing alternative incentives to innovate). Business strategies and motivations may also suffice, as in the case of publication used as a loss leader to increase future income streams, such as speaker’s fees, improved professional status, and so on. \textit{See, e.g.,} William M. Landes & Richard A. Posner, \textit{An Economic Analysis of Copyright Law}, 18 J. LEGAL STUD. 325, 333 (1989) (describing forms of non-pecuniary income authors derive from publication). And competitive motivations may also prove sufficient stimulus to create and innovate, in order to differentiate their products and services from their competitors, whether or not exclusive rights ensue. \textit{See, e.g.,} Jonathan B. Baker, \textit{Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation}, 74 ANTITRUST L.J. 575, 590–92 (2007).
copyright, such as expanding carve outs, lobbying for changes to the duration of copyright protection, seeking to preserve options in copyright, and so on. These, however, may entail significant transaction costs, and therefore must be weighed particularly carefully against the benefits that they may confer.

A more expansive understanding of tailoring also extends beyond the purview of intellectual property entitlements to span the use of other practices -- commercial, technological, and normative -- that can be made either in conjunction with or in lieu of legal solutions or formal ordering arrangements. Some measures may be achieved by business practices that eschew entitlements, looking rather to strategic tactics and competitive advantages to protect content and maximize profitability. For instance, industries can strive to maximize lead time advantage, profit from network effects, exploit market segmentation, or expand the exploitation of protected properties in new markets, and thereby grow their market share without incurring the transaction costs that can accompany changes to legal rights and protections. They can also enter into private arrangements, such as contractual agreements and intra-firm transactions, and cross-licensing. Or they can use a mix of tactics, such as building strategic intellectual property portfolios to leverage protection within firms and among groups of competitors. Technological measures, such as the use of digital rights management protections, are also available to enhance business strategies, such as restricting interoperability with a view to thwarting incursions on revenue-bearing properties and securing a dominant market position. These commercial strategies and technological measures enable creative content industries to reposition themselves in the face of disruptive innovation. When coupled with the exercise of copyright protections, they can be especially effective deterrents to the threat of revenue losses at the hands of digital copyists and disseminators of content.

Even where copyright protection is functionally absent or minimal, creative content industries have recourse to collective action solutions and norms-based practices that can offer vital support systems to help achieve many of the objectives underlying intellectual property law, such as fostering and incentivizing creation, while also furthering other complementary goals, such as promoting collaborative efforts, rewarding originality with reputational returns, and sanctioning unacceptable practices such as content appropriation without attribution or recompense. These
solutions can draw from longstanding collective action paradigms, such as commons, guilds, and patent pools, that allow industry participants to unite in the service of shared goals, such as managing precious resources, protecting vital revenue streams, and building shared or complementary value propositions. Many of these norms-based practices have the added advantage of being so deeply engrained in certain creative content industries as to constitute part of their foundational culture, which lends them particular efficacy, moral suasion, and lasting power. Moreover, they are constitutive of many such ecosystems, and, as will be argued in this Paper, often advance public welfare goals that copyright alone cannot fully realize.\(^{17}\)

When properly executed, tailoring offers a flexible, resilient and administrable approach to equipping creative content companies to respond to disrupted environments in a cost effective manner. But like any such approach, it does raise some potential concerns. How to divide the creative fields into distinct areas of protection, if protection is to be accorded by sector rather than uniformly, is one such question. Institutional concerns, administrability concerns, and political economy concerns, such as the distortionary effects of lobbying, may not be adequately allayed by tailoring efforts without incurring transaction costs. The effects of tailoring on price

\(^{17}\) The investigation of cultural norms, preferences and practices is particularly fascinating, as it reveals the real possibility that creative work can and will be generated without the incentive structure posited by intellectual property entitlements. In music, for instance, the explosion of “user-generated content” (UGC) speaks to the production of creative output without propertization. In education, scholarship and research resulting in publication is not typically accompanied by royalty fees or direct remuneration; rather, indirect benefits flow from publication and the reputation that is secured by advances in scholarly work. See, e.g., Howard P. Tuckman & Jack Leahy, *What Is an Article Worth?*, 83 J. POL. ECON. 951, 951–52 (1975) (making the classic argument about indirect compensation from scholarship). Similarly, it has been argued that business methods patents are not necessarily requisite to the generation of innovative work. See Michael J. Meurer, *Business Method Patents and Patent Floods*, 8 WASH. U. J.L. & POL’Y 309, 322–27 (2002). This view is hardly settled, however. Some commentators have noticed distinctions between those who create with the promise of exclusive rights and those who do not -- as some would say, the difference between professionals and amateurs. Cf. Susana Juniu, Ted Tedrick & Rosangela Boyd, *Leisure or Work?: Amateur and Professional Musicians’ Perception of Rehearsal and Performance*, 28 J. LEISURE RES. 44, 44 (1996) (finding marked differences between amateur and professional musicians toward rehearsal). Others have observed a distinction between open source software programmers motivated by non-pecuniary factors and those who rely on a proprietary strategy as a basis for their motivation. See, e.g., Jürgen Bitzer, Wolfram Schrettl & Philipp J. H. Schröder, *Intrinsic Motivation in Open Source Software Development*, 35 J. COMP. ECON. 160, 160–61 (2007); Jean Tirole & Joshua Lerner, *Some Simple Economics of Open Source*, 50 J. INDUS. ECON. 197, 197–99 (2002). These open questions only underscore the importance of crafting tailoring policies and practices that are flexible and adaptable, so that as more is understood with respect to creativity in a field, better balances in propertization and non-pecuniary incentive strategies may be struck.
signals, competitive practices, and other industry strategies is also complicated, and the balancing of competing interests not be readily resolved. I touch on some of these concerns, recognizing that they are likely to remain open questions, and posit that the case for tailoring rests ultimately on an evidentiary showing that tailoring succeeds when it offers the best possible solution, and the maximum net benefits, that are comparatively worth the costs, administrative or otherwise, that implementing a tailoring system is bound to induce.18

E. Industry prescriptions

The tailoring framework can now be brought to bear on the the fashion, education and music industries. The industry prescriptions are broken down into four areas of approach -- business, legal, technological, and cultural -- that address each of the main aspects of challenge and solution. The prescriptions demonstrate that for each creative content industry a tailored solution is crafted to respond to the specific needs and concerns, as well as to preserve the underlying cultural norms and practices of the ecosystem, highlighted in the opening case studies.

18 One way of assessing costs associated with tailoring is to compare them with costs generated by other incentive systems. For instance, some commentators call for a range of institutional forms of direct compensation. See, e.g., Michael Kremer, Patent Buyouts: A Mechanism for Encouraging Innovation, 113 Q. J. ECON. 1137, 1146–48 (1998) (discussing auction model as superior to patent system); Douglas G. Lichtman, Pricing Prozac: Why the Government Should Subsidize the Purchase of Patented Pharmaceuticals, 11 HARV. J.L. & TECH. 123, 124–25 (1997) (subsidizing buyouts by using a coupon scheme); Steven Shavell & Tanguy van Ypersele, Rewards Versus Intellectual Property Rights, 44 J.L. & ECON. 525, 526 (2001) (arguing in favor of optional system that allows innovators to be compensated under current patent regime or reward system); Michael Abramowicz, Perfecting Patent Prizes, 56 VAND. L. REV. 115 (2003). Other commentators endorse prize-based rewards systems in lieu of intellectual property entitlements. See Joseph Stiglitz, Scrooge and Intellectual Property Rights: A Medical Prize Fund Could Improve the Financing of Drug Innovations, 333 BRIT. MED. J. 1279 (2006); Joseph Stiglitz, Give Prizes Not Patents, NEW SCIENTIST, Sept. 16, 2006, at 21; STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 163 (2004). I would argue that institutional compensations and prize-based reward systems, or “economies of prestige”, can work alongside intellectual property allocations, and indeed are inscribed in certain creative content industries, such as the education sector. They are not, however, likely to be sufficient on a stand-alone basis, in part due to the political climate today (for instance, an increasing reluctance to fund higher education), and in part due to the likelihood that administrative costs in fields with enormous commercial output, such as fashion and music, would be prohibitive and persistent.
In the case of the fashion industry, I argue against advocates of expanded intellectual property rights in the form of grants of copyright in original fashion design, and look instead to secure commercial viability via changing business practices, such as cross-licensing or vertical integration among designers and retailers, increased diversification of product lines and appeals across various consumer bases, and increased rapidity of product diffusion and creation to outpace appropriation. Culturally, fashion has long relied on reputational rewards such as attribution and homage, to advance the professional goals of original designers. These practices should not be undervalued, but should rather be encouraged by increased recognition in the form of prestigious rewards and prizes that confer career-enhancing reputational benefits on emerging designers. Further, drawing from the history of fashion guilds, practices of apprenticeship and collaboration among established and emerging designers will strengthen the industry and give emerging designers support. Lastly, the industry should consider creating collective bodies that offer resources to emerging designers, such as pooled funds to fight appropriation with public relations campaigns, appeals to consumers, and other culturally appropriate actions. These administrative bodies can be modeled on collective rights organizations that manage resources, revenues and rights in other creative fields.

In the case of the education industry, I address patent and copyright separately. On the patent side, I argue that patenting rights in scientific research and discovery must be balanced against publication rights in scholarly work. This tradeoff is well-established in academia, but is constantly put at risk by ever-increasing demands for the propertization and eventual monetization of patentable work. The pressure to patent rather than publish can exert pressure on

19 Fashion is not without recourse to legal remedies, but these should rest in existing rights under trademark law. See C. Scott Hemphill and Jeannie Suk, The Law, Culture, and Economics of Fashion, 61 STAN. L. REV. 1147 (2009).
21 See Madison, Frischmann, & Sandburg, supra note 5 at 397.
on core tenets such as academic freedom and autonomy. This calls for cultural and normative pushback among academics, and the demonstration of institutional commitment to scholarship as a critical mission of education. It can also put pressure on fundamental scientific research, findings and resources, which may be subject to early propertization, thereby running the risk of creating multiple fragmentary rights that are onerous to cross-license or use. One solution that has met with some success is to create patent pools that enable researchers to share such basic information and data among interested researchers and academics. This solution draws upon the strengths of the university as a constructed commons, in which arrangements among its members are modeled upon commons arrangements in natural resources, enabling the sharing, management, protection and husbandry of precious resources without resorting to concretized property rights. Relatedly, the encouragement of scholars within academia to publish findings and share knowledge can be bolstered by open access publishing arrangements and services, modeled upon open source development in other fields such as software development.

With respect to the education industry and copyright, I argue that institutions should begin with a recognition of the value proposition that underlies education -- the aggregation of courses in degree-bearing programs and acknowledgement that this business model is not fixed but, with the aid of digital technologies, subject to change. The disaggregation of stand-alone courses is possible as a key strategy that can serve as a loss leader to attract new audiences or a long-term prospect of customized course monetization. The degree program, however, should be protected, as it is likely to remain the property in which the greatest value inheres. The financing of

24 See Michael J. Madison, Brent M. Frischmann, Katherine J. Sandburg, Constructing Commons in the Cultural Environment, 95 CORNELL L. REV. 657 (Aug. 2010). See also Madison, Frischmann, & Sandburg, University as Constructed Cultural Commons supra note 5..
MOOCs is almost certain to be underwritten by university operating budgets, grants, and external funding. This will increase pressure on institutions to propertize and monetize MOOC in the long term, requiring a clear delineation of rights in courses and materials.

Copyright in courses can begin by looking to historic and legal precedent, which relied upon agency law and the work-for-hire doctrine to resolve disputes over copyright ownership in courses. However, the utility of these precedents are limited in today’s educational market, in which some faculty may function more like independent contractors and others may function more like employees, thereby blurring the distinctions underlying work-for-hire determinations. Educators are better served by considering propertizing courses and allocating rights among institutions and faculty with regard to critical factors such as the investment made in course development; the need to protect rights in the brand of schools and the degrees they confer; and other factors. Crucially, labor concerns play into the consideration of rights allocations, such as the need to support faculty mobility and the portability of their work, particularly as adjunctification becomes prevalent in academia, the rights of faculty to derive reputational benefits from courses they have designed, and the long-term needs of faculty to diversify income streams in lieu of secure tenure-based salaries.

In the views of some commentators, the practices outlined above represent, or steer perilously close to representing, the commodification of education that may clash discordantly with core academic values and the instantiation of the university as a constructed cultural commons. But paradigm shifts in educators must be recognized and accounted for by policymakers. The adjunctification of the academy, in which tenure and tenure-track positions are being replaced by non-tenured positions, signals one such profound change. Copyright in courses may serve to precipitate such a change, or it may merely concretize it in practice. These and other possible outcomes may be affected by cultural efforts, such as an expressly renewed commitment to

28 Moreover, allocation of copyright can cut both ways: grants of copyright may promote the knowledge portability and employee mobility of faculty, or such grants may be withheld in exchange for compensation intended to secure faculty longevity at institutions.
shared academic values, norms, and cultural priorities and their instantiation in institutional practices and policies. Thus, for instance, the development of online courses and pedagogical methods for online teaching can be explicitly valued and rewarded with reputational benefits that are functionally equivalent to the benefits of publication and scholarship. Academics can also affirm commitments to collaborative efforts, commons-like arrangements whereby course development and pedagogical insights are exchanged, open access sources and sites that allow information, course materials, and other resources are shared, and other ventures that draw upon universities’ “culture of openness.”

In the case of the music industry, I argue that changes to the business model have already begun to be put in place, but may be better shaped to fit the contours of the current market. Increased returns derived from live performances and related merchandise sales, and relative decreases in sales of recorded music, are driving changes in standard music contracts. These contracts should expand to encompass rights in new revenue sources, such as online music streaming, delivery of music on new devices and via new services, and in new venues. Some commentators have called for middlemen in the music sector to be eliminated or radically streamlined, or declared that they will be rendered irrelevant if not obviated by digital technology. I argue to the contrary that middlemen play an important role in the authentication, appraisal, and marketing of music, the identification and nurturing of new talent, and the education of music audiences. Moreover, I argue that middlemen such as collective rights organizations (CROs) continue to

30 On bolstering the value of music content, see LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).
play an important role in the management of music rights, returns, and artists, and therefore should be supported. In technological terms, the music industry should pursue interoperability of music delivery systems and products, which will serve to maximize consumer choice, incentivize product sales and facilitate product flows, and promote the development, implementation and adaption of socially optimal innovations in the music market.

The music industry may still be besieged by large-scale appropriation of output, but it does have some recourse in copyright law. Clarification of copyright scope, liberties, and terms of use with respect to new uses of musical output, such as snippets, sampling, ringtones, and so on, should at once allow expanded use of work while metering royalties where appropriate. Strengthening CROs will further contribute to copyright protections and related actions, enabling rightsholders to secure revenue streams in new media and other growing areas of licensing activity. As more user-generated content (UGC) is created and disseminated via digital technologies, CROs will be well-positioned to educate those who both create and consume music with respect to the importance of music copyright, as well as the counterweight importance of keeping music accessible, whether through facilitated licensing, open access, or systems interoperability. Finally, the music industry must reaffirm shared cultural priorities, such as the historical value placed on sharing, creative borrowing, collaboration, homage, attribution, and other nonproprietary standards and norms. Music, like education, is arguably constructed commons, with normative foundations that remain predicated upon openness, exchange, and

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34 I exempt from consideration lawsuits against users, which has generally proven to be costly, uncertain, and has run the risk of alienating audiences that are not only consumers of music but also comprise some of music’s future creators. Most importantly, it does not appear to have had an appreciable effect on music appropriation overall. See generally ADRIAN JOHN, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES (2010).
36 See Merges, Contracting Into Liability Rules, supra note 34.
enrichment of the public weal.\textsuperscript{38} As music consumers increasingly join the ranks of music creators, they present an ideal audience to educate, inform and reach with respect to the value of upholding music copyright and playing by its rules.

F. Salient factors

While compelling on their own terms, the fashion, education and music sectors are also instructive to other creative content industries, many of which are facing a similar array of challenges brought by disruptive innovation in their own sphere of operations. What are the salient factors that can be extrapolated from the analysis of these three ecosystems, and how can their treatment be understood by creative industries and appropriately applied to their own situations? Undertaking this last inquiry, I extract the critical elements that must be considered by creative content industries as they construct and tailor their own blend of legal, commercial, technological and normative solutions to secure their future productivity and growth. I draw liberally from a broad swath of industries, illustrating their particular dilemmas and suggesting tailor-made schemes that will afford them both the protections and the stimuli that they require to maximize creative output, while at the same time allowing them to preserve the aspects of their ecosystem that they most value and seek to sustain. I argue that although truly disrupted by recent innovation, the creative content industries should also be aware that new vistas for creative flourishing may be opening as well. This Paper offers a useful road map that highlights some of the scenery ahead, and suggests that creative content industries should draw on its detailed analysis both to navigate the new landscape and to situate themselves in a position that will secure their commercial longevity and sustain their creative flourishing.

OVERVIEW

In this Paper, I begin in chapters One, Two and Three with an in-depth examination of the three creative content industries, fashion, music and education. I then proceed in chapter Four to make a contextual analysis of the three industries, situating them at the crossroads of choices that involve potential changes to their business models and intellectual property entitlements. I

\textsuperscript{38} See Carroll, \textit{Whose Music Is It Anyway?}, supra note 37.
consider the options that are available, showing the comparative advantages and disadvantages that emerge when different choices are made. This leads to the understanding that a tailored approach offers an optimal, balanced solution, which can be calibrated to suit the needs of the creative content industries in question. In chapter Five, I apply the tailoring approach to each industry, offering industry prescriptions that touch respectively on commercial, legal, technological and cultural strategies and solutions. The inquiry into these three industries is meant to be fine-grained, but also intended to reveal the salient factors that they all must consider in making their choices. It is also intended to yield insights into the strategies and solutions that are available to, and may be more suitable for, other creative content industries that are similarly situated with respect to disruptive changes. In chapter Six, I extrapolate these salient factors, and explore their applicability to some of these industries. While by no means meant to be comprehensive, this applied inquiry seeks to show that the detailed exploration of tailoring undertaken in this Paper can be useful to many industries other than the ones featured here.
CHAPTER 1: FASHION

INTRODUCTION

American industries that rely on a host of intellectual property (“IP”) protections are buttressed by the standard utilitarian law and policy claim that strong IP provides necessary incentives to creative and innovate work, and simultaneously protects against unlawful copying and free-riding on that work.¹ Creative and innovative industries abound as if to prove the point: music, film, book publishing, and most scientific and technological innovations exist in IP-rich environments. There is, however, a creative industry that is anomalous, generating billions of dollars in revenue per year² while to a great extent lacking in significant IP protection: the fashion industry. While U.S. fashion does have some trademark protection in logos, brands, and other identifiers, its principle creative element—apparel designs—remains essentially outside the protections of IP law.³ Even a cursory overview of the industry reveals a clear dichotomy: while trademarks in fashion remain protected by IP, original apparel designs are very frequently copied, and those copies are almost instantly disseminated to eager consumers, many of whom are as satisfied to own the copied version as the original product. Yet notwithstanding the seemingly gaping hole in IP coverage, the fashion industry is thriving, producing vast quantities of merchandise—i.e., clothing, accessories, and novelties—that are quickly replaced by designers and manufacturers, and just as quickly purchased and replaced by fashion’s customers. Moreover, the pace of apparel design remains fluid and swift, demonstrating the flexibility and ingenuity of its creators, who are spurred to innovate despite the relative lack of protection against copying that IP would otherwise offer. The robustness and fluidity of the fashion market therefore poses a conundrum to the conventional wisdom of IP theory, which would dictate that creativity founders without standard IP anti-copying laws in place. Famously known as the

“piracy paradox,” following a seminal article on the fashion industry’s singular practices, the story of fashion’s success serves to illustrate how creativity can work without being embedded in an IP-rich ecosystem.

An increasing number of legal scholars have become intrigued by the paradox that the fashion industry presents. One side of the debate contends that fashion has been ill-served by the lack of legal protections in its low-IP regime, and that systematic reform is required to preserve incentives for creativity and original design, which are the lifeblood of the industry. Proponents of enhanced IP protection note that fashion designers stand virtually alone among innovators in their vulnerability to the copying and appropriation of their original designs. While trademark serves to protect the brands that comprise the works of these original designers, no other protection safeguards their actual creative product, the garments and styles they generate year after year. The argument for enhanced protection stands on grounds of fairness to innovators, incentives to promote their innovations, and a kind of equivalency with other fields that are IP-rich. If music and film, to take just two instances, enjoy strong IP protections for their creative output, why should fashion not merit the same coverage of its underlying creative work? Proponents of change would argue that the only reason—and a weak one at that—lies in the historical oversight of fashion that is so anomalous, and arguably outdated, as to deserve reconsideration and, in light of present-day practices, substantial reform.

On the other side of the debate, advocates of maintaining fashion’s low-IP regime point to the status quo, arguing that there are ample incentives for creativity among original designers and

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7 Vermont, supra note 6, at 91 (noting that copyright protection extends to other utilitarian works, “such as computer code, blueprints, and technical manuals”).
8 See id.
measurable evidence of growth in the industry overall. This position is supported by several prominent legal commentators, but is also joined by many in the fashion industry who have either openly sided with copyists or tacitly given permission to copying by holding back any protests they might otherwise express through lobbying or other means of action. It is notable that while fashion designers and retailers will go to great lengths to secure, protect, and promote their exclusive, trademarked brands and logos, they will not make such efforts to keep their original designs equally secure. While the initial sketches may be kept under wraps, of course, designers will shrug when their three-dimensional versions are showed as actual apparel on the runways and racks and are almost immediately photographed, circulated, and appropriated thereafter. Moreover, while they may bemoan design copying, original designers will just as soon praise the act of “homage,” or tribute, that appropriation signifies within the industry. Indeed, even outright copying, when granted due attribution, is often seen as an important facet of a designer's oeuvre—her ability to appropriate cleverly, to “re-work” original designs into striking derivative work, and even her copies, whether outright or playfully tweaked, are all considered fully as valuable as the original work on which they riff. The significance of copying as an art form in itself cannot be understated in the fashion world; and its centrality very probably plays an important role in keeping the low-IP equilibrium of fashion in place. This stands in marked contrast to the wholesale condemnation of counterfeiting or “piracy” with

9 See Raustiala & Sprigman, supra note 5, at 1698; see also id. at 1720 (discussing how copying adds to the original's vaue).
11 See, e.g., Lauren Milligan, Why Balmain’s Designer Loves Zara Copies, VOGUE (July 28, 2014), http://www.vogue.co.uk/news/2014/07/28/olivier-rousteing-on-zara-copies-and-rihanna-the-new-naomi. In the Vogue article, Olivier Rousteing was quoted as saying:

I think it was Coco Chanel who said if you’re original, be ready to be copied . . . . I love seeing a Zara window with my clothes mixed with Céline and Proenza! I think that's genius. It's even better than what I do! I love the styling, I love the story… I watch the windows always, and it's genius what they do today. They go fast, they have a great sense of styling and how to pick up what they have to pick up from designers. I'm really happy that Balmain is copied - when I did my Miami collection and we did the black and white checks, I knew they would be in Zara and H&M. But they did it in a clever way - they mixed a Céline shape with my Balmain print! Well done! I love that.

Id.
12 See id.
respect to the copying of brands, logos, and other industry trademarks. Clearly even low-IP advocates consider fashion trademarks to be vital industry protections.\textsuperscript{13} But the protection of original designs meets with far more mixed reactions, even on the part of those who stand to be undercut by practices that might, in other creative industries, be deemed infringing upon the exclusive rights of their originators.\textsuperscript{14}

What accounts for the tolerance, unique among creative industries, accorded to appropriation in the fashion world? Why do original works of fashion receive far less IP protection in than in most of the major content-rich industries, and why does the fashion industry thrive despite its low levels of IP? And how does fashion continue to attract the investment, and to command the returns on investment, that are required for its ongoing innovation in original design? This paradox, which stands in such striking contrast to the conventional wisdom that high IP is required for creative content industries, lies at the core of the fashion industry. But it also serves to illuminate the complexities of IP itself, and to point the way to a greater understanding of the parameters of IP and the calibration of IP levels required to optimize growth in creative fields.

In this chapter, I explore the creative cycles of fashion and seek to explain how a low-IP regime actually buttresses the industry’s vibrancy and growth. I argue that while innovation in the form of original fashion designs is a main driver of the industry’s economic success, follow-on appropriation of these designs, either through outright copying or through derivative “re-working,” functions as an ancillary stimulus to its performance. In other words, appropriation in fashion does not undermine the sales of original works; rather, it generates a separate stream of sales and revenues that capitalize on the appeal of the larger trend put into place by the original designers. The relationship may be said to be symbiotic, rather than parasitic—for the later works make their appeal, and their sales, to another segment of the fashion marketplace. Thus, copying in fashion actually benefits the originators of creative work, and at the same time promotes innovation in the industry. This unexpected return, called the “piracy paradox” by its

\textsuperscript{13} See Raustiala & Sprigman, \textit{supra} note 5, at 1700.
\textsuperscript{14} See \textit{supra} notes 10-11 and accompanying text.
early, distinguished commentators, may not be unique to fashion, but it is vividly illuminated by fashion’s rapid and ongoing cycles of innovation, change, and creative renewal.

I begin this chapter by casting a quick overview of the fashion industry. I consider the division of its marketplace into the “fashion pyramid,” and describe the process by which original designs are generated at the top of the pyramid and then trickle down through its layers until the lowest levels of mass-marketing are reached. In the course of this process, the original designs created at the start of a given fashion cycle will be subject to the industry-wide practice of design copying, and it is the design copies that will disseminate through the rank-and-file of fashion’s consumers. I outline the rudiments of design copying, and distinguish design copying from the somewhat similar but wholly distinct practice of trademark copying in the form of “counterfeits” or “knock-offs.” In this regard, one vital distinction is that while original designs are not protected by IP, brand names, logos, and symbols are indeed protected by trademark law, and are therefore subject to very different treatment in practice and at law.

I continue by delving into the two key aspects of the fashion industry—induced obsolescence and anchoring—that together secure its stability, and its success, while yet retaining its low-IP regime. These characteristics of the fashion industry rely, and indeed are predicated upon, the dual nature of the fashion industry’s wares: on the one hand, fashion styles are cyclical—they come into the forefront of consumers’ attention, and then become perceived as stale and passe, and eventually require replacement by the next, newest styles; and on the other hand, fashion goods are at least partially positional, or based in the perceived relative status by consumers. I show that these dual features contribute to fashion’s ongoing vitality, not only promoting the continual creation of original designs but also bolstering the generation of follow-on designs.

Perhaps contrary to expectation, these practices of creation and copying enhance the well-being of fashion’s designers and retailers, and are thus tolerated without recourse to IP protections against appropriation and infringement of original works. I explore, but eventually reject, other possible rationales for the low-IP regime of fashion, such as (i) the structure of copyright

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15 I later explore analogous creative industries that share the low-IP, high-copying ecosystem of fashion and that, similarly, not only survive but are also able to thrive.

16 Trademark protection, however, is generally outside the scope of my discussion.
doctrine in U.S. law; (ii) collective action problems; (iii) first-mover advantage; and (iv) rival, conflicted interests between fashion designers and fashion retailers.

Lastly, I ask whether the low-IP regime of fashion is likely to withstand the current challenges it faces in light of technological changes that are likely to accelerate the fashion’s cyclicality, and to put pressure on original designers through ever more rapid, accurate, and potentially undermining appropriation. I concede that such practices may well heighten the fashion curve for original designers, but I argue that inherent to the creation of fashion trends is a much-needed lag period, in which trends emerge and are secured, and that this pause will continue to give original designers sufficient time to enjoy the full benefits of exclusivity and first sale. I further note that some of the salient features in fashion, such as the importance of reputational capital and the power of “homage,” the shared interest of designers and retailers in perpetuating style and trend cycles, and so on, together contribute to preserving fashion’s stability and vitality in the low-IP equilibrium that has been its preferred setting both historically and currently.

I. FUNDAMENTALS OF THE FASHION INDUSTRY

The global apparel market is estimated at $1.11 trillion, of which approximately 20.5% are U.S. based. The market for fashion is global, but its creative centers still cluster around a handful of cities in the U.S., Europe, and to a lesser extent Japan. Production of apparel has traditionally been splintered, with craftsmanship centered in European and American locales, and larger-scale production moving among labor markets featuring fast and cheap production, mostly in the developing world. Fluidity of wages in global labor markets, however, can make it hard

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17 The working definition of “apparel” comprises apparel, accessories, and “notions,” collectively. It is used interchangeably with “garment(s).”
19 See id.
to follow where fashion production is located, as a constant search for cheaper production is one of the constants in the industry.\textsuperscript{21}

The fashion industry is relatively hierarchical in structure, and its designers and producers have been described as a falling into a “fashion pyramid” that is somewhat fluid yet well delineated.\textsuperscript{22} The top category of designers create haute couture, singular pieces that typically entail extremely precise design, meticulous craftsmanship, and that strive for the highest standards of skill, originality and aesthetic appeal. These few pieces of work will represent the top designers’ acme of achievement, and they are both scrutinized for their creativity and critiqued for their strength of statement. Necessarily requiring great efforts to be crafted, the pieces themselves are, like other forms of artwork, usually purchased by wealthy individuals at very high prices; yet unlike artwork, some of these pieces will be commissioned as custom clothing, and worn by more than one customer. While haute couture sets the standard for fashion, it is by definition limited to the highest set, the “haute” consumer. Its bellwether is imitated, often skillfully but on a much lower scale of production, by designer ready-to-wear clothing, or prêt-à-porter. Thanks in part to lower manufacturing costs, the mass-market producers are able to generate far greater volume of these off-the-rack clothes, which are disseminated to customers hungry for style but more limited in funds than the top-level clients of haute couture. At the same time, haute couture producers are eager to reach these large volume clients as well, and not just through imitations but through offering access to the “real thing.” Hence, many designers will produce second lines of bridge collections or prestige collections—that is, limited-run works that they create specifically to appeal to the mass-market customer. These works are not as meticulously crafted as their finest counterparts, but they often display much of the originality and flair of the designers’ work, and can often enhance the designers’ prestige while expanding their visibility and renown among the consumer masses. Both these tiers of design will be imitated, with greater or lesser success, at the next lower level of fashion, in which even larger mass-marketing of apparel occurs at even more moderate prices. Lastly, apparel sold as a basic commodity can either strive for a modicum of fashion flair, or can merely serve as purely functional wear.


\textsuperscript{22} See Raustiala & Sprigman, The Privacy Paradox, supra note 5, at 1693.
There are a few constant features to the fashion pyramid: for one, prices generally track the level of fashion design. This is logical, as the top tier of production entails an enormous amount of creative effort, craftsmanship, and labor, as well as costly materials and elaborate settings. The corollary to this rule is that while top tier fashion strives for originality and vision, it appears to exhaust its creative appeal quite quickly, moving from the startling to the accepted in very short order. Thus, like the legendary phoenix, it flares, burns out quickly, and is forced to arise from its own ashes. In other words, it is marked by high design turnover and creative churn. Competition in the design industry is particularly fierce, and more than in many other creative industries, the window for lying fallow and re-stoking creative juices is minimal, if it exists at all. Moreover, designers are under enormous market pressures, as their works must appeal to high consumers—who buy few works at high prices, but not usually enough to pay the bills—and to mass-market consumers—who buy moderately priced works that have become popular, but who are choosing among an array of designers and trends. They must retain their “snob appeal” yet ideally become known to, and revered among, the masses. Their works may not last an entire season, but they must sell seasonally, and they must retain their appeal after a season ends. This creates a particularly frantic air to the fashion industry that, while perhaps not escaped by other creative fields, sets design turnover at the heart of production, consumption, and industry churn.

Another well-known feature of the fashion industry is the cyclical nature of its flow of goods and patterns of consumption.\textsuperscript{23} Annually, top fashion design firms release their newest goods in a series of seasonal collections, or runway shows, and each season is marked by clothes that are to be consumed and worn during the successive season. Thus, for instance, a winter collection will showcase “cruise wear,” or clothing to be worn in warm and summery climes; likewise, a spring collection will display the garments of fall through early winter. Fashion followers accept the conventions of the collections, recognizing that the early releases function in part as signals that indicate what styles and designs, and indeed what trends, will be widely adopted and worn in the near future. Hard on the heels of the release of the runway shows, mass-market or “ready-to-wear” producers will issue recognizably similar apparel that is intended to capture the signatures and trends of the season—as established by the top design firms—but that are also constructed to make the apparel more affordable to the average customer. Those pieces that appeal most to

\textsuperscript{23} See id. at 1722.
consumers may be issued many times, sometimes with minor “tweaks” or adjustments to keep them fresh, appealing and, most importantly, differentiated (even to the most minor degree) from the originals. The trendiest pieces will soon issue from the lowest-end producers, such as massive department stores and discount stores, again with some variation in style, as well as in the construction of the garment. Finally, as the apparel of the season begins to lose its initial luster, the pieces will begin to appear at numerous locations (both high and low) on sales racks and at marked-down prices. The prices will continue to fall, as retailers at every level must clear out their racks to accommodate the next wave of fashion apparel. Thus, while the popularity of any one collection might vary greatly, the overall cycle is sure to continue and to keep customers awaiting with alacrity the next, newest batch.24

The fashion industry is characterized by a relative lack of vertical integration among entities, such that design, production, distribution and sales are generally not clustered under the same corporate umbrella; and such entities tend to vary in size, output and sales.25 While firms may cluster at the high or low end, there are only a handful of conglomerates, such as LMVH and a few others in the field. Neither these clusters nor the conglomerates, however, represent a major share of total industry output. Indeed, the fashion industry is remarkably atomized, and stands in stark contrast to many other creative content-rich industries, such as music, publishing and film, in which a relatively small number of entities are responsible for generating a large share of total industry output.26 And yet, contrary to expectation, the fashion industry has persisted in maintaining a low level of IP protection across its ranks.

This low level of IP protection presents an interesting challenge to conventional IP theory. It is generally accepted economic wisdom that concentrated markets allow firms to operate with relatively low levels of IP protection.27 This prevails especially when firms have non-IP based kinds of market power—such as preferred access to distributors, or dominant market position—

26 See id. at 1695.
27 Id.
that allow them to reap the benefits of their work without being undermined by free-riders. In highly concentrated industries, such as music, publishing and film, it would be expected that firms could operate without needing strong IP levels to protect their innovative work. And yet quite the contrary is true: these industries have secured strong IP protections, while the relatively atomized fashion industry, for which conventional economic wisdom would prescribe those same protections, continues to operate in a much lower IP regime. This has been famously dubbed the “piracy paradox” by a pair of leading scholars who were among the first to examine the fashion industry, and who sought to explain its flourishing in a low-IP setting. And this piracy paradox, lying at the heart of the fashion industry, also lies at the heart of how we think of IP itself and what its proper distribution of protection and freedom can and should be.

II. COPYING IN THE FASHION INDUSTRY

A. Early Efforts Against Design Copying: Fashion Industry Guilds

Historically, design copying has been rampant in the fashion industry. In an international context, U.S. firms long engaged in deliberate copying of European fashions, on occasion with the tacit consent of the firms being copied, as long as a toll could be extracted for the copies being made. Fashion industry histories trace these practices well into the turn of the twentieth century, and they prevailed through mid-century, as in the famous instance of copies of Princess Grace Kelly of Monaco’s bridal gown issuing a mere two days after it appeared at the royal wedding. In the domestic context, design copying arose virtually concomitantly with the emergence of the apparel trade itself, and secured a strong foothold in those department stores, such as Filene’s Basement, dedicated to the mass-market reproduction and sale of high level creations. By the 1950s, “style piracy” was universally acknowledged as an industry-wide

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28 Id.
29 See id.
30 Id. at 1717.
31 See id. at 1695-96 (noting that “Seventh Avenue has a long, rich tradition of knocking off European designs”).
practice, and if it was not outright condemned, it was certainly reproved as undermining the efforts of high-end designers and their fashion houses.\textsuperscript{34}

The earliest response to domestic copying in the fashion industry came swift on the heels of the industry’s emergence as a burgeoning marketplace. In 1932, the industry organized the Fashion Originators’ Guild, which registered American designers and their work product, including sketches and prototypes of their works.\textsuperscript{35} The Guild sought to compel major retailers to boycott known copyists, and to police design piracy among both outsiders and its own members.\textsuperscript{36} Retailers and manufacturers were induced to sign a “declaration of cooperation,” binding them exclusively to the use and sale of original creations. Those who did not abide by the terms of the declaration were subject to boycott, or “red-carding.”\textsuperscript{37} The Guild also imposed severe penalties and fines on those members that transacted business with non-compliant retailers and merchants.\textsuperscript{38}

The Fashion Originators’ Guild enjoyed considerable success at thwarting industry-wide copying, particularly among its members.\textsuperscript{39} However, its practices also came to the attention of U.S. antitrust authorities, culminating in a lawsuit that reached the Supreme Court in 1941.\textsuperscript{40} In its decision of that year, Fashion Originators’ Guild v. Federal Trade Commission, the Court held the Guild’s practices to be unlawful, constituting unfair competition and a violation of the Sherman and Clayton Acts.\textsuperscript{41} The Court rejected the Guild’s argument that its practices were

\textsuperscript{34} See Raustiala & Sprigman, The Piracy Paradox, supra note 5, at 1696 (discussing a book published in 1951 addressing the issue of “style piracy”).


\textsuperscript{36} Id. at 10.

\textsuperscript{37} Id.

\textsuperscript{38} Id.


\textsuperscript{40} Fashion Originators’ Guild of Am. v. FTC, 312 U.S. 668 (1941).

\textsuperscript{41} Id. at 708.
“reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited from all four.”

Concomitantly, the Federal Trade Commission (“FTC”) successfully prosecuted, and thence terminated, the Millinery Creators’ Guild, which had united the designers of women’s hats against widespread copying of its millinery designs. The U.S. Second Circuit Court of Appeals upheld the FTC’s position against the Millinery Guild, and despite acknowledging that the guild had in fact successfully impeded the copying of the hat designs of its members, the Court concluded that its solution was ultimately untenable and, indeed, unlawful under U.S. antitrust laws. Interestingly, the Court based its position in the argument that fashion designs presented too small a modicum of “originality” to merit copyright or protection.

At their inception, the American fashion guilds of the early twentieth century created a rather successful impediment to industry-wide practices of design copying. Their practices served as an effective substitute for formal IP rights and protections, until they ran athwart of the U.S. antitrust laws. As demonstrated by Robert Merges, the guilds differed from formal IP rights in fashion design only in a few respects: (i) the guilds based their practices on “an informal, inter-

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42 Id.
43 Millinery Creators’ Guild v. FTC, 312 U.S. 469, 472 (1941).
44 Millinery Creators’ Guild v. FTC, 109 F.2d 175, 177 (1940).
45 Id. (noting that “[a]n ‘original’ creation is too slight a modification of a known idea to justify the grant by the government of a monopoly to the creator”). It is interesting that the “originality” requirement in copyright law has historically tended to be relatively de minimus. Adam R. Tarosky, The Constitutionality of WIPO’s Broadcasting Treaty: The Originality and Limited Times Requirements of the Copyright Clause, 2006 DUKE L. & TECH. REV. 16, at 7. Protection has been ceded to databases and accounting rosters, both of which have contained only a modicum of originality. See Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991); Met. Regional Info. Sys., Inc. v. Am. Home Realty Network, Inc., 888 F. Supp. 2d 691, 704-705 (D. Md. 2012) (citing 37 C.F.R. § 202.3(b)(5)). In fashion, however, it has been argued that the aspect that might make design original—such as the cut of a shoe, or the drape of a sleeve—would not be original enough to merit protection. The reason for this apparent discrepancy is not at all clear, but some commentators argue that a certain skepticism regarding fashion’s creativity may underlie the different treatments. See Hemphill & Suk, supra note 2, at 1160-61; Scafidi, supra note 6, at 85-86.
46 At any rate, the American fashion makers were not very concerned with the international context, perhaps because for the most part it was the Americans doing the copying there. See Raustiala & Sprigman, The Piracy Paradox, supra note 5, at 1734 (noting that the Guild permitted copying of European designs).
47 See generally Picker, supra note 39.
industry, quasi-property right, rather than a formal statutory right;” (ii) the guilds “required concerted action to achieve any appropriability;” and (iii) the guilds “concentrated [their] enforcement efforts at the retail level by requiring retailers to sign contracts and by policing retailers, rather than targeting competing manufacturers.”

Yet while the early U.S. fashion guilds presented an seemingly viable alternative enforcement mechanism to formalized IP rights and protections in their fight against design copying, they were effectively functioning as cartels, and were soon shut down under U.S. antitrust laws. Since their demise, no effective substitute—including a regime of formal IP rights—has arisen in American fashion design and fashion designs remain unprotected by law and in practice. A resurgence in copying has marked the fashion industry, and although it has become global in scope, it still runs rampant in domestic markets and among designers at every level of the trade.

B. Design Copying After the Demise of the Fashion Guilds

1. Fashion’s Low-IP Equilibrium

Although the fashion industry remains rife with examples of design copying, a few of which will be detailed below, its response has historically been not to lobby concertedly for action, but rather to struggle internally for control over the renegade actors, and to ensure that their works, while sold, are not mistaken for originals and valued as such. This apparent quiescence, in the face of both unceasing design copying on the one hand, and ever-expanding IP regimes in other


49 The current proposed legislation is the first real thrust at formal, across-the-board regulation of copying since the guilds. See Katherine Boyle, Fashion Industry Testifies in Favor of Design Copyright Protections (Again), WASH. POST (July 18, 2011), http://www.washingtonpost.com/blogs/style-blog/post/fashion-industry-testifies-in-favor-of-design-copyright-protections-again/2011/07/18/gIQAd2MuLI_blog.html. However, this proposed legislation has been, and remains, highly controversial within the field, and by no means can it be said that there is a general consensus that this is the appropriate response to industry-wide copying. See id. Unlike trademark protection, which enjoys widespread acceptance and even approval among fashion industry insiders, the anti-copying thrust of the proposed legislation has its vocal detractors, which accounts in part for its protracted progress to ratification.
comparable creative industries on the other hand, seems virtually unique to the industry, at least
among its peers.

This stasis in the face of changing IP practices in turn highlights an important feature of fashion:
its “low-IP equilibrium.” In other words, the industry is distinguished by the relatively low
levels of IP protection accorded to its fashion designs sufficient to maintain its overall
equilibrium. The three central areas of IP—copyright, patent, and trademark—vary widely in
the rights and protections they extend to industry participants. Together, they amount to a fairly
modest measure of coverage, and yet this low level of IP has remained surprisingly stable since
the demise of the guilds. We begin examining this apparent discrepancy, so counter to standard
IP reasoning, by considering each of the main areas of IP in the fashion context.

a. Copyright

Why is fashion essentially left unprotected by copyright law? We know it stands outside
copyright’s shelter because copying has been an issue in the industry, and the early guilds that
arose in the United States were organized specifically to thwart its march through the industry
when IP was unavailable to intervene. Further, following the demise of the guilds, copying has
persisted in some industry practices, yet copyright protection remains inaccessible. Further still,
we know of no provision that specifically exempts fashion from copyright law. However, a
perusal of fashion’s case history reveals that it has been treated doctrinally as falling outside the
purview of copyright due to a critical conjunction of its practical and expressive aspects. Broadly
speaking, copyright doctrine denies its rights and protection to the class of “useful articles,” that
is, concrete objects in which creative expression is melded with, and inseparable from, the
practical utility of the object. Thus, for instance, furniture, fixtures, architecture, as well as

50 See Raustiala & Sprigman, supra note 5, at 1699.
51 Id.
52 See supra notes 35-48 and accompanying text.
966422 (Mar. 15, 2010, N.D. Ga.).
uniforms\textsuperscript{54} and other apparel, have been deemed by the courts to be simultaneously, and
indivisibly, practical and expressive, and therefore outside copyrights’ domain.\textsuperscript{55}

\textit{b. Trademark/Trade Dress}

Trademark is very valuable to the apparel industry, as it serves to protect and preserve the
identity of fashion brands—particularly the distinctive, recognizable brands of firms that operate
at the top of the fashion pyramid—and to maintain their prestige against potentially encroaching
competitors. Many fashion firms invest considerable resources into protecting their brands
against two threats to their profitability: the overuse of licensing and overexposure due to
excessive licensing,\textsuperscript{56} and the counterfeiting of trademarks that undermines the valuable
signaling aspect of the brand.\textsuperscript{57} Trademark infringement cases involving apparel and accessories
involve obvious violations of law, in which counterfeiters are alleged to pass off and sell goods
bearing a protected trademark. These cases may be contrasted, however, with more gray area
practices, such as the licit practice of creating and selling “knockoffs.” This illegal practice of
passing off counterfeit goods must, however, be distinguished from its counterpart, the wholly
legal practice of creating and selling “knockoffs,” goods that imitate the design and style of a
product without strictly copying the product itself. While knockoffs are somewhat controversial
within the industry—hewing, as many of them do, extremely closely to the original product—
they are also accepted in practice, and indeed comprise the bulk of many mid-tier, mass-market
producers, such as H&M, Zara, and others.\textsuperscript{58} Counterfeiting, to the contrary, is fought tooth and
nail in the industry, and many of the top level firms have devised elaborate measures, as well as

\textsuperscript{54} See, e.g., Galiano v. Harrah's Operating Co., Inc., 416 F.3d 411 (5th Cir. 2005).
\textsuperscript{55} There are, admittedly, some minor exceptions to this rule.
\textsuperscript{56} See Suzy Menkee, \textit{Fashion Houses Move to Tighten Brand Control: A License to Kill}, N.Y. TIMES
(July 4, 2000), http://www.nytimes.com/2000/07/04/style/04iht-license.2.html (arguing that “it is
impossible to protect the brand if you have too many licenses); also see, e.g., Christina Passariello, \textit{Pierre
Cardin Ready to Sell His Overstretched Label}, WALL ST. J.,
http://www.wsj.com/articles/SB10001424052748704547604576263541408680576 (last updated May 2,
2011) (describing Pierre Cardin’s business practice as “the extreme of fashion licensing” and noting that
his business strategy diluted his image).
\textsuperscript{57} See Chavie Lieber, \textit{Why the $600 Billion Counterfeit Industry Is Still Horrible for Fashion}, RACKED
exhibit.
\textsuperscript{58} See, e.g., Alexandra Jacobs, \textit{Where Have I Seen You Before? At Zara, in Midtown, It's All a Tribute},
tribute.html.
brought extensive lawsuits, to try to stave off the unauthorized imitating of their marks and undermining of their brand.\(^{59}\)

While knockoffs do not present the clear-cut case of infringement that counterfeits entail, many designers of knockoffs will borrow liberally from the more striking design features of a creative fashion designer’s original works. Naturally, the protection afforded by trademark law to knockoffs is limited in scope only to the aspect of the garment or accessory that falls under its purview, such a brand, logo, or distinctive mark.\(^{60}\) For instance, the interlocking, reversed “Cs” on the Chanel brand is highly distinctive, and readily merits trademark protection; while similar, the repeating “Cs” of the Coach brand, in a notably different typeface and style, are distinctive enough to receive protection as well.\(^{61}\) Many brands like Chanel and Coach, having established their logos as both recognizable and desirable to their customers, are increasingly featuring these marks—in varying permutations, and varying degrees of prominence—on the outside of their apparel and accessories.\(^{62}\) In the case of these brands, the logos are such a significant and integral part of the product’s design that they cannot be appropriated without giving rise to a strong case of trademark infringement. To a great extent, then, trademark law would most likely protect the logos, and the products they embellish, against design copying.\(^{63}\) However, these cases represent only a fraction of the fashion industry’s output. In most instances, firms will place their trademarks in less visible locations, such as on an inner garment tag, a button, or a hidden label. In the case of these goods, trademark law will not protect against design copying, since the


\(^{60}\) See, e.g., United States v. Chong Lam, 677 F.3d 190 (4th Cir. 2012) (affirming the lower court’s holding that defendant infringed on Burberry’s distinctive plaid pattern).


\(^{62}\) Note the case of the red Louboutin sole and its limitations, as determined in the recent case of Louboutin v. Yves Saint Laurent. 696 F.3d 206, 224 (2013).

\(^{63}\) Trademark law’s protection is not without limits, however. See, e.g. id.
trademark will not seem an integral part of the products’ design. Thus, trademark offers only a limited scope of defense against design copying for the industry as a whole.

Design copying in the fashion industry may also fall under the purview of trade dress, a component of trademark law that has been expanded over time to encompass product design and even the “total image of a product.” In theory, trade dress may well be expansive enough to embrace fashion design; however, like copyright, it may also offer only a limited remedy at best, applying only to the non-functional elements of a product. But trade dress adds another requirement: it protects those design elements that are not merely adornment, but that are also “source designating.”

Few design elements in apparel are likely to meet the “source designating” requirement, as noted by the Second Circuit in Knitwaves. In that case, the court explicitly pointed out that “[a]s Knitwaves’ objective in the two sweater designs was primarily aesthetic, the designs were not primarily intended as source identification.” Moreover, in the words of the Supreme Court, virtually any fashion design that does clear the threshold of source designation “almost invariably serves purposes other than source identification.” To raise the bar for trade dress protection, the Court held that product designers—including but not limited to fashion designers—must show that the design has acquired “secondary meaning” under trademark law. This standard must be met by a showing that “in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.”

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65 Nowadays, trade dress refers to “the total image, design and appearance of a product and may include features such as size, shape, color, color combinations, texture and graphics.” Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1257 (9th Cir. 2001).
67 71 F.3d 996 (2d Cir. 1995).
68 Knitwaves, 71 F.3d at 1009.
70 Id. at 214.
This standard significantly restricts the possibility that a given fashion design will obtain trade dress protection, since most fashion consumers are unlikely to recognize design elements as identified with a given brand. Perhaps in the rare case of highly individuated brands, and highly sophisticated consumers, such a confluence occurs—there are “fashionistas” who will instantly recognize the sinuous weave and silken wool threads of a Missoni dress—but those instances are hardly sufficient to bring trade dress protection to the forefront of the fashion industry. At present, therefore, it seems clear that trade dress is not likely to avail fashion designers whose works are subject to design copying.

c. Patent

Patent law extends protection for “design patents”—which can in theory encompass new fashion designs—defined as “new, original, and ornamental design[s] for an article of manufacture.” In practice, the design patent offers, at best, limited protection to fashion design.

The first impediment to affording wider protection through patent law is that the design patent provision only affords protection to works that are indeed “new,” and not to works that can be traced back to prior designs. This is an exacting, often impossible, standard for fashion design to reach, since fashion itself builds upon an extremely rich and long-standing heritage of prior work, and since fashion designers most often hearken back, either allusively or directly, to these earlier works even in their latest creations. It is astonishingly hard even to think of a garment that is truly novel—for instance, the iconic “wraparound” dress brought to prominence by Diane Von Furstenberg in the 1970s was well-preceded by many a silk wraparound dress in previous eras. While Von Furstenberg’s refinements are thought by many to have brought the dress to a new level of protection, it would probably not be considered “novel” by even its most ardent advocates—and it would most likely not qualify for design patent protection under the exacting novelty standards of patent law today.

Further, as is well known, filing for patent protection is a costly and time-consuming process; and it is a process ill-suited to a fast-changing field that sees products become obsolescent in a

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72 35 U.S.C. § 171(a) (2012). The term of protection is fourteen years. Id. § 173.
73 See id. § 171(a).
mere season, a matter of months rather than years. Given the uncertainty that a design patent would even be issued, and the high costs involved, it is not a form of protection that might appeal to the fashion industry as a permanent, effective solution to the swift and inexorable design copying that seems so pervasive today.

III. THE “PIRACY PARADOX”

A. Induced Obsolescence

Apparel and accessories are categorized by economists as “positional goods,”—goods whose value inhere in no small part in the status and worth that is conferred upon them by others (i.e., those who do not actually own them).75 Positional goods attain a special significance by their place in the social order: those who own them signal their heightened status by purchasing and displaying their ownership of these goods, and those who covet them affirm the desirability of the goods, and thence the consequence of their owners.76 Embedded firmly in the social context, the value of positional goods is fundamentally relative, for it fluctuates in relation to what members of society consume and how they regard what is being consumed, displayed and desired.77

But positional goods are often two-sided, in that their value is not exactly directly proportional to the nature or scope of their ownership.78 There is a point of diminishing returns, at which the value of such a good diminishes when “too many” people know about it, own it, or have access

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76 There exist some two-sided positional goods that simply increase in value as their use becomes more widespread. Id. at 1719 n.61. These goods are, broadly speaking, subject to positive externalities and network effects. Id. Thus, for example, mobile telephones have become increasingly valuable—and although perhaps slightly less after extensive distribution, there is no point in which their positional value has diminished due to extensive dissemination in the market. The Apple iPhone interestingly blurs this distinction, however, as it is clearly considered positional in some circles and definitely enjoyed a certain cachet at its inception. As its use has become extremely widespread, however, its status seems to have lost some of its luster among early adopters, and the fervor for its progeny has somewhat cooled among the self-styled “hardcore Apple fans.” Even in the case of more “ordinary” two-sided positional goods, then, there might be a point at which market saturation triggers a loss of positional value and a reduction of the products’ value to mere utility and/or commodity levels.
77 Id. at 1718-19.
78 Id. at 1719.
to it. For instance, some of the value of owning a limited edition print lithograph by a modern master lies in the fact that only those who are “in the know” will recognize it, and recognize not just its intrinsic worth but also its market value. But some of its value also lies in the fact that it is a limited edition, and a very costly one at that—not only few can afford it, but only a few exist so only a few can own it. Ownership of such a work is limited to an exclusive few, and the owner can count herself in that elite group, above the hungry crowd. Exclusivity is the watchword and the hallmark of positional goods, and accounts for a good deal of their particular appeal.

Fashion goods, especially those created by designers at the top of the fashion pyramid, are often two-sided positional goods. For instance, Hermes issued the Birkin bag, but deliberately limited its release to an extremely select list of clientele, many of whom proved eager to wait months, even years, for the right to purchase and possess a coveted, iconic item. Instantly recognizable by the fashion elite, the Birkin almost immediately became a signal of the carrier’s exclusive “insider” status. While a beautifully crafted item, the Hermes bag stood almost alone as perhaps the ultimate symbol of “belonging” among fashion’s innermost circle. Importantly, however, as the Birkin became widely imitated or quoted, in part by Hermes itself—which issued a line of handbags that incorporated elements of the bag, such as the small lock, the rolled handlebar, and the striking shape—and in part by knockoffs or outright counterfeits, the Birkin bag lost some of its luster, and the most fashion-savvy moved on. Thus, as the bag’s design became disseminated among, and familiar to, a wider audience, it lost status and prestige value among fashion’s first movers. The diminution of appeal among early adopters was, in one sense,
inevitable: fashion has always looked to its most distinguished designers to create strikingly original works whose very distinction lies in their fresh, new appeal. Such freshness, as in the case of any perishable, cannot last long, and is necessarily diminished by the usual pattern of widespread marketing, dissemination, consumption, and eventually the contempt that is so axiomatically bred by familiarity, staleness and overuse.

The movement from prized insider possession to despised mass-market commodification is completely endemic to positional fashion goods, and is indeed central to their life cycle. Fashion insiders value the highest positional goods precisely because they confer status among those who are “in the know,” and because they signal that status in quiet, exclusive voices that can only be heard and appreciated among elite peers. When those positional goods are diffused among larger audiences, their ability to confer and confirm discriminatory taste is diminished, almost always fatally, and the elite early adopters of fashion lose interest and move on to the next, freshest good that awaits just ahead. This can occur whether the good is merely disseminated to a greater clientele or whether knockoffs, and even outright counterfeits, occlude the value of the original article. In this latter case, the dissemination of knockoffs and copies—of varying quality—may be said to “tarnish” the value and allure of the original good.82 But even barring copying, the mere diffusion of the good beyond the exclusive, and exclusionary, circles of the elite is enough to send fashion’s early adopters off and running in search of the new and as-yet undiscovered status-conferring good. Past the point of inflection, the fashion good has lost its positional value altogether, and fashion’s leaders must find new means of signaling their superior position vis-à-vis the ordinary crowd. The next best design is poised to become the latest positional good, and its adoption yet again becomes the “in” symbol among the fashionista set. The cycle is reset, and the drive to situate oneself in the social hierarchy ensures that it will be run through yet again.83

While consumption trends propel the fashion cycle, the low-IP equilibrium of fashion plays an important supportive role. The relative lack of industry-wide IP protection leaves ample room for

82 Some commentators, such as Jonathan Barnett, have argued that such copies actually enhance the value of the original by showcasing the inferiority of the copy. Jonathan Barnett, Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis, 91 VA. L. REV. 1381, 1384 (2005). The argument is hard, however, to substantiate.
a wide reign of design appropriation and style dissemination. Because designs can be copied closely, and disseminated swiftly, the life cycle of a given fashion good will necessarily be brief. In the absence of protection against copying, even the most original designer piece will be imitated and diffused in short order; and its designer will be compelled to start work immediately on its successor, knowing full well that there is no time to rest on the laurels of success. Design copying limits the timeframe in which positional goods can maintain their status-conferring value, and its lack of protection under IP law ensures that copying will flourish apace. This “induced obsolescence” of fashion designs is familiar ground to designers and copyists, but also to fashion participants at all levels. On the one side, it impels designers to innovate and to try to keep ahead of the fashion curve with continual waves of new offerings. On the other side, it spurs elite clientele to scour the runways for the freshest, most prestigious fashion items, while the next tiers of consumers, not as exclusive but often as avid, follow in pursuit of the diffused versions that proclaim they are on trend.

If copying were to be impeded by a high-IP regime, it is likely that the cycle of production and diffusion would be slower and less widespread, since original designers would have the means to check design copying by lawsuits, threatened or actual, and sanctions. This might be advantageous for top-level original designers, as their exclusive works might retain their positional value a while longer, perhaps until they were replaced by another fashionable objet du jour. On an industry-wide basis, however, the low level of IP in fashion might be quixotically advantageous, in that it erodes the positional value of any given work but increases the number of potentially positional works entering the marketplace. Moreover, the design copies that spring up in the absence of significant IP actually benefits fashion designers by accelerating the overall turnover and sale of fashion goods. Induced obsolescence coupled with a low-IP regime together make fashion one of the fastest moving creative industries and ensure that its cycle—in which goods continue to issue forth, be copied, and make way for the new—remains robust and immensely profitable on an overall scale.

Low IP protections allows lesser copyists to recreate, or rework, expensive original designs, and to make them affordable for the more ordinary customer. From a consumer perspective, then, the dynamic of obsolescence coupled with a low IP regime has a distinctly utilitarian appeal: it
brings positional goods into the purview of a great many consumers, and underpins the existence of a huge mass-market in fashion. This arguably broadly benefits consumer welfare, if one believes that access to a broad range of affordable, trendy garments is inherently beneficial to fashion consumers, but at any rate it most likely expands the market for positional fashion goods, as well as increasing both turnover and sales in the industry.

Design copies in fashion vary considerably in how closely they adhere to the original work. In the case of visible, and markedly inferior, imitation, the status-conferring positional value of the original good remains unchanged, and indeed unchallenged. In an ever-increasing number of cases, however, the copies are so skillfully rendered, and their distinctions so subtly guised, that they may not be discerned without very careful examination, and perhaps even then only with a certain amount of know-how in detecting the imitation. Significantly, the effect of these adroit copies is not merely upon the positional value of the original good, but also on the purchase of, and market for, new goods.

Even in the low-IP regime of fashion, trademarks can be affixed to the original design and serve to distinguish it from its imitators. Trademark law affords protection to fashion brands and products, and to some extent curtails the rampant copying of creative works. Highly visible trademarks, featured on the outside of some garments and accessories, impede the outright reproduction and diffusion of original designs. Yet highly visible trademarks are not yet prevalent in the overall market of fashion goods. Most trademarks are hidden away inside garments and other products, and are not readily visible to the eye. Their unobtrusive placement can help blur the distinction between the original and the imitation, at least without the kind of careful inspection that most consumers tend to forego. This limits the ability of trademarks to impede design copying throughout the industry.

84 Again, commentators such as Barnett would argue that copying can even enhance the value and status of the original, imitated goods. See Barnett, supra note 82, at 1384.


86 The rise in visible, even prominently displayed fashion trademarks has been argued to correspond with designers’ interest in thwarting design copying. Raustiala & Sprigman, The Piracy Paradox, supra note 5, at 1723 & n.72. It may, however, also arise merely the increased importance of brand management, and the ever-growing value of major brands in the fashion marketplace.
While trademarks do not fully inhibit copying, they do of course serve a very useful purpose in the industry. A prestigious brand, such as Ralph Lauren, brandishes its trademark on its clothing to signify that its goods are at innovative, chic, high quality, and eminently desirable. While the firm has multiple tiers of labels, ranging from the highest end (“Ralph Lauren” and “Black Label”), to slightly lesser (“RL Collection”), to more modest mid-market (“Lauren”), all of its goods are positional to some degree, and the highest end of its goods have a distinctly exclusive cachet. The Ralph Lauren trademark helps keep the firm’s high reputation visibly and inextricably attached to its product, not just at the top level but throughout the brand. This secures the firm’s ability to charge premium prices for its wares. The only respect in which trademark does not protect the Ralph Lauren brand is in granting it exclusivity over its designs. If its designs are copied—as they have been rather extensively, to varying effect—trademark may not sanction the copies (unless, of course, the trademarked good is outright counterfeited). And Ralph Lauren cannot seek further protection, as no copyright law currently exists to prevent against straightforward design copying. Further complicating the matter is the fact that much of design copying is not outright reproduction, but rather derivative works that draw upon elements of the original work and then rework them, often imaginatively, in new guise.

In the low-IP environment of fashion, no legal barrier stands in the way of creative borrowing and the imaginative reworking of original design. This openness allows, and perhaps encourages, a host of follow-on designers to borrow creatively from the most innovative names in the business, and to produce a plethora of variations on the original themes. These variations may be considered virtually new designs, and their appeal to the consumer seen to lie either in their differentiation or in their resemblance to the original work. Designers, well aware that consumers may have different preferences, are readily prompted to come up with a great many such variations in the hope that one or more will prove even more appealing than the original good. As variations, however, traces of the original good still linger, and the dissemination of these variations serves to diffuse the original good’s exclusive value and positional worth. The generation of these variations therefore drives off early adopters of the original work, those fashion elite who rely upon their exclusive goods to confer positional superiority, and sends the early adopters in search of new, yet-untouched products that can be theirs alone. The point is that
the availability of free appropriation, and the variations to which it gives rise, accelerates the fashion cycle and ensures that it will constantly be in flux.

The rampant appropriation and creative reworking of original design, so visibly at large in the fashion industry, is only possible in a low- or no-IP regime, for it runs directly counter to the default rule under copyright law, which afford only the original designer the exclusive right to make, authorize, and exploit derivative works.\(^87\) Presumably, in a copyright-rich regime, the original designers of desirable fashion goods would devise their own derivative works, and thereby exploit more fully their rights in the underlying work.\(^88\) Why do they not do so in the present regime? After all, presumably these original designers are free to reproduce their own works “in house,” and to create their own variations on themes, at different price points and for different audiences. This would forestall their competitors from appropriating and exploiting the value in derivative or re-imagined works, and it would expose the designers to vast new audiences without intermediation. Most of all, it would allow the original designers to keep price discrimination among goods of varying originality and quality within their own firm, rather than diffusing value among market participants. Even barring the strictures of copyright against outsiders’ rights to make derivative works, why don’t original designers step into the breach and sell a variety of works in their own stead and on their own terms?\(^89\)

As earlier noted, some firms do pursue the strategy of creating reworked or variegated versions of their own works—that is, derived from their own designers and workshops—and sell those works to a broader market than only the highest end of the spectrum.\(^90\) Thus, they do practice single-firm price discrimination in the form of “bridge lines,” such as the many “labels” under which Ralph Lauren markets and sells its array of fashion merchandise. Some designers are

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\(^{87}\) Raustiala & Sprigman, supra note 5, at 1734.
\(^{88}\) Id.
\(^{89}\) Barnett argues that original design firms might go so far as to sell cheaper, visibly inferior copies of their own goods at lower price points an to lower-end audiences. Barnett, supra note 82, at 1405-06. Barnett argues that high-end design houses are concerned with protecting their valuable brand, and fear tarnishing their brand through such self-imitation. Id. at 1406-07. However, even the best firms could devise new brands under which to release derivative goods. Fear of tarnishing alone, therefore, may not fully explain the strategic choices they make.
\(^{90}\) See Raustiala & Sprigman, supra note 5, at 1724 (noting the incentive fashion firms have to adopt such a strategy).
cautious in pursuing this strategy, for fear that their brand’s identity risks being blurred, and their valuable trademark(s) risk tarnishing, with too much diffusion and not enough protection of the firm’s prestige.\(^{91}\) Yet many top-level fashion firms have rather successfully established lower-tier bridge lines, and only in some instances have those bridge lines come to affect perceptions of the original design.\(^{92}\)

Bridge lines are one strategy by which design firms create multiple fashion “lines” within their own doors, using a form of vertical integration to keep control over the production, reproduction and distribution of their output.\(^{93}\) This enables top designers to knock off, or alternately to make various versions of, their original designs. The design firms are then able to sell their diverse wares at different price points—that is, to price discriminate among tiers of consumers.\(^{94}\) The bridge lines will incorporate and adapt elements from the highest, most exclusive lines, but they will generally feature lower price points, lesser quality of materials and construction, possibly more “mainstream” design variations that render the garment less obviously original but perhaps more readily wearable, and other characteristics that appeal to the consumers targeted at their level. Due to the more populist nature of bridge lines—and the concern that their “watered down” couture may erode the prestige of the original works from which they derive—designers will often sell bridge lines under different brand labels, such as “Lauren Collection” or “Armani Exchange,” and may also sell these products in different markets or venues.\(^{95}\) Thus, for example, the designer’s haute couture collection will be sold in a stand-alone store bearing the design

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\(^{91}\) Id. at 1724-25.

\(^{92}\) This has occurred primarily in instances where the designer lost control of the original brand, either through sale or otherwise. One early illustration, often seen as a cautionary tale in the fashion world, is that of Calvin Klein, who sold his brand and name without retaining any rights of oversight or control. Gene Marcial, *Inside Wall Street: Calvin Klein Is Making Warnaco Look Sharp*, DAILY FIN. (Apr. 9, 2010), http://www.dailyfinance.com/2010/04/09/inside-wall-street-calvin-klein-is-making-warnaco-look-sharp.

\(^{93}\) Raustiala & Sprigman, *supra* note 5, at 1724-25.

\(^{94}\) For example, Armani sells up to five distinct “lines” of its wares, including Armani, Emporio Armani, Black Label, and so forth, thereby strategically targeting different niches in the fashion market. See also *id.* at 1725.

\(^{95}\) *Id.*
firm’s (or the designer’s) prestigious name, whereas a secondary collection may be sold at a mass-market department store.\textsuperscript{96}

It is unclear why relatively few designers resort to the use of bridge lines, and why more have not followed suit. The practice of partnering with mass-marketers, fraught as it is with the risk that the brand be tarnished by association, seems perhaps a shade less clear-cut, yet here too designers have entered the waters only warily, and only in very small number. In both cases, the ability of designers to differentiate their high-end original offerings and their mid-to-lower end derivative works is secured through the use of different brand names, release strategies, and other tactics. To be sure, some brand dilution may occur—Chanel, for instance, may never again be seen as fit to clad only a very exclusive few. But in this day and age, it is not clear that designers

\textsuperscript{96} Designers may also capture the benefits of their own derivative works by partnering with outside vendors—including those that directly aim at the mass-market—in order to create a derivative line that increases both their sales and their recognition factor among a large consumer audience. See id. at 1757. This practice has come to have something of a perverse cachet among designers, in part because it has proven to be wildly, and somewhat unforeseeably, successful, and in part because it is seen as a one-time practice, a judicious effort to become a household name—but not one necessarily available to most households most of the time. Id. For instance, immensely prestigious designers, such as Isaac Mizrahi (who was among the pioneers of this practice), Missoni, Narciso Rodriguez, and so on, have joined the ranks of Martha Stewart and lesser fashion designers in creating one-time collections in collaboration with mass-market retailers such as Target and Wal-Mart. Id. Notably, these collections tend to be extremely limited in quantity—sometimes creating an artificially-imposed scarcity to ratchet up a sense of desirability and urgency—and may even sell out in a matter of hours. See, e.g., Charlotte Wilder, \textit{This Is Why the Internet Freaked Out About Lilly Pulitzer for Target}, BOSTON.COM (Jan. 13, 2015), http://www.boston.com/life/fashion/2015/01/13/this-why-the-internet-freaked-out-about-lilly-pulitzer-for-target/77K1GypB2rbOTDpAmOBFP/story.html; \textit{Missoni Line at Target Creates Black Friday Atmosphere}, S. BEND TRIB. (Sept. 18, 2011), http://articles.southbendtribune.com/2011-09-18/news/30174032_1_target-stores-target-website-target-spokeswoman. Some even found their longevity of appeal extended through the valuable resale market of eBay, in which items may be sold at an even higher price than in the initial department store or mass-market release. See Sandra M. Jones, \textit{Target Hits It Big With Missoni Collection}, CHICAGO TRIBUNE (Sept. 13, 2011), http://articles.chicagotribune.com/2011-09-13/features/chi-targets-website-crashes-after-missoni-launch-20110913_1_target-hits-target-collection-target-corp. Consumers of these single-line, designer-label goods do not seem to mind that the goods are often of far lesser quality, construction, and durability than the original high-end works to be found in the designers’ regular collections. Consumers of the haute couture goods, for their part, do not seem to complain (audibly, at least) that the original designers are diminished in stature by their forays into the markets of the rank-and-file. Instead, the lines of “Missoni for Target” seem to be perceived as a forgivable lark, a playful gesture “de haut en bas” (from high to low), with the result that the original designs may even more coveted, by even more consumers than ever. See John Ewoldt, \textit{Cheap Chic, Luxury Didn’t Blend Well}, STAR TRIBUNE (Jan. 5, 2013), http://www.startribune.com/business/185696602.html. This in turn may enhance the positional value of haute couture (although cf. the example of the Birkin bag and its appearance on \textit{Sex and the City}, supra note 81), and may secure its exclusivity in opposition to the goods that are extended to the masses.
can pay the bills only by selling to haute couture clients: there just are not enough of those elite consumers to go around. While some designers do appropriate their own works, and sell derivative works through their bridge lines, the mystery is not that they do so, but that more do not do so, even as they see the success that their peers have had through the vertical integration of original and derivative works under a single design firm’s roof.

Although designer bridge lines and partnerships with mass-marketers are still not very common practice, most high-end designers do not actively pursue copycats who appropriate their original designs in order to generate apparel and accessories that are mostly “variations on a theme.” This points to a conundrum at the heart of fashion’s low-IP regime. High-end designers cannot seek recourse to copyright law—which would block copyists from making and selling derivative works without the express permission of the original designers—and so cannot legally prevent imitation or appropriation of their work. This implies that they should seek to vertically integrate their original and derivative works in a single-firm strategy, so that they can bring appropriation and its rewards “in house,” thereby preempting at least some copying, and simultaneously profiting from as many permutations of their creative efforts as possible. Instead, however, these designers do neither: copying continues apace, and bridge lines remain fairly scarce.

One result of this low-IP equilibrium in fashion is, as discussed earlier, a pattern in which top designers create original works for an exclusive, status-seeking clientele; follow-on designers appropriate and disseminate the works to lower-end markets, thereby rapidly diffusing the original designs and their style features; early-adopter consumers, repelled by seeing their fashion statements become commonplace, abandon the now-stale designer garments in search of the next avant-garde items; and the top designers are compelled to innovate to satisfy the demands of their restless clientele. The outline of the pattern now becomes clear: the fashion cycle’s engine churns rapidly, and its motor is design copying, or piracy. And fashion’s low-IP equilibrium is central to the pattern—perhaps, to extend the metaphor, it is the transmission system underlying the fashion cycle. For in a high-IP regime, designers would be able to inhibit copying by threatening or bringing actions on copyright infringement grounds against follow-on

97 See, e.g., Constance C.R. White, Mizrahi, Designer Most Likely to Succeed, Doesn’t, N.Y. TIMES (Oct. 2, 1998) (noting that Mizrahi’s failure might have been due to the designer’s lack of a cheaper, secondary collections).
designers that appropriated their work. In the low-IP equilibrium of fashion, designers might forestall some copying by creating their own lines of derivative works, but they cannot thwart all the imitators that borrow their ideas and create similarly styled pieces. They can and do, however, innovate constantly in order to stay at the front of the fashion curve.

The “piracy paradox,” as it has been dubbed, keeps the fashion industry in a state of ongoing creative churn. For this reason, it is arguably a positive stasis that keeps the industry vibrant and robust. At the same time, however, it is still plausible that certain designers of original works—those who are frequently, and perhaps slavishly, copied—can be harmed by free appropriation. In the absence of copyright law’s protections, the rents that they would otherwise gain from having exclusive rights to exploit and/or assign derivative works are lost to follow-on designers. Yet why might original designers still not protest the low-IP ecosystem of fashion? One explanation is that they may wish to reserve for themselves the right to copy others, in turn. That is, fashion cycles are notoriously hard to read, and trends equally hard to predict. An original designer whose work does not “take” one season may wish to jump on the bandwagon of a trend and appropriate the style of her rivals. Even the top designers, then, may wish to reserve the right to borrow or copy freely—and not to be impeded by cumbersome IP rights preventing them from reaping the fruits of their derivative labor.

One reality of the fashion industry is that appropriation and copying are virtually constants, at all levels of the fashion pyramid. There are several reasons for this unusual state of affairs. First, as in any field of creative endeavor, originality is scarce, and cannot be expected to appear every season, or at every collection. Second, fashion is bound to trends—that is, a great many sales in any given season can be linked to a particular trend, such as pastel-colored jeans (spring 2012). At the outset of a season, those trends may seem to be “in the air,” such that designers, merchants, fashionistas, and key industry figures (fashion magazine editors, among others) begin to discuss them widely, to issue items along those lines, and to push to establish the trend firmly.

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98 See generally Raustiala & Sprigman, supra note 5.
99 As Raustalia and Sprigman put it, “in the current system, designers viewing their incentives ex ante are at least partially shrouded within a Rawlsian veil of ignorance.” Raustiala & Sprigman, supra note 5, at 1727 (citing JOHN RAWLS, A THEORY OF JUSTICE 136-42 (5th ed. 1973)).
100 As Raustalia and Sprigman point out, “[i]f copying is as likely a future state as being copied, it is not clear that property rights in fashion design are advantageous for a designer, viewed ex ante.” Id.
among fashion’s many followers. Even among the early adopters, the purchasers of original designs, being among the first to spot, wear, and set a trend is considered highly desirable. Therefore, even top fashion designers may look to one another’s collections, trying to determine what will be the trend du jour, and possibly waiting to bring out their own on-trend versions—in other words, to appropriate.101 Thirdly, the practice of “homage” is well-established and approved in the fashion industry.102 While homage conveys reputational benefits to the original designer, it remains a form of free appropriation, however deliberate and respectful. Finally, fashion is an ancient and universal creative field. Its treasury of work is so vast, and increasingly so accessible to designers, that it is almost impossible to imagine that any design, however original, is completely new. Even new elements may be embedded in familiar contexts—and that itself is a kind of appropriation, although more attenuated, of course, than strict copying. How can the “wrap-around dress,” most recently made famous by Diane Von Furstenberg’s exquisite draping, be considered an “original design”? Wrap dresses can be seen to have existed throughout history, from the toga to the sari to the sarong to wrap-around skirts in the 1960s. While Von Furstenberg’s version might be distinctive enough to merit copyright, if fashion were to become a copyright-rich regime, it would be a challenge to establish that her iconic dress rose to the level of originality that copyright requires to extend its protection. The point is, fashion thrives on creative reworking—it is driven by appropriation, and it recognizes its debt by allowing designers to appropriate freely without harm.103

101 A term of art sometimes used in the industry is “referencing.”
102 For example, following the early, untimely demise of Alexander McQueen, more than one “homage” was created, directly citing his work or alluding to the breadth of his vision and his lasting influence on many designers, including some of his most notable peers. See, e.g., Copy-Kate Dresses, Repli-Kate Shows and More, WHAT KATE WORE (Aug. 28, 2011), http://whatkatewore.com/2011/08/28/copy-kate-dresses-repli-kate-shoes-and-more/ (showcasing copies of Kate Middleton’s dresses designed by Alexander McQueen); Natalie Zutter, Snooki Sinks to New Lows by Ripping Off Deceased Designer Alexander McQueen With Her New Handbags, CRUSHABLE (Mar. 15, 2012).
103 Randy Picker dissents from this key point. Picker, supra note 39, at 5. He argues that fashion copying primarily runs vertically, not horizontally—and typically in one direction, that is, lower-end designers copying those above them. Id.; see also, e.g., ‘Michael Kors Copies Everything!’ Roberto Cavalli Slams Fashion Industry for Failing to Call Out Fellow Designer on ‘Plagiarized’ Designs, DAILY MAIL (Feb. 20, 2014), http://www.dailymail.co.uk/femail/article-2564053/Michael-Kors-copies-Roberto-Cavalli-slams-fashion-industry-failing-call-fellow-designer-plagiarized-designs.html. Thus, for example, Target’s stable of designers will copy Dior, whereas Dior will not copy Target’s apparel; further, Dior will not likely copy its equal, such as Gucci. Id. I disagree. Dior and Gucci can indeed be seen to appropriate freely from one another—subtly, no doubt, but often clearly with regard to points of style and design. It
B. Anchoring

“Anchoring” is the process by which the fashion industry establishes an identifiable trend and then communicates that trend to its participants. The process is essential to the industry if it is to turn over its products successfully and repeatedly. Consumers must be made aware that a style has become fashionable, and then again when the style has passed out of fashion and the next style has taken its place. Anchoring secures the trend, and induced obsolescence ensures that the trend moves on. Together, these steps occur in the context of the stable, low-IP regime that fashion maintains.

Anchoring is predicated upon the cycle of trends that lies at the center of fashion’s practices. Trends, however, are hard to pin down. A season in fashion may begin with the launching of one or many potential trends, loosely defined as a set of styles coalescing around a discernible subject—a “look,” such as “safari chic,” a “theme,” such as “punk rock,” or a conceit,” such as the sophistication of the 1950s as portrayed by the television show “Mad Men.” These trends are informally shared among designers—sometimes seeming just to emerge concomitantly, but not concertedly, on multiple runway collections—but also may formally be discussed and promoted among industry participants, not just designers but retailers, editors, buyers, and the like. At times the consensus falls upon a trend, as some agreement is made that the trend will take hold

seems much more the case that fashion is a kind of free-for-all, in which many designers, at various levels, as well as fashion’s followers (i.e. magazines, editors, experts, and so on) often seem to be mulling similar ideas, and picking up on similar trends, at around the same time. These ideas may crystallize into an agreed-upon trend, such as pastel jeans in the Spring of 2012, and then the trend gets disseminated as widely as possible, until it’s the rare designer who doesn’t pick up on the trend (including latecomers, some of whom may even be high-end designers) and, say, issue their own version or interpretation of a pair of brightly colored jeans. See generally MARK TUNGATE, FASHION BRANDS: BRANDING STYLE FROM ARMANI TO ZARA (3d ed. 2012).

Picker also argues that “legislation to protect fashion designs should be forthcoming then only if creators have more political power than the copyists. . . . I find that much less likely in the U.S., where Wal-Mart is vastly more important (and probably politically influential) than the entire high-end fashion industry.” Picker, supra note 39, at 5. This might be true, but the latest proposed legislation would seem to run counter to that intuition: the high-end designers certainly have at least some clout to get legislation in play; and while they probably have more clout than the smaller, independent designers, they still seem to have a lot.

104 Raustiala & Sprigman, supra note 5, at 1728.
105 Id.
among consumers over the course of the season. That convergence of opinion is requisite for a trend to fall into place; also necessary, though, is the buy-in of those who are deemed trendsetters, not just in identifying but also in accepting the trend for their own.

Design appropriation and copying are useful tools in the anchoring process. At the onset of a season, multiple style ideas, and possibly multiple trends, are floated by a range of designers. For a dominant trend to arise, a reasonable number of designers must rally around it and adopt its vernacular in their creative output.\textsuperscript{106} This lends coherence to the trend and emphasizes its wide acceptance in the fashion community. Appropriation and copying further anchor the stylistic themes and devices that are central to the given trend, thereby lending it substance and widening its familiarity among fashion’s consumer base.\textsuperscript{107} By repeating the theme and variations, copying does to a trend what Wagner does to a leitmotif—makes it instantly recognizable every time it is encountered. Trendsetters may have heard the trend first, and adopted it instantly, but at times they may circle back to pick it up in a newer manifestation. Trend followers, understanding the trend as it is trumpeted forth, follow in turn. Anchoring thereby enables fashion’s devotees to learn what is the trend of the season, to find it at their price point, and to consume it. Moreover, it enables them to learn when the trend has become passé, what the newest trend replacing it might be, and what to consume to be on-trend. The anchoring process is thus at once an essential source of information and a vital spur to consumption.

\textbf{C. Summary: The Paradoxical Effects of Low IP-Protection}

Fashion’s low-IP ecosystem gives leeway to widespread practices of appropriation and copying. This both enables and accelerates the cycle of fashion trends—from creation to adoption, diffusion, abandonment, and replacement by new trends. Due to the positional nature of its goods, fashion moves through the fashion pyramid—from the highest haute couture echelons to the middle ranks of consumers to the lower end of the mass-market—as though its value were passed from hand to hand. Consumers at every level of fashion, however they are able, are eager to follow the trends of fashion and discard them when a trend is deemed stale and “over” by their

\textsuperscript{106} See Raustiala & Sprigman, \textit{supra} note 5, at 1728-29.
\textsuperscript{107} Id.
cohorts. Fashion-conscious consumers watch for the industry’s signals as to which trends are to be followed and when they are ripening, “red-hot,” and passe. Thus induced obsolescence and anchoring unite to propel fashion designs through a swift and tumultuous life cycle. The turnover that is innate to the industry is also extremely beneficial to the industry overall, as it stimulates consumers to purchase seasonal goods well beyond their actual utility or durability. The “luxury” of fashion is more democratic than it may sound, in that at almost every price level consumers can indulge their taste, and their appetite for trending items, and thereby express and sate their fashionable interest. Designers are benefited both by the ongoing sales of apparel that this high turnover represents, as well as by the creative stimulus of having an eager audience that is ever in pursuit of new wares. The result is that a rich ecosystem thrives in fashion without the aid of much IP protection, and to date remains remarkably stable politically.

One caveat, noted by leading commentators in the field, is that while the entwined forces of induced obsolescence and anchoring are the underpinnings of a stable low-IP regime in fashion, they may not be the direct causal basis for low levels of IP protection in the industry.\(^\text{108}\) They have helped to keep the political equilibrium stable, at least to date, and they have contributed to the ongoing vitality of the industry despite the open appropriation that takes place regularly in the absence of IP barriers to design copying. These forces also have not affected every single creative act in the fashion world—certainly some designs, and perhaps designers, may be unmoved by fashion’s trends and cycles—but they do affect the majority of creative output in the industry, and certainly assist with the sales of that output to its consumers.

It is also somewhat of an open question whether the low-IP regime is optimal for designers and consumers of fashion. If a formal high-IP regime were to prevail, it seems likely that the most creative designers would continue to innovate, but follow-on designers would be less motivated to appropriate and rework the original designs. Perhaps original designers would be able to charge an even higher premium for their apparel, secure in the knowledge that their designs were and would remain both unique and unreproducible.\(^\text{109}\) And perhaps follow-on designers would be

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\(^\text{108}\) Raustiala & Sprigman, supra note 5, at 1733.
\(^\text{109}\) This is the thrust of Randy Picker’s argument. See Picker, supra note 39, at 5.
compelled to turn their hand to more creative efforts in lieu of copying.\textsuperscript{110} What is unclear is whether, under these circumstances, this would be to the benefit or the detriment of the overall welfare of fashion’s designers and consumers alike.

The only precedent that gives some insight into what might happen in a high-IP equilibrium is the historical evidence presented by the Fashion Originators’ Guild, which is mixed at best. In that instance, the guild created barriers to copying that, while not strictly legal, offered the functional equivalent of copyright’s private property rights scheme and its strictures (registration and monitoring among guild members; sanctions such as boycotts against identified copyists).\textsuperscript{111} On the one hand, design copying\textsuperscript{112} did diminish under the Guild’s regime. It has even been argued, and there is some evidence, that the erstwhile copyists may have begun to create original designs—or at least they began to register their designs with the Guild, which presumably they could not do unless the designs showed some measure of originality. But was this socially optimal? Was the market for fashionable dresses constrained by the Guild’s property rights regime, or did the number of original higher-end dresses grow and the number of imitative lower-end dresses diminish, resulting in a net gain to the consumer base? The antitrust suit brought before the Supreme Court, ending the reign of the Guild, effectively halted such inquiries. But since that chapter was closed, fashion copying began anew, and the low-IP regime of fashion re-emerged to prevail to the present date. And not only has that regime proved to be stable, but the industry itself has proved to be ever more flourishing and profitable. Even as other creative industries have seen an astonishing surge in IP rights and protections, the fashion industry has built a rich ecosystem in a relative absence of IP. This is the real paradox at the heart of fashion—and its resolution lies in the nature of the industry itself.

\textit{D. Alternative Explanations for Fashion’s Low-IP Equilibrium}

\footnotesize{\textsuperscript{110} Id. \\
\textsuperscript{111} See Raustiala & Sprigman, \textit{supra} note 5, at 1696. \\
\textsuperscript{112} This is limited to American designs—the Guild did not seem to concern itself unduly with the copying of European designs, which would be a rather interesting tangent, but is outside the scope of this paper. See Raustiala & Sprigman, \textit{supra} note 5, at 1734.}
The American fashion industry is, by any account, extremely successful. It carries off its success in a low-IP equilibrium due to its rapid turnover and very robust sales. Both phenomena are driven by the twin engines of original output, issuing from high-level designers, and secondary reworking or copying, generated by lower level follow-on designers and firms. Designers at all levels of the fashion pyramid create successive trends that generate ongoing churn in the fashion market. Sales are distributed throughout the pyramid—greater per unit, but fewer in volume, at the top, and the inverse at the lower rungs—but overall, industry productivity and profitability remain at very high levels indeed. Thus, despite significant IP protection, fashion exhibits a remarkably stable ecosystem in which participants symbiotically co-exist, interact and create.

There may, however, be additional (or alternative) explanations for the ongoing stability, both political and economic, of the fashion industry. Chief among these are the following: (i) Copyright law’s “useful articles” doctrine stands in the way of allowing copying to encompass fashion designs; (ii) The industry is reluctant or unable to come to agreement about changing extant laws; and even when it does organize and mobilize itself, as in the case of the I3P proposed legislation, the amount of controversy shows that the industry remains deeply divided about such systemic changes; and (iii) First-mover advantages, which privilege certain participants in the industry, work in favor of the status quo and bolster a general acceptance of industry-wide copying and derivative work.113

1. Copyright Doctrine as a Barrier

The fashion industry has long been divided over whether or not to seek expanded IP rights and protection in its original works. Certainly, the recent proposed legislation indicates that there is consensus in at least one significant faction (significant in terms of lobbying power, at any rate) that would find greater IP coverage preferable to the present low-IP regime.114 But that faction, as well as the industry, must reasonably respond to a key doctrinal concern: Does the longstanding “useful articles” doctrine of copyright law immutably prevent the fashion industry from securing expanded copyright protection over its original designs?

113 Raustiala & Sprigman, supra note 5, at 1745-62.
114 See infra notes 193-195 and accompanying text.
Two responses would argue against the useful articles doctrine as standing in the way of expanded copyright protection in fashion’s original designs. First, a precedent has been established that opens a path to expanded protection: in architecture, a field that parallels fashion in certain close regards, copyright has been extended to its creative endeavors where previously it was not accommodated.\textsuperscript{115} The analogy to architecture hints at an “end-run” around the useful articles doctrine in the fashion field as well. Second, the useful articles doctrine in copyright law has not deterred the extension of protection in certain other creative endeavors, such as the design of boat hulls and semiconductors, where such protection exists on a sui generis basis. If fashion industry participants were to seek extended copyright protection in original designs, such sui generis treatment might offer an avenue for obtaining particularized coverage irrespective of whatever proscriptions the useful articles doctrine might otherwise entail.

2. The Useful Articles Doctrine

In statutory terms, the Copyright Act grants exclusive rights in “original works of authorship” that are “fixed in any tangible medium.”\textsuperscript{116} One basic building block of fashion, the original sketch by a designer of a new design, is protected by copyright if it contains but a modicum of originality. Yet while the original design sketch—a two-dimensional rendition of the envisioned three-dimensional garment—is protected by copyright, the final product itself is not. Indeed, actually manufacturing the garment itself does not constitute “fixing” in a “tangible medium,” as might seem reasonable to imagine. Rather, and rather complicatedly, copyright’s useful articles doctrine denies the extension of copyright to garments based on original designs unless the expressive content is separable from the garment’s useful function.\textsuperscript{117}

\textsuperscript{115} See Raustiala & Sprigman, supra note 5, at 1745, 1749-50.  
\textsuperscript{116} 17 USC § 102 (2012).  
\textsuperscript{117} The Copyright Act extends copyright protection to two-dimensional sketches of original fashion design. This protection, however, does not extend to the actual garments on which the design is based. This completely undermines the usefulness of the protection, however, as appropriation in fashion can easily be undertaken by copying from a sketch, a sample, or a garment itself. Under current U.S. copyright law, copying from a garment is not deemed the equivalent of copying from a design sketch—although of course in a functional sense, they are one and the same. Raustalia and Sprigman suggest that “[a] relatively direct path to expanded protection for fashion design would change U.S. law to allow an infringement finding to be based on the underlying copyright in the design sketch. . . . Accordingly, even
Whereas copyright law’s useful articles doctrine protects original expression, its counterpart in patent law protects useful inventions—or, where design patents are concerned, novel ornamental designs. Further, copyright law only protects works that exhibit some modicum of creativity (and that have clearly not been copied), while patent law only protects useful inventions or novel ornamental designs that have never been produced. The difference between the “originality” standard in copyright and the “novelty” bar in patent is one of degree—the patent standard being distinctly more difficult to clear.

Notwithstanding the functional/aesthetic distinction inscribed in copyright law, any given item can readily comprise both a utilitarian dimension in its usefulness and an expressive dimension in its original, artistic nature. Such an intertwining of characteristics has not necessarily barred the item from meriting copyright protection. In Mazer v. Stein, the Supreme Court was asked to determine whether a lamp base made from a statuette could be copyrighted. The Court determined that the lamp base did indeed fall into the purview of copyright, pursuant to the Copyright Office’s protection, at that time, of “works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries.” In accordance with the Mazer decision, courts have extended copyright law’s rights and protection to artistic jewelry, designs printed upon scarves, and dress fabric designs. Together, these decisions have generally afforded copyright protection to a range of useful articles that are both functional in nature and aesthetically appealing.

Mazer and its progeny extended copyright to a previously unprecedented range of useful articles. In its turn, the U.S. Copyright Office issued regulations curtailing the range of articles falling under copyright law’s protections, stating that articles in which the “sole, intrinsic function . . . is
its utility” would not be granted copyright even if it were “uniquely and attractively shaped.”\textsuperscript{123} However, the Copyright Office did allow that if the shape of an article “incorporates features . . . which can be identified separately and are capable of existing independently as a work of art,” those features would be eligible for copyright.\textsuperscript{124}

In granting copyrightability only to useful articles bearing a “separable” expressive element, the Copyright Office distinctly limited the holding of Mazer, which broadly acceded copyright to artistically appealing useful articles.\textsuperscript{125} The Copyright Act, even to its current instantiation, still further narrows the copyrightability of useful articles. The Act denies copyright coverage to any article having “an intrinsic utilitarian function”\textsuperscript{126}—which clearly encompasses more items than the Copyright Office’s regulation’s denomination of articles having a “sole intrinsic [utilitarian] function.”\textsuperscript{127} Further, the Act specifies that “[a]n article that is normally a part of a useful article is considered a useful article.”\textsuperscript{128} This stipulation reduces the likelihood that the utilitarian and expressive aspects of an article will be considered separable, thereby reducing, perhaps fatally, the likelihood of copyrightability of most useful items, however aesthetically appealing they might be.

The Copyright Office, followed by the Copyright Act, successively narrowed the scope of copyright protection granted to useful articles as earlier articulated by the Mazer Court. Effectively, then, the IP protection of such useful articles has defaulted to the domain of patent law. Yet patent law, with its stringent standard of “novelty,” raises the bar to a level that a great many useful articles, whether aesthetically expressive or not, are not likely to clear. This policy choice has had profound implications in a range of creative endeavors, but nowhere is it more clear than in fashion, in which the functional nature of garments tend to be inextricably intertwined with their expressive elements and their aesthetic appeal.

\textsuperscript{123} 37 C.F.R. § 202.10(c) (1959).
\textsuperscript{124} Id.
\textsuperscript{125} See Raustiala & Sprigman, supra note 5, at 1748.
\textsuperscript{127} 37 C.F.R. § 202.10(c) (1959) (emphasis added).
\textsuperscript{128} 17 U.S.C. § 1301(b)(2) (2012).
E. A Side Note “Regarding Substantial Similarity”

The policy choice regarding the copyrightability of useful articles is not necessarily irreversible. Under an alternate regime, original designers might secure exclusive rights to qualifying useful articles and any related derivative work, and designs that exhibited “substantial similarity” with the original design might be deemed to infringe upon the designer’s exclusive rights.

Most courts agree that the “substantial similarity” test hinges upon the perceptions of the “ordinary observer.” The Seventh Circuit stated that the inquiry turns upon “whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectible expression by taking material of substance and value.”129 The Ninth Circuit recognized that “a taking is considered de minimis [and therefore does not rise to the threshold of infringement liability] only if it is so meager and fragmentary that the average audience would not recognize the appropriation.”130 The Second Circuit is in accord with this line of reasoning, holding that “[t]wo works are substantially similar where ‘the ordinary observer, unless he has set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal [of the two works] as the same.”131 These holdings, taken as a whole, suggest that the “substantial similarity” test poses a fairly low practical threshold for a finding of infringement.

In the context of the fashion industry, adoption of a more expansive copyright in garments (which would otherwise constitute useful articles), and acceptance of the “substantial similarity” test for infringement would be bound to alter the landscape considerably. Significantly, much of the design appropriation and reworking that now pervades fashion would most likely be actionable, and might well be found infringing pursuant to the “substantial similarity” guidelines outlined by the courts above. The mere challenge of shepherding an array of fashion

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129 Atari v. N. Am. Philips, 672 F.2d 607, 614 (7th Cir. 1982).
130 Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986); see also Newton v. Diamond, 349 F.3d 591, 594-95 (9th Cir. 2003) (noting “the relationship between the de minimis maxim and the general test for substantial similarity, which also looks to the response of the average audience, or ordinary observer, to determine whether a use is infringing”).
131 Castle Rock Enter. v. Carol Publ’g Grp., 150 F.3d 132, (2d Cir. 1998) (quoting Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1072 (2d Cir. 1992)).
infringement claims through the courts would likely entail major upheaval. But were these claims to result in large-scale findings of infringement, the entire practices of the industry would be disrupted and would require shaping anew.

At the same time, however, like the “useful articles” standards, the “substantial similarity” measures could be cut to fit the fashion industry’s cloth. The test could be narrowed, for instance, to bring only exact line-by-line copying into its purview. This would align with the standards some courts have imposed in copyright infringement cases involving databases. Thus, copyright could protect original fashion design, and could still allow some appropriation in the case of “substantially transformative works,” while limiting findings of infringement to items that exhibit too-close line-by-line copying. In effect, this approach would displace the low-IP regime of fashion, opening the door to copyright protection, but restricting copyright infringement to a strict standard of copying rather than a more expansive standard of appropriation. This compromise would place fashion at a separate remove from truly high-IP creative regimes, such as the music, film and publishing industries. Rather, it would create a more moderate, or intermediate-IP regime. Such a qualified level of IP protection might be well suited to the fashion industry, with its longstanding traditions, and generally widespread acceptance, of design reworking and appropriation.

F. How Congress Can Circumvent the Useful Articles Rule, Part I

In the case of architecture, Congress and the courts have shown that the useful articles doctrine can be modified, without undermining copyright law’s substance, to lend copyright protection to a particular area of creative design and physical construction. Buildings, architecture’s main output, are readily analogous to fashion in that they can be based on original designs, but when

132 The distinction between reworking and line-by-line copying is delineated by Suk and Hemphill. See Hemphill & Suk, supra note 2, at 1181-82 & n.136.
134 Raustiala & Sprigman, supra note 5, at 1749 n.118.
135 This is a relatively recent development, as architecture, like fashion, was basically marginalized by copyright law. Id. at 1749-51.
built assume a predominantly utilitarian function. Historically, original architectural blueprints, like fashion design sketches, were protected and could not be copied without infringing. Buildings, on the other hand—even those erected on the basis of original blueprints—could be freely appropriated or copied without transgression. Further, a copycat architect could assess the dimensions and features of an already-existing building and appropriate freely from it, or simply copy it, without fear of being deemed to infringe upon the original architect’s work. Copyright would only protect the purely ornamental or decorative elements of the building, as long as those elements were perceived to lack utility and to be “separable” from the building overall. These minor decorative elements, however, were very much the exception in architecture to the general rule.

In recent years, however, the historical lack of protection for architectural structures has been significantly reversed. In 1990, Congress amended the Copyright Act to allow copyright protection not just for blueprints but also for buildings themselves. Under the Architectural Works Copyright Protection Act (“AWCPA”), Congress extended the scope of copyright coverage to “architectural works,” broadly defined to include “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.” In the AWCPA, the scope and parameters of protection for architectural works was somewhat more closely delineated, setting forth that “[t]he work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”

In enacting the AWCPA, Congress has clearly carved out a sui generis area of protection for the architecture field by defining “architectural works” broadly and extending them expansive

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136 Id. at 1750 (citing Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972); Herman Frankel Org. v. Tegman, 367 F. Supp. 1051, 1053 (E.D. Mich. 1973)).
137 Id.
138 Id.
141 Id. In the legislative history of the Act, Congress states that the separability test of the useful articles doctrine does not apply to architectural works, and that “the aesthetically pleasing overall shape of an architectural work could be protected.” H.R. REP. NO. 735, at 6951 (1990).
copyright protection. Equally importantly, in so doing it simply eliminated the long-held, presumptive application of the useful articles doctrine to buildings constructed from original architectural designs. Were Congress willing, a parallel course could surely be made available to the creative field of fashion and its physical works, garments, constructed from original fashion sketches and designs. At present, a significant faction in the fashion world is mobilizing the impetus to persuade Congress to do so—that is, to define “fashion works” broadly enough to encompass their three-dimension manifestations as actual garments, and then to extend copyright protection to include those garments in its scope.\(^{142}\) If this effort succeeds, fashion too would overcome the presumptive obstacles of the useful articles doctrine, and not just its original designs but also its original garments would fall under copyright’s protective domain.

G. How Congress Can Circumvent the Useful Articles Rule, Part II

As in the case of architecture, discussed above, Congress has extended sui generis copyright protection to the creation of useful articles that would not otherwise, without special treatment, not qualify for such protection under the Copyright Act. Two areas of production, semiconductor “mask works” and boat hulls, offer instructive examples for such sui generis treatment.

1. Semiconductors

Congress carved out protection for semiconductor “mask works” under the Semiconductor Chip Protection Act (“SCPA”), which it adopted in 1984.\(^ {143}\) In the semiconductor industry, “mask works” are “the stencils used to control the process of etching onto silicon wafers the circuitry that make up a microprocessor.”\(^ {144}\) The production of mask works, and the transistor and layout design work that they represent graphically, are among the most valuable components to the semiconductor industry.\(^ {145}\) Under the SCPA, a mask work is protected if it is fixed in a

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\(^{142}\) See generally Raustiala & Sprigman, supra note 5, at 1751.


\(^{144}\) Raustiala & Sprigman, supra note 5, at 1752.

\(^{145}\) Arguing for the protection of semiconductor mask works, Congress stated that the “appropriation of creativity” by those copying mask works would be a “devastating disincentive to innovating research and development.” Id. (quoting H.R. REP. NO. 98-781, at 2-3 (1984)).
semiconductor chip and is original.\textsuperscript{146} Not only must mask works display originality, they also may not be “staple, commonplace, or familiar in the semiconductor industry.”\textsuperscript{147} Protection extends only to the works of U.S. nationals and domiciliaries,\textsuperscript{148} or to works first commercially exploited in the United States regardless of the nationality of ownership.\textsuperscript{149} Further, the SCPA requires that mask works either be registered with the Copyright Office or be commercially exploited as a condition of protection.\textsuperscript{150}

The SCPA grants owners an exclusive right in mask works pursuant to their fulfilling its formal statutory requirements.\textsuperscript{151} The protection runs for a ten-year period, and reserves to the owner the exclusive right “to reproduce the mask work by optical, electronic, or other means.”\textsuperscript{152} The exclusive right to reproduction is broad, and not only encompasses identical copies but also those that are “substantially similar” to the protected work.\textsuperscript{153} The SCPA also confers upon the owner the exclusive right to “import or distribute” a chip for which the mask work has been used in production.\textsuperscript{154}

\section*{2. Boat Hulls}

\textsuperscript{146} 17 U.S.C. § 902(a)(1) (2012)
\textsuperscript{147} Id. § 902(b)(2).
\textsuperscript{148} Id. § 902(a)(1)(A).
\textsuperscript{149} Id. § 902(a)(1)(B).
\textsuperscript{150} Id. § 904(a). The SCPA represents a “conditional” system of protection, that is, one that creates property rights only when the “author” of a mask work demonstrates—through commercial exploitation or registration—that protection is needed. Id. Pursuant to the SCPA, authors seeking protection of their works through commercial exploitation must register their works within two years, or protection will be terminate. Id. § 908(a). Prior to the ratification of the current Copyright Act in 1976, copyright law was similarly conditional, requiring authors to take specific steps, including registering their works and marking published copies with a copyright notice, in order to come under copyright’s protection. See Raustiala & Sprigman, supra note 5, at 1752 n.131. The current copyright laws, by contrast, are “unconditional,” in that authors need not follow those steps, but rather gain copyright protection automatically upon the fixation of their original, expressive works in a tangible medium. See 17 U.S.C. § 102(a).
\textsuperscript{151} Id. § 905.
\textsuperscript{152} Id. § 905(1).
\textsuperscript{153} Raustiala & Sprigman, supra note 5, at 1753.
\textsuperscript{154} 17 U.S.C. § 905(2).
Not only semiconductor mask works have been extended sui generis protection: in 1998, Congress carved out sui generis design protection for owners of boat hulls.\textsuperscript{155} The issue came to the fore somewhat earlier, in 1989, when the Supreme Court, in its landmark decision Bonito Boats v. Thunder Craft Boats, invalidated a state law that prohibited the process used by certain boat manufacturers to copy rival manufacturers’ boat hull designs.\textsuperscript{156} To protect owners against such copying, Congress enacted the Vessel Hull Design Protection Act (“VHDPA”),\textsuperscript{157} contained within the broader purview of the Digital Millennium Copyright Act.\textsuperscript{158} Under the VHDPA, boat hulls are protected by federal fiat, although in accordance with the Supreme Court’s holding in Bonito Boats, states are preempted by federal law from extending such protection.\textsuperscript{159}

As in the case of the SCPA’s protection of mask works, the VHDPA grants a ten-year period of exclusive rights in the design of boat hulls or, more precisely, in the “design of a vessel hull, including a plug or mold” used in the construction of a boat hull.\textsuperscript{160} Under the VHDPA, however, the exclusive protection is more constrained than under the SCPA, extending only to “original” designs.\textsuperscript{161} The VHDPA provides that “original” designs are “the result of the designer’s creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source.”\textsuperscript{162} The VHDPA extends the owner of such an original design the exclusive right to “make, have made, or import” any boat hull that incorporates the design in its work.\textsuperscript{163} The owner then has the exclusive right to sell or distribute the boat hull incorporating that original design.\textsuperscript{164} The VHDPA adds that it extends protection to any element of a boat hull design that

\textsuperscript{155} See generally Raustiala & Sprigman, supra note 5, at 1753.
\textsuperscript{156} 489 U.S. 141, 167-68 (1989).
\textsuperscript{159} 489 U.S. at 168.
\textsuperscript{161} Id. § 1301(a)(1).
\textsuperscript{162} Id. § 1301(b)(1).
\textsuperscript{163} Id. § 1308(1).
\textsuperscript{164} Id. § 1308(2).
“makes the article attractive or distinctive in appearance to the purchasing or using public.”  

Moreover, it extends protection to elements of boat hull design that may be considered strictly utilitarian function. The VHDPA resembles the SCPA in having a strict set of formal requirements. For one, it mandates that original designs must be registered within two years after the design is made public, or the owner will forfeit protection. The owner must mark protected designs with a prescribed notice of protection. Omission of the notice will bar the owner from recovery against a potentially infringing party if the “undertaking leading to infringement” was begun by “before receiving written notice of the design protection.”

In sum, semiconductor mask works and boat hulls are two areas of creative work that have been granted a form of sui generis protection by Congressional act. In both cases, Congress has chosen to side-step the useful articles doctrine of copyright law, granting protection to and original expression that would not otherwise be covered, since it is typically comprised by a useful article. The exclusive rights granted in these works are very much akin to the protections granted by traditional copyright law. They could also be readily extended, in theory at least, to a range of other creative and original works, including fashion design and industrial design. As noted by Raustiala and Sprigman, among others, the VHDPA itself was originally written rather broadly to encompass general design protection. Raustialia and Sprigman suggests that the VHDPA might have served as a platform by which Congress could eventually extend protection to a wide array of industrial design. This would merely require Congress to alter the definition of “useful article” in the Copyright Act.

In the pending design piracy bill, this expansion of the “useful article” definition is precisely what is sought. The bill seeks to append “fashion design” to the term “design of a vessel” used in

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165 Id. § 1301(a)(1).
166 See, e.g., id. § 1301(a)(2) & (b)(5) (noting that plugs are protected “regardless of whether [they have] an intrinsic utilitarian function”).
167 Id. § 1310(a).
168 Id. § 1306.
169 Id. § 1307(b).
170 See Raustiala & Sprigman, supra note 5.
171 Id.
the VHDPA, and thereby to expand its general definition of “design.”\textsuperscript{174} The bill also seeks to append a three-year period of protection to the new design class.\textsuperscript{175} If the bill were to be ratified, Congress would yet again successfully circumvent the strictures of traditional copyright law, extending protection to original fashion, and perhaps even more broadly industrial, designs. This would further demonstrate that standard copyright law need not necessarily prevent original fashion designs from enjoying the exclusive rights and protections now shared by semiconductors and boat hulls.\textsuperscript{176}

3. Political Barriers

As discussed above, copyright law may not present an insurmountable obstacle to the fashion industry gaining protection in original designs. Following the precedents outlined here, Congress can enact legislation that will effectively carve out IP protection for a favored industry, even if its creative products might otherwise be barred by standard copyright doctrine such as the useful articles rule. But other impediments to the protection of designs may prove more challenging. The political process of effecting change raises at least two significant concerns: collective action problems and the “rival rent-seekers” problem.\textsuperscript{177} In both of these cases, the political will to action may be thwarted by industry participants, or even interested outsiders.\textsuperscript{178} In the fashion context, the collective action problem lies primarily among the designers seeking design protection, while the rival rent-seekers problem lies among both designers and retailers.

4. Collective Action Problem

Collective action problems have been widely examined and outlined, most notably by Mancur Olson in The Logic of Collective Action.\textsuperscript{179} They arise when industry participants, such as

\begin{footnotes}
\item[174] Id. § 1.
\item[175] Id. § 1.
\item[176] Alternatively, as in the case of architecture, Congress could simply limit the scope of the useful articles doctrine and effectively arrive at the same results.
\item[177] See Raustiala & Sprigman, supra note 5, at 1755.
\item[178] Id.
\end{footnotes}
fashion designers, cannot effectively organize themselves to lobby for, and bring about, change. The challenges of collective action often arise among industries with large constituents that are relatively decentralized. This is because, as Olson argued, small groups of tightly-knit members are typically more effective at organizing behind a mutually-held cause than larger, less cohesive groups. Smaller groups can lobby to effectuate policy proposals that they favor, or conversely to thwart proposals that they oppose. The individual members of these small clusters tend to have a significant stake in the policy position of their group, and their vested interest gives them a strong motivation to act and follow through on their actions. In contrast, the individual members of large, diffuse groups may have a small stake in the group’s overarching policy position, and therefore may not be inclined, or able, to bear the transaction costs arising from organizing and acting. Olson posited further that as the size of the group swells, the problems of incentives and transaction costs grows increasingly problematic.

High-IP industries that are relatively centralized and have dense concentrations among their participants are especially effective at rallying behind policies that maintain or increase levels of IP protection. Both the recording and motion picture industries, for instance, are very politically effective and powerful, due in part to the strength of their centralized representative blocs. In the recording industry, which is made up of a limited number of major producers, the central trade association, the Recording Industry Association of America (“RIAA”), galvanizes the political resources and might of the industry. In the motion picture industry, also consisting of a limited number of major producers (and also a limited number of smaller producers), the counterpart of the RIAA is the Motion Pictures Association of America (“MPAA”), another trade association that wields considerable political sway. In both cases, the centralized industry

180 See Raustiala & Sprigman, supra note 5, at 1755.
181 See id.
182 See id.
183 See id.
184 Id.
185 Id.
186 Thus, for e.g., consumers of certain commodities, like oil, constitute such an enormous group that they are unable to organize and lower high oil prices; while oil producers, who are both concentrated and limited in number, are successful at organizing and obtaining the price points they desire.
187 See Raustiala & Sprigman, supra note 5, at 1755.
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representatives actively work on behalf of their constituents, lobbying for political policies that their members agree will best advance their interests. Their effectiveness is amply demonstrated by the range of political victories they have notched, including the striking extension of copyright protection to the creative output of their respective industry members.190

Does the fashion industry lack the ability to organize itself effectively, and does a political failing explain its stasis as a low-IP regime? If this were the case, the collective action problem would explicate the lack of copyright protection in fashion, rather than the doctrinal impediment of copyright law, or the lack of detriment caused by outright copying of fashion’s original designs in industry practice. In other words, the fact that designers have been unable to unite under a political banner would emerge as the main reason they could not gain copyright protection, even the designers considered it central to their shared interests and needs.

The first objection to pinning the low-IP regime on collective action is that there is a strong trade association—similar in many key respects to the RIAA and the MPAA—that underlies the fashion industry. The Council of Fashion Designers of America (“CFDA” or the “Council”)191 counts a significant number of key fashion designers in its roster,192 and represents their interests before Congress, the courts, and in the public regard.193 Most recently, it has been lobbying for IP protection under the aegis of the proposed legislation H.R. 5055, which would greatly expand copyright in American fashion design.194 While it has not noticeably galvanized the industry’s


response to earlier legislation affecting fashion, it does not appear to have been impeded in any respect from lobbying activities.\(^{195}\) Yet it is evident that the CFDA has not, prior to the process that has brought the pending legislation before Congress, engaged in any important lobbying efforts.\(^{196}\) The absence of political activity on its part may indicate that the majority of industry members stand behind a low-IP regime, and do not in fact consider design copying to be significantly detrimental to creative output and robust growth in the industry as a whole.

5. Rival Rent-Seekers Problem

Collective action problems do not seem to undergird the lack of political mobility that the fashion industry has evinced until fairly recent date. As suggested, this might be due to a shared view in the industry that design copying does not pose enough of a challenge to original designers as to merit concerted action by the Council or other representative agents. Another possible explanation, however, is that there is no shared view in the industry, and that fractured interests prevent political action from being mobilized successfully. In other words, the industry may be divided among rival rent-seekers,\(^{197}\) the retail sector and the design sector, which have divergent views and preferences as to the proper level of protection. In this scenario, the retail sector might be found to have better cohesion and more political clout, and thereby be able to impede the design sector’s initiatives seeking the expansion of fashion design protection. It may be, then, that the retail sector has a marked preference for a low-IP system allowing it greater latitude to copy original designs and sell them to various market segments under differentiated strategies, fashion collections, and prices. The greater strength of the fashion retail segment would, under this explanation, supplant the efforts of its rival, the design segment, to lobby Congress in search of a higher-IP regime.

\(^{195}\) See Raustiala & Sprigman, *supra* note 5, at 1756. In a slew of legislation dating from around 1980 to the present, Congress has broached the issue of design protection. *Id.* In many of these measures, apparel has been expressly exempted from protection. Thus, for instance, in the proposed “Industrial Design Anti-Piracy Act of 1989,” protection was expressly disallowed for designs “composed of three-dimensional features of shape and surface with respect to men’s, women’s and children’s apparel, including undergarments and outerwear.” *Id.* (citing H.R. 3017, 101st Cong. § 1002(5) (1st Sess. 1989)). However, the legislative history of this proposed legislation, among others, does not show that the CFDA or other fashion industry representatives or agents lobbied or testified with respect to the application of the bill to fashion design. *Id.*

\(^{196}\) See *id.*

\(^{197}\) See *id.* at 1755.
The theory of rival rent-seeking is predicated on conflicting interests that divide and undermine the political willpower among industry participants.\textsuperscript{198} The case for such internal conflicts, however, is not so clear-cut in the fashion world. The retail sector includes not only retail firms, such as department stores and boutiques, but a fair number of designers as well. Some designers are retained in-house, and design collections under their own label that are then marketed by their affiliated retailer.\textsuperscript{199} Other designers remain independent, but are contractually hired to design “exclusive” collections that are likewise marketed by the retailer. In both instances, the interests of the retailer and the designer are wholly contiguous. There are exceptions, such as when retail firms sell “house label” or “private label brand” (“PLB”) garments, such as the many lines carried by Macy’s department store, particularly when the PLB garments use derivative designs based on others designers’ original works. Original designers whose works are thus copied may find themselves at odds with the retail firms in these cases, and may well wish for enhanced IP protection that would give them some recourse against having their original works copied and marketed at various retail levels. In other cases, however, even original designers will partner with retail firms to market their works to a large and increasingly appreciative audience. This practice has grown rapidly in recent years, and has been widely praised by designers and retailers alike. Thus, for instance, Target has partnered with a range of highly talented original designers, including Alexander McQueen, Missoni, and others,\textsuperscript{200} and its success has been mirrored by a range of retailers at various points in the fashion pyramid.\textsuperscript{201} Whether retailers offer private label brands by in-house designers or exclusive collections by partnered designers, the interests of these collaborating retailers and designers dovetail to such an extent that distinguishing their positions vis-a-vis appropriation of original designs becomes hard, if not impossible, to discern.

\textsuperscript{198} See id.
\textsuperscript{199} See id. at 1757. Examples of such arrangements are the exclusive collections offered by Issac Mizrahi, Luella Bartley, and Tara Jarmon through Target. Id.
\textsuperscript{201} See \textit{Is Target Having a Brand Identity Crisis?}, INSIDEFMM, http://fashionablymarketing.me/2012/01/target-designer-collaborations/ (noting that other mass retailers, such as Macy’s, Kohl’s, H&M, and Barney’s have designer collaborations and licensing deals).
Retail firms that either retain in-house designers or partner with outside designers for exclusive collections may have some incentive to protect their products from appropriation and thereby preserve their exclusivity. This might appear to weigh in favor of a high-IP system offering protections against original design copying. At the same time, however, retailers can also allow the designers of their garments to appropriate designs from others’ original designs, thereby bringing in-store collections into line with current trends and consumer preferences. Under fashion’s current low-IP regime, little stands as a bar to designer copying in any direction. In other words, the freedom to copy cuts both ways, and benefits retailers and designers at almost every level of the fashion pyramid. It may be challenging to ascertain precisely how much retailers actually favor a low-IP regime. To date, they have not voiced a strong position on any fashion-related policy proposals that have come before Congress. Only in the most recent instance of proposed legislation, H.R. 5055, have retailers expressed a modicum of concern over the standard of infringement, such that designs that do not closely copy original works will not be deemed to be infringing.\textsuperscript{202} This has not, though, been evinced by a united position expressly stated by retailers publicly or in Congressional hearings.

Not all retailers retain designers to create the garments they carry; some may carry garments based solely on mass-marketed designs. These “pure” retailers may prefer to operate in a regime that does not penalize design appropriation.\textsuperscript{203} In a low-IP regime, pure retailers can strategize how best to optimize their sales inventory: on the one hand, they can repackage and resell goods based on original designs, and on the other hand, they can freely appropriate from or reproduce pre-existing designs and sell them as in-house brands.\textsuperscript{204} This enables retailers to follow the latest fashion trends at diverse price points and across a spectrum of consumer preferences. The open appropriation environment of a low-IP system thus affords retailers a great deal of retail flexibility, and can so be seen as a desirable attribute from the pure retail firms’ perspective. Indubitably, what is sauce for the goose is sauce for the gander: that is, the retailers engaged in copying may find their own garments reproduced by competitors, either at a peer level or lower in the fashion pyramid. Thus, for instance, Barney’s in-house label may copy the design of an original, trend-setting suit originally designed by Giorgio Armani, only later to find that Saks

\textsuperscript{202} See supra note 200 and accompanying text.
\textsuperscript{203} See Raustiala & Sprigman, supra note 5, at 1758.
\textsuperscript{204} See id.
Fifth Avenue has reproduced the suit and marketed its version under the Saks in-house brand. This serial copying, as it were, may result in the sales of many copies of a trendy suit to consumers across the fashion spectrum. But from the point of view of the individual retailer, this implies that neither Armani, Barney’s, nor Saks will remain at the forefront of a trend for long. This limits the potential of any given retailer to retain any great degree of exclusivity in a given fashion trend, but it does allow retailers overall to jump on the bandwagon of a trend and enjoy derivative sales from its follow-on works. Some retailers may prefer a low-IP regime in which product differentiation is achieved via the protection of trademarks in brands and logos, but not as readily available to specific garments. Other retailers may prefer a system in which product exclusivity is maintained under a higher-IP framework. It is difficult to predict, ex ante, which system will be preferred by retailers across the fashion continuum, or whether there is a significant degree of variation in preferences among retailers. But for those retailers that prefer a strategy of differentiation that is predicated on exclusivity of design and style, no doubt a higher-IP regime would serve the purpose. In today’s fashion environment, however, where widespread copying permeates the industry and practices of free appropriation and style “re-workings” are widely accepted, it would appear that the low-IP status quo is not only accepted but also approved by retailers and designers alike.

6. First-Mover Advantage

In fast-moving markets, innovators can sometimes garner such a significant market position that they effectively preclude competitors from gaining a strong foothold and challenging the first movers’ dominance.\(^205\) The advantage of a first mover can be so powerful that it greatly reduces, or even obviates, the need for high levels of IP protection to safeguard it against copying and appropriation at the hands of follow-on rivals.\(^206\) Thus, the first-mover advantage theory can offer a compelling rationale for how original creators and innovators can succeed and flourish even in a low-IP regime that does not promote the propertization of original works and does not enforce sanctions against appropriation or derivation based on original works.\(^207\) In the fashion landscape, original designers assume the role of first movers, creating styles that establish the

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205 See id. at 1759.
206 Id.
most sought-after trends of the season. In order to be successful first movers, these designers must sell as many of their original works as possible before their designs are reworked or reproduced by follow-on designers, retailers, and imitators across the fashion spectrum. If they make a significant amount of sales—or if they sell even a limited volume of works, but at extremely high price points, as often occurs at the height of haute couture—they will successfully recoup their investment and make a profit from the originating designs. Irrespective of follow-on designs, which are most likely to appear in the market as soon as the innovative works are recognized as being trendsetters, the original designs will have more than paid for themselves. Thus, while the window of profit opportunity for original designers may be rather short, it can be highly lucrative, enough so to compensate for some rents lost to copycat goods. This advantage held by the most successful original designers may be sufficient to explain why they have not, at least until recently, taken significant issue with the low-IP regime that does not afford protection to their most creative fashion designs.

Since first movers know they are bound to be imitated swiftly—particularly when their works prove to be commercially desirable—they rely upon the window of profitability that originality affords them before their imitators appear. The first-mover advantage is indeed predicated upon the timeframe in which the earliest appearing works are sold at a price high enough to clear their investment and clear a profit, and in which follow-on works cannot encroach upon these initial sales. But the fashion world does not divide so neatly along these lines: in much of its recent history, fashion vendors have had access to technologies that enable accurate, inexpensive, and extremely rapid copying. Garment manufacturing and distribution has also been rapid, due to fashion’s ongoing need to meet high consumer demand in very short order, and its pace has only been accelerating with improvements in logistics and its related technologies. But not only is the window short in fashion—it is also constantly shrinking. Improvements in technology are of course the most effective means of accelerating the fashion cycle. Copyists have ready access to

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208 See Raustiala & Sprigman, supra note 5, at 1759 (noting that “[f]or the last quarter-century . . . the copying of fashion designs has been easy and fast”).

209 Id. at 1759. Even in the case of the wedding of Grace Kelly, Princess of Monaco, the bridal gown was kept a carefully-guarded secret until the day of the event. See La Ferla, supra note 32. Yet within 48 hours of the highly publicized wedding ceremony, knockoff dresses reproducing with startling accuracy the gown’s every last detail appeared in department stores in the U.S. and abroad. Id.

210 See Raustiala & Sprigman, supra note 5, at 1759-60.
better means of reproducing garment details, better means to disseminate their knowledge, and better means of delivering their derivative products to the ever-hungry market.\textsuperscript{211} It is virtually indisputable that the distance between original designs and follow-on works has been reduced to a sliver, and may well end in something that effectively approaches no distance at all.\textsuperscript{212}

The ever-shrinking distance between the emanation of original designs and follow-on copies at once reveals that the first-mover advantage in fashion was always relatively weak, and suggests that it is not likely to have been a significant benefit to original designers in the first instance. Moreover, as technology improves, any first-mover advantage will most probably be further compromised by enhanced means of reproduction and methods of distribution. Thus, it seems unlikely that if any original designers enjoy first-mover advantages, they will perceive it as being sufficient to protect their rights in, and profits gained from, the exploitation of their original designs. First-mover advantage would not, then, seem to explain fully fashion’s low-IP regime.

Of course, even if first-mover advantage exists, and even persists, among the original designers of fashion, these designers might yet want to enhance their returns from the exploitation of their works with additional leverage in the form of IP protection.\textsuperscript{213} Such protection would strengthen the barriers to entry facing follow-on designers, who would be forced to create works that did not prove to be infringing or derivative. And IP protection would be especially effective with respect to garments that were not merely trendy but also had a more enduring market life. Therefore, the absence of appeal to IP protection among original designers requires further explanation than first-mover advantage alone. One possibility is that the costs of bringing about change through lobbying and legislative action is too daunting to original fashion designers, such that they prefer to funnel their resources into creating more innovative and frequently-changing designs. Since legislation can only promise protection under the law, another possible explanation is that

\textsuperscript{211} Id.

\textsuperscript{212} One possibility is that sketches of an original garment appear on the Internet and can be reproduced immediately, and in any volume, with the sole time lapse being determined only by the time it takes to manufacture and distribute the copied garment. Id. One might envision an online distribution of garment sketches as well, rather resembling the pattern catalogs of old (for e.g., Butterick’s), many of which were done on a mail order basis. In a more current parallel, one might consider e-books that are delivered to various terminals with stand-alone printers, which can be printed instantaneously, and in as many copies as needed, on demand.

\textsuperscript{213} Id. at 1760.
original designers perceive the costs of pursuing such protections for original designs, and litigating for enforcement of those protections, as too onerously high. Yet while protecting designs under a high-IP regime does tend to come at a cost, in many industries that are no more lucrative than fashion, original creators do take recourse to such protective legal measures. Cost does not seem to be an obvious deterrent, and particularly not to those at the highest end of the spectrum, who are analogous to fashion’s original designers at the top of the fashion pyramid. In other words, it is not likely that cost alone keeps fashion’s first movers from bolstering their market advantage with enhanced legal protection.

Recently, however, a consortium of some of fashion’s most successful, and arguably most original, designers has sought a change in fashion’s equilibrium. What may explain this sudden turn toward increased IP protection among fashion’s first movers? One possibility is that while first-mover advantage has remained more or less secured by the same group of original designers in fashion, its overall magnitude has changed over time, and has only recently reached a critical point. In other words, it is possible that changing technology has taken fashion to a tipping point, such that almost immediate reproduction, manufacturing, and distribution of garments is finally eroding any remaining space between originators and copiers. By closing the gap in the fashion cycle, copyists may also be diminishing the returns that original designers can gain from the first unveiling of their works. And by enhancing the quality of their reproductions, copyists may also be undermining the long-term appeal of the original designers’ works—at least some of which has traditionally been based in their claim to superior quality of production. These new elements, and a resulting shift in the fashion equilibrium, may be strong enough to drive designers to seek new IP protections, where previously the case for such protections was not seen as compelling enough to spur them to legislative action.

The first-mover advantage theory ties in neatly with the pattern of trend-setting and induced obsolescence that drives the fashion cycle. When original designs issue forth from top designers, they circulate through the marketplace—beginning with fashion-forward consumers and continuing through to mass-market customers—and, like meteors falling to earth, lose some heat

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214 Id.
215 See supra notes 193-96 and accompanying text.
as they approach. It is in their first appearance, then, that these designs are arguably most valuable, both in terms of commanding the highest prices and in terms of seeming most desirable. While not all original designs are pacesetters, of course, those that are will be snapped up within a very short timespan. In that short time, designers can best recover their often considerable initial outlay, reap a profit on the margins, and simultaneously secure their reputation for originality and trend-worthiness. Indeed, the reputational benefits that first-movers enjoy cannot be overstated. By creating an original work, or style, that becomes the seasonal standard-bearer, an original designer plants her stake in the fashion landscape and secures her place in the pantheon. The most innovative designers and their firms absolutely rely upon this step to establish the value and to grow the renown of their brand. Reputational value bolsters the strength of their trademarks and adds immeasurably to the selling power of their logos. The process may be lengthy—after all, firms like Chanel have matured into iconic brands over more than half a century—but it is essential and requires constant tending. Thus, while the fashion cycle is short and tumultuous, its “long tail” is prolonged and ultimately value-adding. Original designers will recoup their investment in the early and short window of trend-driven sales; but they will realize the rewards from their brand value only after their leadership status is secured.

The window of opportunity for first-movers is critical to their advantage, and nowhere does this seem clearer than in the fashion industry. For one part, it benefits the original designers, as discussed above. It also yields a vital space in which consumers can evaluate the latest fashions, determine what is this season’s trending style or garment(s), and seek out either the original, haute couture version or the inevitable copies or re-workings that are sure to follow. In this time, trending items or styles often become identified in consumers’ minds with their fashion originators, such as Hermes’s Birkin bag, or the Azzedine Alaïa’s “bandage” dresses. In recent years, this window can seem very short: top designs are continually issued and shown at couture collections year-round; photographers, magazines, and now blogs, social media sites, and other interested observers very rapidly disseminate detailed descriptions, critiques, photographs, sketches, and other representations of the original works; follow-on designers are preparing their appropriations, almost simultaneously with these fashion conversations; and

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216 See Kim, supra note 80.
consumers are poring through the host of information in order to determine just which fashions they “must” have and purchase for immediate use. And the speed of the fashion cycle only accelerates with new technologies, as has happened in many other industries as well. Thus, copying seems to approach near-instantaneous rates of reproduction, which leads to the question: when, if at all, does the ever-shrinking window cause copying to become more of a threat to, rather than a mere side-effect of, the production and exploitation of fashion’s original design?

In theory, the simplest answer is that induced obsolescence requires some margin of time between the issuance of original designs and the appearance of their copies. If that margin is so small that original designers cannot sell their goods exclusively, and at a premium, then they will not be able to recoup their investments and make a profit. Recognizing this, original designers would feel they had no incentive to issue original designs regularly, and would instead resort to other strategies, such as continually re-issuing variations on older fashions, or just abandoning stylistic creativity altogether. This scenario would seem most to likely occur if copying were to become nearly instantaneous—which advances in technology would seem almost certain to allow. In recent years, technology has in fact made nearly instantaneous copying possible. Again, in theory, the mechanisms for immediate appropriation seem set in place.

In practice, however, there is a critical reason why near-instantaneous copying has not threatened the creative and commercial fundamentals of original design. The induced obsolescence of the fashion industry depends upon the existence of trends that arise season upon season and anchor stylistic preferences among consumers. These trends can arise across the industry as a whole, or in certain niches that then spread outward to reach a wider audience. They can be seeded by the leaders of fashion, or they can arrive somewhat organically, as a “look” that is carried by the enthusiasm of certain early adopters—not all of whom may be obvious standard-bearers. But in more than one case, these trends do not occur or crystallize overnight; rather, they require some time to disseminate and gain acceptance in the marketplace. Even the most assiduous follow-on designers cannot immediately predict or determine which trends will take hold of the

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218 One example is style-setters in Tokyo, Japan, known as Harajuku Girls, who have cobbled together unique looks, and set trends that have surprised and inspired a range of designers. See Mariana Tsolova, *Walk Like a Japanese—From Kimono to Harajuku*, THE MUNICH EYE (Jan. 19), http://www.themunicheye.com/news/Walk-like-a-Japanese---from-Kimono-to-Harajuku-3078.
consumer imagination—that is, which will sell and which will flop. Their design appropriation, to be cost-effective, cannot occur without such a determination of the latest and most popular trends. There is a strong incentive among follow-on designers to wait until they can most accurately assess the trend-setting pieces that are to be re-worked and resold. Even original designers themselves must wait to see what consumers will gravitate toward and what they will leave on the shelves. This lag-time is critical, therefore, in trend-setting, but also in delaying the process of design appropriation. This lag also secures the first-mover advantage by virtue of ensuring that time must pass between the issuance of original designs, the establishment of trends, and the eventual appearance of copied or derivative works. This may well help to explain why fashion succeeds as a low-IP regime: its structure enables originators to thrive even where legal protections do not shield their works from appropriation.

Even in the current era, when technological advances certainly enable near-instantaneous copying, the lag between original design, trend, and copies does seem to persist.\(^\text{219}\) This merely follows a long arc of fashion history, however, in which the window between phases seems to have been ever-shortening. Empirically, there is much evidence to show that copying was rife in much earlier times, and that copyists became ever more adept at reproducing designs through the technological advances in photographing, communicating, and manufacturing designs both on paper and in cloth. Not once but on several occasions, Congress has considered the legal protection of fashion, only to override its challenge and reject its necessity outright.\(^\text{220}\) Original designers have, for the most part, been quiescent as these challenges have been raised.\(^\text{221}\) Only in very recent years has the clarion call for IP protection of fashion been raised by a consortium of originators in the industry.\(^\text{222}\) They now contend that technological advances have made near-instantaneous copying so profitable that copiers will appropriate even before trends have definitively emerged.\(^\text{223}\) If it is the case that copying has approached such immediacy, and that it

\(^{219}\) Susan Scafidi, Designers try to create or preserve this gap through various techniques, including creating designs “too expensive to replicate on the cheap.” See Pattern Recognition, COUNTERFEIT CHIC (Sept. 28, 2007), http://www.counterfeitchic.com/2007/09/pattern_recognition.php.


\(^{221}\) See Raustiala & Sprigman, supra note 5, at 1758.

\(^{222}\) See supra note 191193 and accompanying text.

\(^{223}\) See Raustiala & Sprigman, supra note 5, at 1759.
has impinged upon original designers to an unprecedented and irreparably damaging extent, then the low-IP regime of fashion may need to be reappraised and perhaps recalibrated. There is a need for empirical data in this regard, but changes in incentives through propertization remains, at best, an open and arguable question indeed.

7. Innovation in the Context of Fashion

Another possible rationale for fashion’s low-IP stasis may lie in the nature of innovation specific to the apparel industry. Broadly speaking, fashion is an industry that cannot look to either continuous innovations or improvements in product quality to drive demand. It therefore requires another mechanism to prompt consumer demand, induce the turnover of goods, and spur sales. The need for such inducements is even greater when taking into consideration the nature of fashion: its garments are ordinarily quite durable, and do not need to be replaced regularly due to simply being worn out and unserviceable. While apparel itself is essential, new apparel often is not (and of course much of its accompanying accessories usually even less so). Nothing, then, inherently necessitates product churn in the context of fashion. Yet the industry’s vitality depends upon consumers replacing their garments, however serviceable, and purchasing new items as often as possible. What then is the mechanism that drives consumer demand? It is the process of trend creation, and its dissemination across the fashion pyramid via appropriation, that moves the market. In short, piracy stokes fashion’s fires and keeps them burning year-round.

In comparing the features of fashion cycles to those of other creative industries, it becomes clear that innovation in the context of fashion is rather special. In electronics, for instance, innovations can be as important as the creation of a new device, such as the invention of the mobile telephone, or as minor as the addition of a new feature on a device, such as the emergence of ringtone choices that are carried on a mobile telephone. On occasion, electronic innovations can be so vital that they disrupt the market altogether and create entire new markets around them, as

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224 See id. at 1762.
225 See id.
226 For a discussion on fashion pyramid, see id. at 1693.
in the well-known case of Apple’s portable devices. Technology affords many examples of “game changing” innovations—inventions that profoundly affect and shape the industry. Fashion has very few, if any, real equivalents. Perhaps the introduction of fashionable denim apparel for both men and women, and across the socioeconomic spectrum (as opposed to merely working attire), could be said to be similarly revolutionary. But another such example is hard to find, as it does not occur with any kind of frequency in fashion. Similarly, innovations that affect quality in electronics—reliability, size and portability, and so on—do not have much of a functional equivalent in fashion. Of course, there are some improvements in the quality of fashion goods, such as better manufacturing processes and greater availability of luxury materials due to globalized sourcing and distribution. But these do not offer the same significant impetus to consumer demand that quality improvements do in the industry contexts of technology and electronics. Simply, fashion does not, and cannot, rely on this kind of innovation to keep its market activity afloat.

But while fashion does not have game-changing innovation, it does have the ability to present itself as ever-changing and newly appealing. The dynamism of the fashion industry is founded on its ability to market its products as seasonal, fresh, and continually desirable—not just on one occasion, but on multiple appearances. The corollary premise that fashion promotes is that consumers should want to pursue the freshest, most widely approved and sanctioned garments—that is, what is on trend. But the trend, naturally, is by design finite and indeed short-lived, so that fashion’s consumers are not only constantly induced to purchase but also, simultaneously, to be seeking the next, newest items to pursue. The iteration of original designs by top designers begins the process, but securing those works by follow-on designers is what adds the seal of general sanction and approbation to the trend. This is the particular nature of fashion—and it may be the most powerful rationale supporting fashion’s acceptance of copying at the heart of the industry. The role that design appropriation plays in trend-setting and securing is likely recognized by designers as an integral part of stoking consumer demand. Possibly for this reason, designers have been loathe overall to pursue greater IP protection in the industry, which might

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otherwise bring it on par with innovative industries like electronics and information technology. The low-IP stasis, then, rests on the understanding that innovation in the context of fashion is particularized and not truly comparable to certain other innovative industries. And as the industry’s vitality is integrally tied to appropriation, it must distinguish itself by maintaining the low levels of IP that best suit its own nature.

There are two objections to the idea that the particular nature of originality in fashion functions best in a low-IP regime. The first one begins with agreeing, ex hypothesi, that original fashion design exists, and that it is generated by top-level designers with enough of a modicum of originality to satisfy the current copyright law requirements. It is also granted that such original design must somehow disseminate throughout the fashion pyramid through the process of widespread trend-setting and appeal to consumers’ purchasing instincts and desires. Haute couture alone, it must be recognized, does not a sufficient fashion market make; mass-market sales are where the bulk of profits lie, and where fashion sees its essential success. But what if such original design were to come under a high-IP regime, subject to copyright and reserving to its designers all the exclusive rights appertaining to copyrighted original work?

One possibility under a high-IP regime might be that original designers would have far greater incentives not only to generate original work but also to create derivative works themselves and to capitalize on the gains from such derivation and, as it were, self-appropriation. Original designers might be motivated to create more tiered levels of apparel and goods, such as the varied brand lines discussed earlier.\textsuperscript{228} Another option, as also discussed,\textsuperscript{229} would be that original designers undertake to engage in more partnerships with retail firms and mass-marketers, so that these derivative works could reach as broad and diverse an audience, at as wide a range of price points, as possible. The work of copyists—and importantly the rents that copyists secure under a free appropriation regime—would be captured by the original designers. It might seem only fair that original designers have the right to benefit from their own derivative and appropriated work, as would be the case under any standard high-IP regime. And perhaps follow-on designers, deprived of the rewards flowing from appropriation, would be stimulated to

\textsuperscript{228} See \textit{supra} at section III.A.
\textsuperscript{229} See \textit{supra} note 102 and accompanying discussion.
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engage in more original work themselves. In theory, this would appear to result in a net increase in originality throughout the industry. Further, it would square with the incentivization rationale of IP law, in which creativity is encouraged and rewarded by exclusive rights. Lastly, where appropriation and/or derivation occurred, it would appear to distribute the associated rewards to the superior claimant, the top designers whose originality dominates and drives the industry. This too fits under standard IP law doctrine, which includes among the rights it cedes to owners the right to make and benefit from derivative work. 230

One countervailing response to this objection is based in an observation of present-day practices: nothing thus far has prevented original designers from engaging in practices such as offering multiple lines of apparel under different brand names, partnering with retail firms or mass-marketers, or otherwise creating derivative works or new items appropriated from their earlier original designs. As noted, increasing numbers of designers are availing themselves of these opportunities to take advantage of their work at multiple levels and in various venues. Moreover, even top designers have been known to circle back and create works that draw upon, or frankly copy, their earlier original designs. 231 The practice of offering multiple iterations of a garment, even among haute couture designers, is well-established. 232 Self-appropriation is accepted

230 In essence, this is Randy Picker’s argument in Of Pirates and Puffy Shirts. See Picker, supra note 39, at 5. There, he argued that the early fashion guilds in America seemed to enjoy some success at shutting down rampant copying and related losses in sales, thereby increasing the creation of original designs and the prices they commanded. Id. at 3. Picker argues that following on this success, some copycat designers began joining the guilds, abandoning their copying efforts and beginning to generate more original designs themselves. Id. The history of the American fashion guilds came to an abrupt end with the antitrust suit of 1941, id. at 4, so Picker’s evidence is perforce slight and inconclusive, as he concedes. But his argument cannot be dismissed, and offers some support for the position in favor of increasing copyright protection for original fashion design.

231 For example, Coach created the “heritage” collection of bags that recreated and “referenced” their own best-selling bags from the 1980s. Christina Binkley, Coach Comes Around to Reclaim Its Iconic Look, WALL ST. J. (July 13, 2012), http://www.wsj.com/articles/SB10001424052702303644004577521072256706462.

industry practice, and readily allows top designers to benefit from derivative work based on their original design. In many instances, their most iconic work can have a very “long tail” indeed, and stretch its rewards over generations of retail and consumption.

At the same time, however, designers could well expand their efforts in this direction. That they are not overwhelmingly eager to do so may indicate several considerations that may not rest on the putative harms of design copying. First, designers may be aware that too much derivative work can dilute the exclusivity, and hence the cachet, of their jealously-guarded name. Even as early as in the 1970s, such famous designers as Pierre Cardin discovered that selling secondary lines, often unfortunately of secondary quality, irreparably damaged the prestige of their brand and the sales of their highest-end goods. Thus, top designers may choose to allow lower-level designers to imitate their work, and yet maintain their distance from those works, thereby reinforcing their exclusive standing. Further, designers at all levels may at some point or other benefit from the open appropriation environment of fashion. While some top-level designers, in particular those who advocate for increased copyright protection of original designs, may offer examples of the harms caused by copying, they do not always discuss, or indeed acknowledge, certain less-obvious benefits that can accrue from open appropriation. These benefit are: (i) the freedom all designers enjoy to borrow from other designers, even among peers; (ii) the ability of all designers to participate in trends that emerge in a given season, which may entail copying, again even among peers; and (iii) the benefits that top designers may gain when their design becomes trend-setting and therefore widely consumed, including increases in sales of the original works. In toto, copying may well serve the industry from top to bottom, and the net aggregate return to the industry may well explain the persistence of the low-IP regime.


INTRODUCTION

In the last 40 years, IP rights in academic work, such as scientific research and discovery, has seen an enormous growth in generation of work, management of rights, and allocation of rewards. More recently, the ownership of academic copyright has recently become a hotly contested issue in the higher education sector, due in great part to the disruption that the Internet has wrought on many areas of academic work, including teaching and learning, scholarship, preparation of courses and related materials, and other tasks and outputs. To analyze IP in the educational sector, one must begin with recognizing the transformation of the academic marketplace. The emergence of IP rights as a vital area in academic circles began with rights in patentable work. The Bayh-Dole Act of 1980 was enacted to spur academic research and innovation, by allowing it to be patented and marketed for profit. Recognizing the value of such work at the outset, universities were quick to assert rights over patentable work, establishing sophisticated technology transfer offices to manage such rights and the revenues that might accrue from marketing of patented academic work. At the same time, faculty scholars strongly asserted their right to continue publishing their results, and in many instances reserved their right to share and collaborate in “upstream” scientific research. The division was made relatively clear: universities owned patent rights -- with the exception of certain spin-offs created by especially entrepreneurial faculty -- while faculty members maintained the right to publish, teach, own and control their scholarly work, such as articles, textbooks, and other written work.

The division of IP rights in patentable academic work created a de facto allocation of rewards as well. On the institutional side, universities had the right to own and commercialize patentable scientific research and discovery (“R&D”). This reward of ownership also came with a strong measure of control, particularly when the patentable work was initially funded, in part or whole, by outside entities, such as venture partners, corporate sponsors, and so forth. Ownership and control, however, can challenge the culture of open sharing and collaboration that many academics feel is innate, and even necessary, to the “cultural commons” of higher education. Many scholars still dispute the value of commercialization of patentable academic work, when
such monetary potential is measured against the cultural values of education -- the sharing and dissemination of information, pedagogy, academic freedom, and so on. But at the same time, scholars cannot so easily dismiss the benefits that come from relinquishing patentable rights so that they may be monetized. Scholars whose work is patentable do gain considerable reputational benefits, access to grants and outside funding, as well as other desirable status-related rewards in their field. Moreover, the monetary rewards that can flow from patents enrich the university, which redounds to their benefits -- witness the success of Gatorade at University of Florida, and the rewards it has yielded to the entire institution’s benefit. Monetization, therefore, can offer a reason for academics to compromise on IP rights -- and in a best-case scenario, the outcome can be described as win-win.

On the copyright side, the division of IP rights with respect to the ownership and control of courses and related course materials has been far more quiescent until quite recently. Early cases involved disputes over academic copyright in lectures and lecture notes prepared by professors. Both well-established practice and state copyright law made it clear that professors were considered to own the rights in their lectures and lecture notes. The latter, i.e., the lecture notes, served to “fix” the lectures sufficient for copyright purposes, and thereby enabled the lecturer to assert copyright in his or her lectures and, naturally, courses.

Courts granting faculty ownership and control over their lecture notes relied upon a doctrine known as the “teacher exception” (also sometimes referred to as the “academic exception”). Without the protection of the teacher exception, an argument could be made that faculty working for universities were employees of the institution under the common law of agency, and were therefore subject to the “work made for hire” doctrine that vested rights in their output to the institution. The “teacher exception,” however, as delineated by the courts, exempted faculty from the work made for hire doctrine on the grounds that academics were autonomous agents, whose professional lives were defined by academic freedom -- a high degree of independence from any institutional controls, enabling faculty to engage in free thought and expression that may be considered essential to advancing scholarship, teaching, and learning -- and that faculty were therefore the owners of copyright in their work. All this became thrown into question by the enactment of the Copyright Act of 1976, which was silent on the issue of teachers’ rights, and
did not codify the judge-made exception into statutory law. Since the promulgation of the Act, courts have not clearly spoken on whether or not the teacher exception survives to date.

Why, then, has copyright in courses become a hot-button issue now? As in the case of patentable academic work, the commercial potential of courses has driven the debate. The emergence of the Internet, and its ability to make online education -- or distance learning -- viable and active on a scale previously unheard of, perhaps unimagined, has opened up new vistas for the commercial potential of academic courses. Distance education allows universities to disseminate courses to vast audiences, and in theory at least, to charge supplementary fees for such courses. The spread of online courses has seemed to promise new profits for cash-strapped institutions. At the same time, another trend in education is the ongoing increase in hiring of permanent adjunct professors, rather than tenure-track faculty, to teach courses. “Adjunctification,” as it is known in higher education circles, tackles the expense side of the ledger, while monetization of courses affects the revenue side. But do adjuncts function more as independent contractors than as employees of an institution? The trade-off seems to be one of decreased autonomy, and likely decreased academic freedom, but increased mobility, agency, and ability to circulate on the open marketplace. Should adjuncts, if they are indeed independent contractors, be exempted from the work-made-for-hire doctrine not due to the “teacher exception,” but rather due to their status as non-employees? And if so, do they have a stronger right to claim copyright in their work?

The first case that brought copyright in courses to the fore was not one involving an adjunct, however, but one involving a famous faculty member at Harvard Law School, Professor Arthur Miller. The Miller dispute made waves in academic circles in part due to a dawning awareness that distance education was burgeoning, and institutions had better respond quickly by making their “land grab” much as had been done in the early days of patent’s commercial promise. Universities did so respond, on several counts. First, many chose to establish online ventures, either individually or collaboratively, seeking to gain a “first-mover advantage” in the online marketplace. Second, most issued comprehensive copyright policies, or contractual agreements with faculty, usually asserting institutional ownership of copyright related to courses their faculty offered at the university. And third, as in the case of Professor Miller, most chose to make it
clear that they would defend the institutional right to assert copyright in courses and related work.

Interestingly, however, even the most entrepreneurial universities failed to take into account one reality of the marketplace, academic or otherwise: for a seller to succeed, there must be a willing buyer on the other side. Virtually every distance education venture established by traditional universities failed to recuperate its startup costs, primarily because the buyers just were not there: the online courses were generally massively undersubscribed, and any groundswell of interest in general education seemed elusive, not to materialize in actual course participants. In other words, the gold rush mentality that sought to make copyright in courses the new ground for monetary success met up with the reality of the marketplace. Courses suddenly seemed only valuable in the context of a degree-granting program, whether educational or vocational. And concomitantly, the tussle over copyright in courses went quiet again.

Almost at the same time as the diminution in the distance education gold rush, a few entities, most notably MIT, were exploring an “open source” alternative to for-profit online learning. The OpenCourseWare project was the most ambitious in scope, and in many ways the innovative leader in the emergence of free online courses, available to all, known as “Massive Open Online Courses” (“MOOCs”). MIT’s project was primarily underwritten by a very large funding grant, as well as by its institution’s deep endowment. In certain other cases, such as Coursera, edX, and Udacity, institutions may partner with venture capitalists, philanthropists, government support, and other outside sources, to fund startup, maintenance, and expansion costs. Some MOOCs offer programs that may award a “certificate of accomplishment”, but most still offer only credit or non-credit courses, while none to date terminate in a degree.

If MOOCs offer primarily free courses online, why would course copyright continue to matter? The most powerful answer at present is that their business model is still evolving, and institutions are still keenly interested in trying to monetize them. Various commercially interesting options have been raised, including: (i) A tuition model, under which students pay the originating institution for course credit; (ii) a cross- or up-sell model, under which course materials, such as videotaped lectures, are freely available, but ancillary services such as assignment grading,
access to social networks and discussions, and so on are fee-based; and (iii) a spin-off/licensing mode, under which the course, parts of the course, or customized versions of the course are sold to institutions or businesses for their internal use; or use of the MOOC platform itself is licensed for institutional use. Under any of these business models, monetization of the courses offered would benefit the copyright holder in the course, and might yield further benefits upon exploitation of derivative works or use.

The emergence of MOOCs is being heralded as a major part of disruptive innovation in the higher education sector. It is in particular one aspect of the separation -- the “unbundling” -- of the goods and services offered by the modern university, and sold to its customers in either a full menu, such as a terminal degree program, or a la carte, such as an individuated course. This draws into question, however, what is valued at the university, and not just what has (monetary) value. Is it the degree, as the “freemium” model -- which gives away the course content and retains the value in the final imprimatur of a degree -- that has value? Is it the instruction by a professor to a class of students, and if so, does it matter if the class consists of a handful of students meeting face-to-face or an audience of asynchronous, invisible learners connected by technology? Is an instructor the creator of a course, or merely its vessel for delivery? Does she have control of her work, and ownership rights in it, or does she transmit it and relinquish it to the institution at which she teaches? What goal does copyright in education serve? As the Constitution provides, it is intended to “promote progress of science and the useful arts.” Does vesting copyright in a particular entity or person make a difference to the promotion of progress in education? The standard argument in favor of granting the “limited monopoly” that intellectual property affords is that without its incentive, creators will not be able to recuperate their investment costs of creating, let alone make a profit from the fruits of their labor. Granting copyright in courses and related materials, if such can be sold and exploited via online learning ventures, should surely further the purpose that lies behind the grant of intellectual property rights. What is unclear, however, is who should hold those rights in the brave new world of distance education, and whether copyright can be allocated in a balanced way that serves faculty, both itinerant and fixed, as well as institutions, both established and new. These important normative questions are not answerable by black-letter law. Thus, we need to work through the
implications of how we as a society want to address these conflicts and contradictions and shape the law to changing circumstances and technology.

In this chapter, I address the complicated issues surrounding ownership of copyright in academic work with a survey of its treatment in the courts, both prior to and following the enactment of the Copyright Act of 1976. I show that the narrow “teacher exception” to the work-for-hire doctrine, which normally governs the ownership of work done in the employment context, has been carved out by practice and policy, but not codified into law. The status of the teacher exception is therefore unclear, and may not survive challenge in the courts. Due at least in part to this ambiguity, I show that higher education institutions are taking care to draft contractual policies and agreements that allocate copyright ownership rights and rewards in courses and related course materials. I examine several university policies that exemplify the distribution that most institutions now agree on, in which course ownership is claimed by universities, while support and resources for course creation, sometimes with additional compensation, is accorded to faculty. Finally, I discuss the future of academic copyright ownership in the context of the burgeoning online education market. I argue that in early stages, the expenditure of university resources in starting distance education programs may justify institutional ownership of copyright. However, as universities continue to move toward a business model that entails the increased hiring of adjuncts -- free agents who far more closely resemble independent contractors than university employees -- they may be compelled to reconsider their ownership in courses pursuant to the agency law contours of the work-made-for-hire doctrine, and to return copyright ownership to the academic creators who will take their work into the academic marketplace and earn their livelihood from its exploitation both online and in the traditional university space.

I. BACKGROUND

A. Early Spaces of Commercialization in University Patents

Copyright ownership in the university has moved away from its sedate, well-established past to a more contested territory with mutable borders. This development is relatively recent, but has accelerated in the past decade or so since the wide-scale adoption of the Internet. The driving
force of this change is the increasing commercialization of academic work, especially intellectual property. Technology transfer offices have long exploited the profit potential of commercially viable scientific research and discovery, and patentable academic work has been one of the earliest spaces of the commercialization and monetization of academic work.

Until recently, commercialization in U.S. universities has grown in the wake of congressional legislation, the Bayh-Dole Act of 1980,\(^1\) that gave universities the ability to patent and license scientific inventions and discoveries to corporate entities and partners.\(^2\) One example is that of Novartis, the Swiss pharmaceutical company and producer of genetically engineered crops, which agreed to fund $25 million of basic research at the University of California at Berkeley’s Department of Plant and Microbial Biology.\(^3\) In exchange, Novartis retained the first right to negotiate one-third of the department’s discoveries, even if the research was government-funded.\(^4\) Novartis also retained two of the five seats on the department’s research committee.\(^5\) This agreement, according to some observers, was unprecedented, and gave rise to broadly held concerns over academic freedom and the free exchange of ideas in the university setting.\(^6\) As one scientist maintained, “this deal institutionalizes the university’s relationship with one company, whose interest is profit.”\(^7\) Following on this scenario, similar arrangements have arisen in the academic world. It is increasingly common, for instance, for university scientists to negotiate to retain stock options and other incentives that might affect the impartiality of their research.\(^8\) Moreover, companies may require scientists to keep research in secret for longer than they might otherwise normally do so, delaying publication or even discussion of their work, to such an extent as may stifle the community of sharing that has traditionally been the norm in the university-driven sciences.\(^9\) Some studies have also found that industry-sponsored research has

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4. Id. at 40
5. Id.
6. Id.
7. Id.
8. Id. at 41
9. Id. at 41-42
produced more industry-beneficial conclusions than research that is not funded by industry -- a conclusion that casts no small cloud on the commercialization of academic science.

The emphasis on commercialization of patents has shifted in recent years to a concern that such profit-driven motives are spilling into other areas of academic creation, including work that may be open to copyright. Professor James Boyle, for example, fears that the concentrated privatization of scientific research will lead to “creators [being] prevented from creating,” as the availability of material in the public domain is diminished or impinged upon by private nets being cast around basic research and discovery. Others feel argue that “the classical view of knowledge for knowledge’s sake [has been] supplanted by the public-service mission of ‘knowledge for use.’” But the fear that speaks specifically to copyright in academic work is not only a fear of utility, rather than learning, becoming the driver of instruction and learning. Rather, it is a fear that the intellectual endeavors of professors are being commodified, managed as intellectual property by institutions’ administrative arms, and marketed with an overriding profit motive in view. Thus, for instance, after passage of the Bayh-Dole Act of 1980, the University of California System (the “UC System”) focused its attention on its existing central office for all of the universities, known as the Patent, Trademark, and Copyright Office, and transformed it into the Office of Technology Transfer. Individual campuses were then given the choice to create their own technology transfer and licensing offices, with some “provid[ing] management for commercializable software.” Not until 1988 did the UC System create a University of California Task Force (the “UC Task Force”) to consider the need for a specific Copyright Office, which could address more comprehensive issues of ownership in courses that

10 Id. at 42. Mildred Cho, a senior research scholar at Stanford’s Center for Biomedical Ethics found that 98% of papers based on industry-sponsored research reflected favorably on the drugs examined, as compared with 79% of papers based on research not funded by industry. Id.
11 Press & Washburn, supra note 3 at 48.
14 University of California, “Institutional,” Universitywide Taskforce on Copyright: Report and Recommendations (Oct. 1999), at 4 [hereinafter UC Taskforce on Copyright].
15 Id.
might be used for distance learning or other market-driven projects. In other words, the UC System began to shift from the general management of intellectual property to a more concentrated focus on profit-making academic work, not just in kinds of patentable work but also in various forms of copyrightable work.

On the technology transfer side, the profits to be made from academic work are impressive. The Association of University Technology Managers estimates that in one year 189 North American universities (US and Canada) reaped $1.5 billion from royalties and licenses. In part, this implies that universities are capitalizing upon academic research, inventions and discoveries before they can reach the public domain, and perhaps before they can even reach publication. This raises important questions concerning nature of not only scientific research, but also scientific norms, research sharing, publication, tenure, and other key components of academic work.

In the 1990s, the advent of academic courses offered via distance learning only augmented some of these key concerns. At this time, not only universities but also businesses, including some profit-driven educational ventures, saw and seized upon the commercial potential for education disseminated online to a new, burgeoning audience of students. Some of the early efforts in this new online space were collaborative; however, they often resulted in battles over the commercially viable intellectual properties underlying the courses. For instance, unauthorized commercial note-taking emerged as an early issue, and universities quickly learned to use the

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16 Id.
19 See Press & Washburn supra note 3. See also Bronislaus B. Kush, Funding can blur line between research and business; Many institutions and journals are worried about conflicts, TELEGRAM AND GAZETTE Apr. 6, 1998, at A6, (noting results of zinc lozenges as helping to cure the common cold indicate that the researcher held stock in the company that made the zinc lozenges: “After the stock soared, the researcher sold his shares and made $145,000.”)
law to protect themselves, and their faculty’s output, through such measures barring unauthorized third-party note taking as state legislation, cease and desist letters, and litigation.\(^{20}\)

As early as 1988, David Noble wrote: “During the last two decades campus commercialization centered upon the research function of the universities, but it has now shifted to the core instructional function, the heart and soul of academia.”\(^{21}\) This change in institutional focus, according to Noble, is spurred by technology industries and corporations “looking for subsidized product development and a potentially lucrative market for [instructional hardware and software],” which leads to a “fundamental transformation of the nature of academic work and the relationship between higher educational institutions and their faculty employees.”\(^{22}\) This commercial thrust is mirrored by for-profit companies, which require faculty to assign them copyright as part of their terms of employment, under a business model -- rather than university tradition -- in order to make their distance learning projects both operational and profitable.\(^{23}\)

More recently, the profit potential of distance learning and other technology-driven works have come to the attention of the higher education sector, which has spurred an interest in copyrightable classroom. This creative work, deriving from teaching, research, and writing, is now the contested territory of intellectual property ownership in traditional non-profit institutions and for-profit ventures alike. As one journalist, upon speaking with online education consultants, has noted, “[t]his idea of wrestling academic control from the faculty is at the heart of many


\(^{22}\) *Id.*

\(^{23}\) Nobles’ articles illustrate university and for-profit connections in the online sector, often at the expense of faculty.
business models.” One such consultant, Bob Tucker of InterEd online education, led Arizona State University’s initiative to build its online program outside the scope of faculty oversight, in order to run the online venture as a business model, but also specifically to avoid “the enormous bureaucratic red tape” that faculty participation would necessarily entail. Many other universities, including UCLA, New School for Social Research, and Columbia University, have engaged in distance learning projects as well. Some of these institutions have considered the Arizona State model in their ventures, but it remains to be seen whether they, too, will seek to exclude faculty oversight in their pursuit of education in the online space.

B. Software and Digital Media

The changing nature of the academic marketplace may well trigger more contentious claims -- if not litigation -- over copyright ownership in faculty-created work. As noted, universities once tended to refrain from challenging ownership in faculty work at least in part because there was no expectation that such work would become commercially marketable. Only in the area of technology transfer, where valuable patents have always been commercially viable, have universities looked to reap significant sources of revenue from academic intellectual property. But while most universities’ technology transfer offices have concentrated their efforts on owning and harvesting marketable patents, some are now looking to potentially lucrative

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25 Id.
26 An early example of distance learning was Fathom, a joint venture between numerous prominent institutions to offer online courses. Fathom was conceived as a route to monetizing online education, but eventually disbanded when it failed to attract a sufficient volume of students. Participating institutions included Arizona State University, Columbia University, the BBC, UCLA Extension, University of British Columbia, University of San Diego, University of Washington, Concord Law School, Syracuse University, University at Buffalo, University of California Extension, Berkeley, University of Michigan-Flint, American Film Institute, the British Library, the British Museum, Cambridge University Press, London School of Economics, the Natural History Museum, New York Public Library, RAND, the Science Museum, University of Chicago, and University of Michigan. See Course Providers, FATHOM at https://web.archive.org/web/20020829013101/http://fathom.com/about/course_providers.jhtml. See also the University Alliance, which includes Jacksonville University, Regis University, Saint Leo University, University of South Florida, Villanova University, and eArmyU (the U.S. Army), Homepage, UNIVERSITY ALLIANCE, http://www.universityalliance.com (last visited Feb. 28, 2015).
28 See Id.
copyrights to add value to their IP portfolios. As one commentator puts it, “[t]he ownership of academic work, non-patentable work, is now on the table as a negotiation item between faculties and their employing universities.”

The main driver of change is simply that faculty members are creating more copyrightable works that potentially have substantial commercial value. For instance, university departments of science and engineering have created pioneering software that underpins both the Internet and the economy the Internet sustains. Some digital media, also often generated by universities, such as online content and databases, may have substantial commercial value. Most germane to the point, universities are increasingly focused on growing both online courses and the digital materials (including lectures, class notes, platforms, and so on) on which these courses are based. Distance education, an industry experiencing exponential growth in both for-profit and not-for-profit sectors, relies upon such digital educational materials for its very existence. At the same time, many traditional universities have sought to stay competitive with distance education providers by offering online courses and utilizing or distributing digital course materials, while incurring minimal additional costs to their institutional budgets. When

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29 See Arti K. Rai, University Software Ownership and Litigation: A First Examination, 87 N.C. L. REV. 1519, 1525 (2009) (“[I]n contrast with biotechnology, where copyright is not available, universities can use software copyright to achieve revenue goals); Scully, at 229, 231, 259
30 Scully, supra note 27, at 260.
31 See Id. at 239 (explaining how this changed, and how circumstances differed “before the arrival of digital distribution by the Internet ten years ago” [that is, ten years prior to the article’s publication in 2004]).
32 See Id. at 257 (outlining the development of the “information economy,” in which “[w]ealth could now be more easily created from the acquisition, manipulation, and dissemination of information through computers and the Internet than from the manufacture and distribution of tangible goods like razors and race cars”).
34 See Morgan, Glenda, Faculty Ownership of Digital Course Materials, 5 TEACHING WITH TECH. TODAY (Jan. 25, 2000).
36 See REPORT ON COPYRIGHT, at 22-24 (“One major benefit of [online education] is that educational institutions have the costs of expensive distance education defrayed by their corporate partners...and often gain access to the latest research of leading academics as reflected in their curriculum”); Klein, supra note 35 at 148-49 (providing examples of several universities that offer distance education courses in conjunction with for-profit ventures); Scully, supra note 27 at 231.
universities can couple such course offerings with proprietary software, social network platforms, and other digital media, they can strengthen their competitive advantage and stay ahead in the commercial educational marketplace.

C. Lectures and Lecture Notes

One area of copyrightable academic work that predated the emergence of technology such as software, the Internet, and digitization is the ownership of lectures and lecture notes created by a professor for a specific course. This was an early area of litigation in the academic sector, a notable fact given that litigation in the area of copyright ownership of scholarly work has been remarkably sparse. There are two rather obvious reasons for the relative lack of published opinions in the field. First, universities generally prefer not to resort to litigation, particularly against their own faculty members. The academic world tends to favor internal resolution of disputes, thereby avoiding both internal discord in the community and outside attention to its concerns. Second, the vast majority of educational institutions now preempt potential disputes over copyright ownership through the careful preparation of faculty policies and guidelines, as well as employment contracts. Virtually every university has sought to meet today’s intellectual property challenges by drafting policies that specifically address the allocation of ownership rights in the work created by its faculty. Third, and lastly, a relative lack of commercial value in copyrightable academic work has mostly relegated such disputes to a back-burner status. Unlike the evident potential value of patentable work, copyrightable work has never seemed to hold out the promise of riches for either institutions or faculty. Although the

37 Nathaniel S. Strauss, Anything But Academic: How Copyright’s Work-For-Hire Doctrine Affects Professors, Graduate Students, and K-12 Teachers in the Information Age, 18 RICH. J.L. & TECH. 1, 3 n.10 (Fall 2011) (citing WENDY S. WHITE, WHAT TO DO WHEN YOU GET A SUBPOENA OR A LEGAL NOTICE OR COMPLAINT? (2010)).
40 See Ashley Packard, Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work, 7 COMM. L. & POL’Y 275, 294-99 (citing Laura G. Lape, Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies, 37 VILL. L. REV. 223 (1992)).
academic sector does have something of a reputation for in-fighting over seemingly insignificant rewards, until quite recently copyright has not typically been one of the disputed domains.

Lectures and lecture notes were likewise not subject to dispute for a significant span of time. As in the case of a professor creating copyrightable work such as a book, article, or monograph, deeply-seated academic tradition and widespread belief in the academic community generally held that the work belongs to the professor who creates it. However, even prior to the Internet, copyright ownership debates did arise over the unauthorized publication of lecture notes by third parties not associated with the originating faculty member or university.

A preliminary concern with lectures and lecture notes was fitting them into the purview of copyright law in the first place. Two points of contention needed to be cleared: “creativity” and “fixation.” In order to be copyrightable, the Copyright Act provides that a work must have some modicum of creative originality and be fixed in a tangible form. While relatively low, the creativity threshold is important. As one commentator, Professor Elizabeth Townsend-Gard, illustrates: “a multiple choice or essay test would, in most circumstances, meet the two requirements. However, if a teacher prepares an answer sheet that has the student circle either the ‘T’ or the ‘F’ for twenty-five questions, in all likelihood the answer sheet would not be copyrightable, because two columns with ‘T’ and ‘F’ in them would not meet the minimum

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41 As the famous Columbia Political Science professor William Stanley Sayre once noted “academic politics is the most vicious and bitter form of politics, because the stakes are so low.” Alan L. Otten, Politics and People, WALL ST. J., Dec. 20 1973 at 14. This quote is often attributed to Henry Kissinger. See A Humanist at the Humanities, THE NEW REPUBLIC, 8 (Aug. 20, 1977)( “The republic of learning and letters works by squabbling—especially bitter squabbling, Henry Kissinger used to say, because the stakes are so small.”).
42 See, e.g., MCSHERRY, supra note 37.
43 17 U.S.C. § 102(a): “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression... Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”
45 Professor Townsend is an Associate Professor at Tulane Law School.
qualifications for creativity or originality.” As Professor Townsend-Gard further points out, “the policy behind this makes sense: if one teacher owned the copyright on that type of answer sheet, that one teacher could prevent everyone else from using that form, because having a copyright allows the owner to control the reproduction and distribution of the work, the creation of derivative works, the distribution of copies, and the public performance of the work.” Under the idea-expression dichotomy of copyright law, a copyright protects the expression of a creative work, but does not create the ideas expressed within said work. Thus, if the teacher in the above example were to create an essay test, rather than a multiple-choice test, the phrasing and language of the essay questions -- that is, the art of creation -- would be protected, while the facts and ideas expressed would not. In other words, if another teacher were to use the same ideas as those in the test, her essay test would not be found to infringe on the original work. However, if her expression of those ideas were to resemble too closely the original, her essay test might not be considered infringing under copyright law.

Lectures and lecture notes, typically prepared for a specific class by a professor, are likely to meet the originality requirement. In cases where the lecture is “canned,” or offered many times without variation, even among professors -- for example, a bar review lecture that follows a highly fixed format and structure, and that may not vary even in phrasing over several years -- there may be some debate as to originality. But again, a relatively low modicum of originality would be sufficient to pass muster for most university professors and the class lectures they individually prepare and present.

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47 Id. at *222. See also, 17 U.S.C. § 106
48 See, e.g., Mazer v. Stein, 347 U.S. 201, 217 (1954)(“Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”)
49 Townsend, supra note 46, at 222. See also, 17 U.S.C. § 102(b): “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work.”
Lecture and lecture notes, however, are less clear-cut than exams on another front, as they do not on their face meet the “fixed” requirement of copyright law. A professor who seeks to copyright her lecture must render it in a fixed, tangible form. If she writes out her lecture in a document, or if she creates written lecture notes, those written versions are protected by copyright. If she creates audio or video recordings of her lecture, these versions may also be protected by copyright. If the professor authorizes students to tape-record her lecture, the tape recordings will be deemed to fix the lecture sufficiently to establish copyright in the live version. However, the permission she grants to the student in making the audio- or videorecorded copy of the lecture does not transfer any kind of ownership rights in the copyright to the student. The professor alone retains the rights to reproduce, distribute, and publicly perform the lecture elsewhere. The student, on the other hand, retains ownership only of the audiotape or the videotape itself; she has no rights in the content of such recordings.

50 Prior to the Copyright Act of 1976, courts had ceded ownership of lectures to the lecturer. Kenneth D. Crews, Instructional Materials and ‘Works-Made-for-Hire’ at Universities: Policies and Strategic Management of Copyright Ownership, in THE CENTER FOR INTELLECTUAL PROPERTY LAW HANDBOOK 19 (Kimberly M. Bonner, ed., 2006).
51 17 U.S.C. § 102(a)
52 Lecture notes, even if unpublished works, are still protected by statutory copyright. The term of copyright begins from the moment of the lecture notes’ creation and lasts for the life of the author plus seventy years. See, e.g., Mike Masnick, Professors Claiming Copyright Over Their Lectures, TECHDIRT (Oct. 6, 2009, 9:33 A.M.), https://www.techdirt.com/articles/20091005/020707420.shtml (citing the Harvard Office of General Counsel’s assertion that lecture notes, and the lectures themselves by extension are copyright and owned by the professor). See also Faulkner Press, L.L.C. v. Class Notes, L.L.C., 756 F. Supp. 2d 1352, 1357 (N.D. Fla. 2010) (holding that a professor’s practice questions were protected by copyright and rejecting defendants fair-use predicated summary judgment motion).
53 See generally Id. See also 17 U.S.C. § 102(a)(6)
54 The whole question of whether teachers own their own creative work could be seen to begin, or at least to come to general attention, with the issue of teacher ownership in lectures and lecture notes. The earliest iteration of the question was whether a student, audience member, or third party could transcribe and print the notes from the lecture, and then disseminate them to others. In an important early case on this matter, the court found that only the lecturer held the copyright in the lecture, and not those who were merely taking down the lecture notes. See Williams v. Weisser, 78 Cal. Rptr. 542 (Cal. App. 1969).
55 See 17 U.S.C. § 202: “Ownership of a copyright… is distinct from ownership of any material object in which the work is embodied.” One possible way of heading off any problems at the onset would be to allow a recorded copy of the lecture to be made by a third party, on the condition that she transfer the recorded copy to the instructor upon completion of the course. This would give the instructor a recorded copy of her own course, and would establish copyright in lectures if an issue were to arise at a later time. See Townsend, supra note 46, at 223 n.66.
56 See 17 U.S.C. § 202, discussing ownership of copyright as distinct from ownership of a material object.
57 Id.
The issue of ownership in lecture notes was established in an early case involving academic work, in which the court granted the right to control both lecture notes and professionally-generated lecture notes to the professor who created the original, underlying lecture.\footnote{See Sherrill v. Grieves, 57 Wash. L. Rep. 286 (D.C. 1929).} This expanded to allow courts to grant faculty ownership in lecture notes and other copyrightable works, under the court-made doctrine known as the “teacher exception.” Ownership afforded faculty members the fundamental grounds for their professional roles: (i) the autonomy requisite to academic freedom; (ii) the ability to produce material without outside interference or input regarding content; (iii) the control to determine when a work should be published (both in the subjective sense as to when the author believes the work to be ready, and in the objective sense as to the timing of the stages that lead up to publication); and (iv) the ability to take lectures and deliver them to students at another university when the faculty member taught elsewhere, either temporarily or permanently.\footnote{Townsend, supra note 4 at 211}

The expansion of the “teacher exception” was widely seen as encompassing academic scholarship, publication, and creativity as a whole. Thus, it was generally agreed that academic faculty owned their creative works, whether they be made for the classroom, during working hours, or as a part of ongoing scholarship. Ownership of such academic work, afforded by the “teacher exception,” gave faculty members certain rights and privileges: (i) the freedom to take their work with them, and to use their work at other universities; (ii) the right to make alterations, new versions, and new creations from the initial works; and (iii) the right to make profits from their scholarly works, such as textbooks, monographs, or other publications.

This understanding was thrown starkly into question, however, by the promulgation of the Copyright Act of 1976, and it is far from clear, how such treatment of lectures will fare under cases that may be brought subsequent to the enactment of the 1976 Copyright Act. Recent history has shown that some well-established practice may be under challenge, both by courts and by litigious institutions seeking to protect their own intellectual property portfolios.\footnote{There has been some dispute over whether third parties can market course lectures and notes. UCLA, for instance, has filed lawsuits to protect the lectures, while other California State University and other University of California schools have sent cease and desist letters to note taking companies such as}
same time, however, institutions value copyright in lectures highly enough to lobby for protection against copying and commercial exploitation of professors’ lectures by unauthorized third parties. In response to such lobbying, for instance, California passed legislation prohibiting the unauthorized sale of lecture notes to such commercial note-taking companies as Versity.com, Study24-7.com, Studyaid.com, and StudentU.com.\(^{61}\) All of these sites ceased to operate by the end of 2002, due to a combination of legislative efforts such as California’s, cease and desist letters issued by various institutions such as Yale University, and a subsequent lack not only of profitability but also of long-term viability.\(^{62}\)

**D. Courses: Beginning of the Academic Copyright Era**

Lecture notes, however readily transcribed and disseminated, may have represented an early foray into staking out copyright claims in course ownership. But like Cliff Notes, or other forms of “short-cuts” available to students, their dissemination and use is not likely to pose a serious threat to academic activity and its intrinsic value. Only students already taking a class are likely to avail themselves of note-taking services; and this means that students have already paid for the class, and both the institution and the faculty have garnered the profits of their attendance. The value of note-taking services might diminish the professor’s ability to monetize her own transcription of lecture notes, should she choose to do so, but those are the only lost profits that may be held to the account of such third-party services. Thus, while vigilant to the potential for undermining class attendance that transcription services raised, universities were not especially inclined to see their sale of lecture notes as more than marginally challenging to the university business model based on the monetization of classroom attendance by degree-seeking students.

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\(^{61}\) *Editorial: Lecture Notes Will Protect Students from Illegitimate Services*, DAILY CALIFORNIAN, September 28, 2000; Sharon Jayson, *Online Notes Debate: College Lecturer Split Over Propriety of Free*, AUSTIN AMERICAN-STATESMAN, March 26, 2000 at B1 (“StudentU.com has 1,300 notetakers on more than 80 campuses. Study24-7.com claims a presence at more than 300 colleges and universities through the United States, Canada and the United Kingdom.”)  
The first real challenge, then, arose in the early days of the Internet, with a dispute that occurred so publicly, and that involved such esteemed parties, as to send a shot across the bow of academic institutions across the U.S. In 1998, the prominent Harvard Law School professor Arthur Miller elected to record a series of videotapes of his famous lectures on Civil Procedure. He then entered into a contractual arrangement with Concord Law School, a for-profit and wholly-online institution, for the delivery of the Civil Procedure lectures in an online course.\footnote{63 See Amy Dockser Marcus, Seeing Crimson: Why Harvard Law Wants to Retain One of Its Star Professors, WALL ST. J., Nov. 22, 1999, at A1.} Perhaps understandably, Concord highlighted the connection by prominently advertising the courses as “taught by Harvard Professor Arthur Miller.”\footnote{64 Id. See also Professor Miller’s “About the Lecturer” on the Concord Law School site, available at http://www.concordlawschool.edu/lecturer/arthur-miller.aspx (last visited Feb. 25, 2015).} Harvard strongly objected, and voiced their objection primarily on the ground that university policy prohibited its faculty from teaching at outside educational institutions without express permission being first granted by the administration.\footnote{65 Marcus, supra note 63, at A1.} No doubt the dilution of their brand name may have added a significant dimension to their outrage, but Harvard did not so explicate in making their stand.\footnote{66 Id.} Miller argued, in response to Harvard’s objection, that the course merely consisted of a series of “canned,” videotaped lectures -- and that at any rate he owned the copyright in the lectures he produced, and was therefore free to dispose of them as he chose. Ultimately, the parties resolved the dispute out of court, and Miller was compelled to refrain from offering the courses at Concord.\footnote{67 Id.} Further, Harvard hastily called a meeting of faculty and administration, at which it was decided that any professor seeking to teach a course outside the precincts of Harvard must first obtain the approval of the appropriate oversight body of administrators to receive clearance for such an action. The dispute over copyright was raised, but not resolved. Still, it was clear that academic copyright was not solely in the hands of a professor who created and taught a course.

The attention the Miller dispute garnered brought to the forefront the increasing stakes in the distance education arena.\footnote{68 See Id. (explaining that Professor Miller’s sanctions would be no more than that issued by Harvard university); see also Klein, supra note 35, at 192 (discussing the innate friction arising from Harvard’s}
Dershowitz, pointed out at the time, “[w]hat distinguishes the Internet [from other forms of distance learning] is the number of zeroes. The money is so overwhelming that it can skew people’s judgment.” But money was not the only sticking point that the Miller dispute highlighted. Issues of course ownership and control were equally paramount. As yet another famous Harvard professor, Henry Louis Gates, Jr., pointedly said, “I’ve been teaching the same course -- for 23 years. I’ve taught at Yale, Cornell and Duke, too, and when I moved to a new university nobody said to me I couldn’t take my course with me because the university owned it.” The assertion of faculty ownership, then, was clearly linked from the onset to a sense of academic autonomy and control. The advent of distance education, reflected in the Miller dispute, not only served to underscore an inevitable clash between traditional and non-traditional educational institutions using the Internet to educate and disseminate instructional materials. More remarkably, however, it vividly illustrated the persistence among almost all stakeholders in higher education -- faculty, administrators, publishers, and even students -- a profound and lingering conviction that professors above all own the academic work that they create. Of course, this belief, while widespread, may not be true. In fact, the law is far from clear as to whether or not the professor owns her course outright, be it taught in traditional academic bricks-and-mortar classrooms or in virtual electronic venues. But the idea of the academic creator is central to the question of copyright in coursework, and its origins as revealed in the Miller dispute persist and color the debate to the present day.

69 Marcus, supra note 63 at A1.
70 Id. at A1
71 Cf. Pub. Affairs Assoc. Inc. v. Rickover, 177 F. Supp. 601, 605 (D.D.C. 1959), rev’d on other grounds, 284 F.2d 262 (D.C. Cir. 1960), vacated, 369 U.S. 111 (1962) (“Many scientific articles published in technical journals are written by scientists employed by private concerns and their employers generally encourage such activities. No one would contend that the copyright on such articles would belong to the employer”)

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E. Ownership of the Electronic Course

The Miller dispute opened the door for discussion of copyright among universities and their faculties. The exponential increase in online education that ensued in the following years, however, opened the floodgates to the ever more important question: Who owns an electronic course: the professor or the institution s/he works for?

The question of ownership of electronic courses has been controversial since at least the late 1990s for several reasons: (i) The overall growth of distance learning; (ii) the amount of human and technical resources needed to develop even a single distance course. An institution of higher education can easily spend many thousands of dollars to produce even a single distance education course. Further, multimedia course materials, including Internet materials, have become increasingly prevalent and appealing to institutions and students alike. The accessibility of these materials has led some institutions to attempt to “package” their courses and course offerings, and to seek to profit by marketing them to other institutions.

The central reason for change, aside from start-up costs, is that while courses as stand-alone units were never seen to have lucrative potential, they suddenly seemed to become commodities that could be sold for a profit with the aid of digitization. Now, the financial viability of courses and related materials as stand-alone products that might be sold for profit -- triggered by the remarkable growth of distance education via the Internet -- has completely changed the higher

75 See Lisa Guernsey and Jeffrey R. Young, Professors and Universities Anticipate Disputes Over the Earnings from Distance Learning, CHRON. OF HIGHER EDUC., June 5, 1998.
Suddenly, the consideration of ownership of copyright in courses has become a pressing, and hotly contested, matter. Moreover, the dispute is exacerbated by what appears to be a complete reversal of long-standing policy: faculty were traditionally considered to retain ownership of the fruits of their academic labors, including courses, related materials, notes, and so on. Any royalties flowing from their academic work were ceded to faculty as well, and were widely considered a means of supplementing faculty salaries, encouraging research and scholarship, and enhancing academic reputation and standing. Faculty ownership of copyright in courses, it seemed, was established practice -- but not one that affected the institutional balance with any immediate financial impact (indeed, this may be why the practice was so readily established).

The growth of distance education, however, challenged this equilibrium with a single factor: the profit motive. Courses that were offered in a single institution could be transported to a single or multiple venues -- virtual venues, with increasingly large audiences -- or they could be “packaged” and sold to commercial entities for dissemination [as they saw fit]. With this potential income stream in sight, universities began to claim ownership of courses, especially in cases where the faculty member drew upon substantial institutional resources to produce the course materials and offer the course. Thus, for instance, the use of technical support, such as server time, licensed software, instructional designers, programmers, and graphic specialists, might be required to undergird a course. This would likely be deemed to entail a “substantial use of resources,” as set forth in the copyright policies of many institutions.

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77 See Laura N. Gasaway, Drafting a Faculty Copyright Ownership Policy, THE TECH. SOURCE, Mar./April 2002, at 3.

78 See ARMATAS supra note 72 at 336-337.

79 One university has defined “substantial use of resources” as sue of its “laboratory, studio, audio, audiovisual, video, television, broadcast, computer, computational or other facilities, resources and Staff or Students which: (i) falls outside of the scope of the faculty member’s normal job responsibilities or (ii) entails a faculty member’s use of such resources not ordinarily available to all faculty members.” See THE GEORGE WASHINGTON UNIVERSITY, COPYRIGHT POLICY 5 (2005), available at www.my.gwu.edu/files/policies/CopyrightPolicyFinal.pdf.
Universities might counterweigh their claims to ownership of copyright in courses by offering faculty compensatory relief in institutional commitments, release time, or supplemental payments for course development. Additionally, universities might justify their claims by arguing that institutional ownership was preferable to individual ownership for commercial reasons: the university is better positioned to evaluate the commercial potential of courses, to market courses, and to manage the income flow related to the sale and dissemination of courses to distance learning ventures. But of course while the compensations and justifications may make sense on a quid pro quo basis, they hardly serve to resolve the issue of ownership of copyright in courses -- rather, they merely support an institutional preference of ownership.

Does copyright law finally resolve the question of who owns copyright in courses and course materials, whether the given courses stand alone or are disseminated online? The answer may be a qualified yes (albeit with a necessary evaluation of the facts on a case-by-case basis). On a first examination, resolution of the copyright ownership issue will be determined by a three-pronged analysis, namely whether: (i) the instructor is an employee or independent contractor of the institution; (ii) the work in question was produced inside or outside the scope of a person’s employment; and (iii) any other type of writing, contract, institutional policy, or charter governs the relationship between the instructor and her institution. Each of these factors, as well as an overview of the current law, is examined below.

II. COPYRIGHT LAW

A. Works Made for Hire

In general, the author is the creator of the work, that is, the person who expresses an idea in a fixed, tangible medium. The law allows two or more authors to be deemed joint authors, and therefore co-owners of the work’s copyright, when they prepare their work “with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”

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80 This is the model that the Penn Online Contract follows. See PENN ONLINE CONTRACT (on file with Author).
81 See Gasaway, supra note 77 at 3.
The law makes an exception to this general authorship rule under the doctrine of “work[s] made for hire.” Under that doctrine, the “author,” and therefore owner of the copyright, is the employer or person for whom the work was prepared.

The determination of whether a work is a work made for hire has important ramifications, including rights regarding: (i) copyright duration; (ii) renewal rights; (iii) termination rights; and (iv) possibly the right to import certain goods bearing the copyright. As such significant rights are at stake, the determination of what constitutes a work made for hire is paramount.

B. Congress’s Two-Part Definition

The Copyright Act of 1976 establishes two situations under which a work is a “work made for hire”: (1) A work prepared by an employee within the scope of his employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

The Copyright Act further defines two terms -- “supplementary work” and “instructional text” -- which are of particular interest to universities and their faculty. A “supplementary work” is a

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84 Id.Id.
85 17 U.S.C. § 201(b) (2000). The creator may still own the copyright if there is a written agreement. Id. The U.S. Supreme Court first recognized the ownership of copyright by the employer, rather than the employee, in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 242 (1903), which held that advertisements produced by several employees belonged to the employer.
86 Copyright ownership lasts for the life of the author plus seventy years. 17 U.S.C. § 302(a) (2000). In the case of a work made for hire, copyright ownership lasts ninety-five years from the first publication of the work or 120 years from its creation, whichever comes first. 17 U.S.C. § 302(c).
91 Roberta Rosenthal Kwall, Copyright Issues in Online Courses: Ownership, Authorship and Conflict, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 13 (2001) (“One of the pertinent statutory categories is
work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes. An “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Importantly, however, the Act does not provide definitions for “employee” and “within the scope of his employment.” In light of this statutory ambiguity, a determination of whether a work is a work made for hire must examine and establish the relationship between the interested parties. Absent specific Congressional directive, the courts have offered their interpretation of “employee” and “within the scope of his employment.”

The framework to determine an “employee” in a work-for-hire relationship emerges in the U.S. Supreme Court case Community for Creative Non-Violence v. Reid. In Reid, the Community for Creative Non-Violence (“CCNV”), a Washington, D.C.-Based organization dedicated to eradicating homelessness in the United States, hired James Earl Reid, a sculptor, to produce a statue dramatizing the plight of the homeless. The statue was to be displayed at the 1985 Christmastime Pageant of Peace in Washington, D.C. The parties agreed that the project would cost no more than $15,000, not including Reid’s services, which he offered free of charge. However, the parties did not enter into a written agreement; and neither party mentioned the issue of copyright ownership of the finished work. Reid worked on the statue, called “Third

‘an instructional text,’ and thus there is the possibility that online courses in their entirety could be considered works made for hire under this specific provision [provided the parties can enter an express agreement]”

92 17 U.S.C. § 101 (2000). See also H.R. Rep. No. 94-1476 Cong., 2d Sess., at 121 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5737: The concept is intended to include what might loosely be called ‘textbook material,’ whether or not in book form or prepared in the form of text matter. The basic characteristic of ‘instructional texts’ is the purpose of their preparation for ‘use in systematic instructional activities,’ and they are to be distinguished from works prepared for use by general readership.

93 Id.
95 Id. at 730.
96 Id. at 733.
97 Id. at 734.
98 Id.
World America,” at his studio in Baltimore, MD. Members of CCNV periodically visited Reid’s studio both to check on his work and to coordinate CCNV’s construction of the sculpture’s base, as agreed by the parties.  

Reid accepted most of CCNV’s suggestions and directions. After the completed piece was delivered to Washington, CCNV paid Reid the final installment of the agreed-upon price, attached the sculpture to its base, and displayed it. To this point, the parties had never discussed copyright in the sculpture. They then simultaneously filed competing copyright registration certificates. CCNV sued Reid in federal court for return of the sculpture Third World America and for a determination of copyright ownership.

The Supreme Court in Reid began its determination of ownership with an inquiry into whether Third World America was “a work prepared by an employee within the scope of his employment” under 17 U.S.C. Section 101(1). The Court looked to the common law of agency to make its determination, in light of the Copyright Act’s abstention from defining either “employee” or “scope of employment.” In its examination of whether a hired party is an “employee” under the common law of agency, the Court considered thirteen factors: (i) the hiring party’s right to control the matter and means by which the product is accomplished; (ii) the skill required; (iii) the source of the instrumentalities and tools; (iv) the location of the work; (v) the duration of the relationship between the parties; (vi) whether the hiring party has the right to assign additional projects to the hired party; (vii) the extent of the hired party’s discretion over when and how long to work; (viii) the method of payment; (ix) the hired party’s role in hiring and paying assistants; (x) whether the work is part of the regular business of the hiring party; (xi) whether the hiring party is in business; (xii) the provision of employee benefits; and (xiii) the tax

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99 Id.
100 Id.
101 Id. at 735.
102 Id.
103 Id.
104 Id. at 738.
105 Id. at 741, 751.
treatment of the hired party. While assessing each of these considerations, the Court nonetheless advised that “no one of these factors is determinative.”

Upon making its assessment, the Court found that Reid “was not an employee of CCNV but an independent contractor.” Moreover, the Court found CCNV could not satisfy the requirements for a commissioned work under § 102(2). Absent a work for hire exception, the Court held that CCNV was not the “author” -- and therefore not the copyright owner -- of the sculpture Third World America, and affirmed the Circuit Court’s order remanding the case to district court, in order to determine whether CCNV and Reid were joint authors -- and thereby co-owners of the copyright -- insofar as they prepared the statue and its installation “with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole,” as provided under Section 101 of the Copyright Act.

C. Defining “Scope of Employment”

In Reid, the Supreme Court deliberately limned the contours of the first prong of the statutory definition of works made for hire -- that is, work prepared by an “employee.” It did not, however, address the second prong of the definition -- that is, whether the work was made by the

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106 Id. at 751-52 (internal citations omitted). See also RESTATEMENT (SECOND) OF AGENCY, §§ 220(1), 220(2) (1958).

107 Reid, 490 U.S. at 752. But see Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992) (stating that some factors often have little significance in determining whether a party is an employee, while other factors -- such as the right to control the manner and means of creation, the skill required, the provision of employee benefits, the tax treatment of the hired party, and the right to assign additional projects -- will almost always be relevant and should be given more weight “because they will usually be highly probative of the true nature of the employment relationship.”). See also MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03[B](2004) (“[T]he major factor in determining whether a work is for hire is whether the employer had the right, whether or not exercised, to supervise and control the putative employee.”)

108 490 U.S. at 752.

109 Id. at 753.

110 Id. See also Nimmer, supra note 106.

111 On remand, the district court held that: (i) Reid is the sole author of the sculpture and that he has sole ownership rights under 17 U.S.C. § 106 with respect to all three-dimensional reproductions; (ii) CCNV is the sole owner of the original copy of the sculpture; and (iii) both parties are co-owners of all Section 106 rights with regard to two-dimensional reproductions.) Comm. for Creative Non-Violence v. Reid, CIV.A. 86-1507, 1991 WL 415523 (D.D.C. Jan. 7, 1991).
creator “within the scope of his employment.””\textsuperscript{112} To address that question, federal courts stepped once more into the breach, turning again to the common law of agency to give the term of art its proper measure.\textsuperscript{113} In so doing, courts have developed a three-pronged test to determine whether employees are acting within the scope of their employment when creating a copyrightable work.\textsuperscript{114} The three prongs are: (i) whether the work is of the type that the employee is employed to perform; (ii) whether the work occurs substantially within authorized work hours and space; and (iii) whether the work’s purpose, at least in part, is to serve the employer.\textsuperscript{115}

The case of Marshall v. Miles Laboratory, Inc.,\textsuperscript{116} is especially instructive with respect to copyright ownership in the context of the “scope of employment.” In Marshall, the district court held that an article written by an employee of a laboratory was prepared within the scope of his employment and that, therefore, the employer laboratory owned copyright in the article.\textsuperscript{117} On one side, the employee argued that he had written the article in question at home, he had not been instructed to write the article, and he received no additional compensation for writing it.\textsuperscript{118} On the other side, the employer responded that the employee researched the article while at work, the employee discussed the article with one of the laboratory’s scientists (who was ultimately made a co-author) while at work, and the employer reimbursed the employee for expenses he incurred while presenting the article at a symposium.\textsuperscript{119} The Marshall court, while concluding that employer Miles Laboratory owned the copyright, pointed out that the employee’s job description included the development, summarization, and reporting of “information about advances in technology” to the employer.\textsuperscript{120}

\textsuperscript{114} RESTATEMENT (SECOND) OF AGENCY § 228 (1958).
\textsuperscript{115} Beasley, 883 F. Supp. at 7; Roeslin, 921 F. Supp. at 797-98.
\textsuperscript{116} 647 F. Supp. 1326, 1331 (N.D. Ind. 1986)
\textsuperscript{117} Id. at 1331.
\textsuperscript{118} Id. at 1330.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 1331.
**D. Distance Education Courses as Works Made for Hire**

1. **Faculty Members: “Employees” Under the Work-Made-For-Hire Doctrine?**

   **a. Maybe Not…**
   
   Should faculty members be considered “employees” under the work-made-for-hire doctrine? It is arguable that they are not employees, but rather acting independently. This position centers upon one critical factor: the manner and means of production.\(^{121}\) First, academic autonomy is fundamental to the field: faculty select “their own research goals, procure their own funding, determine their research strategy, and choose the format through which their findings are expressed.”\(^{122}\) The American Association of University Professors (“AAUP”), in adopting its Statement on Copyright in 1999, articulates this position clearly: “in the case of traditional academic works…the faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusions. This is the very essence of academic freedom.”\(^{123}\) The AAUP acknowledge that the employer institution may reasonably claim ownership of work created by faculty in only three exempted categories: “special works created in circumstances that may properly be regarded as ‘made for hire,’\(^{124}\) negotiated contractual transfers, and ‘joint works’ as described by the Copyright Act.”\(^{125}\)

   Another feature of academic autonomy arguing against regarding faculty as employees under the work-made-for-hire doctrine is how their work is generated: typically, the university is not the motivating force behind a professor’s work.\(^{126}\) As one commentator asserts, “since professors do not create scholarly works for the universities that hire them, but rather to advance their own interests (future employment, enhancement of reputation), their scholarship does not fit the

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\(^{121}\) *Reid*, 490 U.S. at 751.


\(^{124}\) *Id.* Included in this category are works created as a specific requirement of employment or as an assigned institutional duty, for example, reports prepared by a dean, or by the chair or members of a faculty committee.

\(^{125}\) *Id.*

\(^{126}\) Dreyfuss *supra* note 112, at 597.
intended meaning of a work made for hire.” 127 Alongside the “advancement of their own interests,” commentators have also noted that professors are further motivated to strive for “proof[s] of excellence” that will secure their reputation, retention, advancement, or general marketability 128 -- and these goals far bypass any purported requirement or need to create copyrightable works for their employer.

Professional autonomy is also central to the argument at least one commentator has made regarding university-faculty relations. Professor Robert A. Gorman, of The University of Pennsylvania Law School, asserts that the work-made-for-hire doctrine is predicated upon an employer-employee relationship that presumes “the accountability of a subordinate to a superior,” and that such a predicate “cannot be transplanted to academic writings.” 129 Professor Gorman, reasoning that faculty are therefore not employees pursuant to the work-made-for-hire doctrine, puts forth several specific examples of faculty autonomy: professors select the subjects of their work; professors select the views about the subject that they present to the reader; professors decide the opinions and their expression in their work; and informed readers do not identify professors’ views with those of their affiliated university. 130

Taking into consideration other factors detailed by Reid, the location of the work may also suggest that faculty should not be deemed employees. Faculty may readily create courses, whether online or not, on home computers and related software. Further, they may incorporate material developed either while working at other institutions, while working as a consultant, or through other outside activities. 131

130 Id. at 302-03.
131 Kwall, supra note 91, at 18.
on the ground that faculty have the freedom to hire assistants and determine work hours.\textsuperscript{132} As she states, “most faculty members probably enjoy total discretion in the selection of research assistants, and in deciding when and how long to work.”\textsuperscript{133}

Another factor suggesting that faculty are not employees under the work-made-for-hire doctrine is the right faculty have to assign additional projects. Universities do not typically assign scholarship to professors, “and it is doubtful whether they could do so without also invading a professor’s academic freedom.”\textsuperscript{134}

Further, the not-for-profit status of universities may effectively preclude their being deemed a “business” under a close interpretation of the Reid factors. In a potentially telling parallel, the Court in Reid specifically stated that CCNV itself -- a nonprofit, unincorporated association -- was “not a business at all.”\textsuperscript{135}

The AAUP likewise contends that universities and their ilk are not typical businesses. In its Statement of Principles on Academic Freedom and Tenure, the AAUP asserts: “institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.”\textsuperscript{136}

The argument that the university-faculty relationship does not fall conformably under the work-made-for-hire doctrine is not predicated upon Reid and agency law alone. Several scholars have put forward policy and constitutional grounds as underpinning their stance. Professor Kwall, for instance, argues that the policy behind copyright law promotes the AAUP’s position that universities are not a traditional “business.” Consonant with the AAUP’s assertion in its

\textsuperscript{132} Id. at 17.
\textsuperscript{133} Id.
\textsuperscript{134} Kilby, supra note 121, at 466.
\textsuperscript{135} Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 753 (1989).
Statement, she asserts, “all educational institutions have the dissemination of information and the advancement of knowledge as their primary goals.”

Similarly, other scholars look further into the traditional role of faculty members and the well-established policies of the academic sector to bolster their contention that faculty do not fit squarely under the definition of “employee” under the principles of work made for hire. Corynne McSherry, the Intellectual Property Director at the Electronic Frontier Foundation, raises both policy and precedent to argue that “traditional scholarly works” that spring from “independent academic effort” are generally not considered works for hire; and the majority of professors have been considered to own copyright in the work they produce in the course of their employment. The very presumption of faculty ownership of copyright in faculty-generated work itself is offered as evidence that faculty and their institutions do not commonly consider the creation of copyrightable courses to be within the scope of employment. Once more, the professional autonomy and authority of faculty members is argued to support this position. As Professor J.H. Reichman notes: “to equate a general duty to write with a duty to produce specific work for a university distorts the nature of academic employment and downgrades the professorial rank to that of an ordinary staff member.”

Another commentator, attorney Pamela A. Kilby, argues that encompassing faculty-generated work in the work-made-for-hire doctrine is outright unconstitutional. She argues: “it is outside the scope of Congress’ power under the Copyright Clause to vest rights of authorship in a party who is not the motivating factor that brought the work to light. To do so would inhibit, rather than promote, the progress of science.” Kilby further argues that “the university employer generally is neither the motivating factor nor the creative spark behind the creation of professors’

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137 Kwall, supra note 91, at 20. See also Wadley & Brown, supra note 122, at 419: “[I]n academia...the creation of economically valuable copyrightable works is clearly subordinated to the goal of the dissemination of information”
139 Kilby, supra note 121 at 467. See also Wadley & Brown supra note 122, at 403, 404 (noting that the parties’ presumed intent and expectations are to have certain work, including lesson plans, exams, lecture notes, and letters of recommendation, fall outside the work-made-for-hire doctrine).
141 Kilby supra note 121, at 457-58. For expansion of this analysis, see id. at 469-74.
work." She then asserts that bringing academic work under rubric of work for hire principles would constitute a violation of the First Amendment by “impos[ing] an undue burden on academic speech -- a burden that is not justified by the government interests that the law is meant to advance.” In concluding, Kirby alludes to the principles of academic freedom to underscore her position: “the prospect of a university using the copyright law to stifle unorthodox or politically incorrect speech strikes at the very heart of First Amendment values.”

b. But They Probably Are...

In opposition, some commentators consider the thirteen-factor test of Reid and conclude that faculty members should indeed be considered employees of their respective institutions under the work-made-for-hire doctrine of the Copyright Act. As Corynne McSherry argues: “professors could be considered employees under work-for-hire doctrine because they are treated as employees for tax purposes, receive benefits, use materials and equipment provided by the employer, and cede substantial control in the hiring and remuneration of their assistants to their employer, the university.” With respect to the development and dissemination of online courses, and in particular the large up-front expenses that such endeavors typically demand, two Reid factors are particularly relevant: the right to control the manner and means of production, and the source of instrumentalities and tools. Numerous commentators analyze these considerations in the context of online courses, and thereby conclude that faculty members may be found to be employees creating works made for hire under the Copyright Act.

Universities shoulder the costs of establishing and supporting distance education programs in four major areas: (i) course design; (ii) course delivery; (iii) faculty development; and (iv)

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142 Id. at 473.
143 Id. at 458, 483-85.
144 Id. at 475.
145 McSHERRY supra note 138, at 107.
146 Id. See also Todd F. Simon, Faculty Writings: Are They “Works Made for Hire” Under the 1976 Copyright Act?, J.C.& U.L. 485 (1982-83); Gregory Kent Laughlin, Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine’s Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses, 41 B.C.L. REV. 547, 569-72 (2000); Wadley & Brown, supra note 122, at 426.
147 See, e.g., Townsend, supra note 44; Crews, supra note 49; Gasaway, supra note 76; Springer, Intellectual Property Legal Issues For Faculty and Faculty Unions, AAUP.ORG (Mar. 18, 2005), http://www.aaup.org/issues/copyright-distance-education-intellectual-property/faculty-and-faculty-unions-2005.
student support. Course design entails defining the learning objectives, organizing the materials to be covered, assembling resources such as text and research sources, and designing interactive, graphically rich student assignments. Course delivery and support requires investment in the technological infrastructure, including the course-delivery software that makes the course content accessible to students and instructors, and technical support for users. Faculty development includes both direct costs, such as the use of new technological tools to redesign courses for dissemination online, as well as indirect costs, such as faculty release time, and possible adjustments to faculty salaries, promotion, and tenure policies. Student support includes access to library materials, as well as advising, registration, financial aid, and career counseling. To provide just one example, the University of Wisconsin at Madison provides students engaged in distance learning courses advising services, admissions, registration, bookstore services, and technical assistance via the Internet, e-mail, fax, and telephone.

As under the “manner and means of production” analysis above, universities may also lay a strong claim to controlling the “source of instrumentalities and tools” element also derived from the Reid test. First, universities provide faculty with the tools typically required for scholarly and instructional work, including office supplies and equipment, photocopiers, computers, printers and other technological resources, research aides, travel expenses, and registration fees for

149 Id. See also McSherry, supra note 138, at 108 (arguing that if the university staff is greatly involved in designing a website for the course, the university will have a legitimate claim to copyright in the site because it “substantially controls” the production of the work). Further, the university may have a still stronger claim to copyright if it chooses to sell its website to a distance education provider, leaving the originating faculty member without the ability to rework the material she prepared. Id.
150 See Scott Carlson, A Patent Claim That Could Cost Millions, CHRON. HIGHER EDUC., Nov. 7, 2003, at A35 (Acacia Research Corporation, the owner of certain patents involving streaming, or the storage and transmission of digital sound and video on the Internet, threatens infringement actions against universities with which it does not have a license agreement. Acacia’s usual license fee is two percent of the revenue earned from courses using its technology for dissemination).
151 Sjoren & Fay, supra note 141, at 54. See also Simon, supra note 146, at 504. Simon observes that universities may offer faculty a reduced teaching load to provide extra time for scholarship, research and writing. Another such schedule adjustment is the provision of a one-year sabbatical with pay. Both illustrate the “control of means and manner of production by the institution. “The university would not offer such free time unless publication or research is expected.” Id.
152 Sjogren & Fay, supra note 141, at 54-55.
scholarly conferences.\textsuperscript{154} Distance education courses may require additional technological investments and technical support. Most faculty members rely on technology in a variety of ways: they use their university’s online services to conduct research, the university’s computers to generate work, the university’s servers to store their work, the university’s Internet connection to disseminate the work, and the university’s information technology staff to assist their work.\textsuperscript{155} Illustrative is the “electronic classroom” M.B.A. program at the University of Arizona, which connects its classes based in Tucson to a classroom in Santa Clara, California, and features a system of two videoconferencing rooms leased by the university for a fee of $17,00 per month.\textsuperscript{156}

Accompanying the provision of technological “instrumentalities and tools,” universities extend the support, and underwrite the expense, of technical staff to assist with the creation and maintenance of online courses. Among these support staff are computer programmers, video crews, support staff, script writers, graphic artists, and photographers.\textsuperscript{157} It has been estimated that an institution serving approximately twenty-thousand students will require a staff of twenty to thirty technicians to support the institution’s communications infrastructure.\textsuperscript{158}

It is evident that universities must invest significant resources in creating, implementing, and maintaining online course programs, and with ever-increasing demand, even more resources may be required in expanding online offerings. This institutional output buttresses the argument that the university does indeed control the manner and means, and instrumentalities and tools, of

\textsuperscript{154} Simon, supra note 146, at 504. See also Wadley & Brown, supra note 122, at 426 (noting that “teachers create copyrightable works...using the instrumentalities of the employer such as paper, pens, computers, printers, and other resources....”).

\textsuperscript{155} Laughlin, supra note 146 at 571

\textsuperscript{156} Florence Olsen, Videoconferencing With Some Life to It: The U. of Arizona Finds That Pricey Technology Attracts Distance-Education Students, CHRON. HIGHER EDUC., July 4, 2003, at A24


\textsuperscript{158} Diane Lynch, Glenn C. Altschuler, & Polley McClure, Professors Should Embrace Technology In Courses...and Colleges Must Create Technology Plans, CHRON. HIGHER EDUC., Jan. 18, 2002, at B16. See also C.B. Crawford et. al., Quality and Growth Implications of Incremental Costing Models for Distance Education Units, 13 ONLINE J. OF DISTANCE LEARNING ADMIN (Spring 2010) (exploring the validity of various proposed approaches for modeling the costs of distance education programs).
production. One such online effort, for instance, known as AllLearn, is the now-defunct distance education venture, supported by Oxford University, Stanford University, and Yale University, which expended between $10,000 and $150,000 to produce each of its approximately fifty courses.\footnote{Scott Carlson, \textit{Alliance Backed by Oxford, Stanford, and Yale Offers Courses to the Public}, \textit{Chron. Higher Educ.}, Sept. 6, 2002, at A47.} Fairleigh Dickinson University approximated that it would expend in the range of $12 million to complete a five-year implementation of its online program, under which all of its students would be required to take at least one distance education course per year.\footnote{J. Michael Adams & Michael B. Sperling, \textit{Ubiquitous Distributed Learning and Global Citizenship}, \textit{The Presidency}, Winter 2003, at 35.} Taking another tack, MIT has projected a total cost of nearly $100 million, over a seven-year period, to implement its innovative OpenCourseWare project, which makes all MIT courses available for free, and to anyone interested (that is, not just MIT students), over the Internet.\footnote{Florence Olsen, \textit{MIT’s Open Window: Putting Course Materials Online, the University Faces High Expectation}, \textit{Chron. Higher Educ.}, Dec. 6, 2002, at A31.}

Consideration of other factors derived from Reid also lend support to the argument that faculty members are employees in the distance education context. The “skill required” element of Reid, for instance, suggests that faculty who may not have the skills required to publish their works online without assistance will draw on university resources for necessary technical support, bolstering the notion that faculty members are employee. While some faculty may have independently developed the technological facility needed to create online courses and materials, many faculty still depend on institutional information technology, personnel, and librarians to produce their “Internet-published works.”\footnote{Laughlin, \textit{supra} note 146, at 570.}

The “location of the work” factor of Reid also operates in favor of the argument that faculty may be deemed employees under the work-made-for-hire doctrine. Faculty members not only tend to perform a substantial share of their work, if not all, at their university offices, but they also are likely to create online work on university computers, and to store and disseminate such work using university servers.\footnote{Id. at 571.} Such on-site work also enables the faculty member to have ready

access to university staff dedicated to online projects, such as video producers, computer programmers, and website designers.\textsuperscript{164}

The “assignment of additional projects” is a Reid factor that is particularly relevant in the online context. With respect to standard courses and research, universities do not commonly assign specific topics or dictate course parameters. But in the case of online work, universities may need to centralize and control course offerings, and therefore may be more likely to assign the courses that faculty must teach. They may also be more likely to mandate the generation of specific, web-based course materials.\textsuperscript{165} This assignment of additional projects may further bring faculty into the purview of the work-made-for-hire doctrine.

Likewise, the “duration of relationship” element of Reid indicates that faculty may be employees under work for hire principles. Employer institutions and their faculty members, barring a few exceptional cases such as visiting professors and fellowship scholars, typically seek to establish a long-term relationship that is not delineated by, or in any respect subject to, the completion of a particular copyrightable work.\textsuperscript{166}

The Reid factors regarding method of payment, assistants, benefits, and taxes further point to the status of faculty members as employees under the work for hire provisions. Virtually all full-time faculty members receive salaries, rather than hourly wages.\textsuperscript{167} Some faculty also receive additional remuneration for online work. “The method of payment can be especially suggestive of an online course being considered a work for hire in those instances where a university awards a faculty member a particular amount of money to create an online course.”\textsuperscript{168} Universities also typically hire and compensate graduate and research assistants.\textsuperscript{169} The vast majority of universities also provide faculty benefits, such as health care, insurance, pension, and tuition

\textsuperscript{164} Kwall, supra note 91, at 18
\textsuperscript{165} Laughlin, supra note 146 at 570.
\textsuperscript{166} Id. at 572.
\textsuperscript{167} Id. See also Wadley & Brown, supra note 122 at 426 (noting that “teachers create copyrightable works while being paid by the employer….”).
\textsuperscript{168} Kwall, supra note 91 at 17.
\textsuperscript{169} Laughlin, supra note 146, at 572; MCSHERRY, supra note 138, at 107.
wavers or reductions for faculty and their dependents. It is also standard university practice to withhold federal and state income taxes, as well as FICA taxes, from faculty compensation.

Lastly, under the Reid factor that inquires whether the work “is part of the regular business of the hiring party,” it can be argued that institutions of higher education are in the business of educating students, which may include the provision of online courses and related materials. Universities may also be said to be in the business of generating and disseminating scholarly research. Professors “create many of these works to enhance their own productivity or quality of work, much the same way as any employee working in commercial, labor or service jobs.”

Notably, the AAU appears to offer some support for this interpretation. In its report on academic intellectual property, the AAU Task Force observes that while the central mission of a research university is “to create, preserve, and disseminate knowledge through teaching and research,” the creation and dissemination of knowledge is “a collective enterprise at the university…. Individual faculty members as well as the School itself are part of a larger enterprise, and this must be recognized along financial as well as other dimensions.”

2. Developing Online Courses: Within the “Scope of Employment?”

a. Yes, Under Typical Faculty Contracts
In Marshall v. Miles Laboratories, Inc., the court looked to the employee’s job description as a crucial means of determining the scope of his employment. On similar grounds, a court considering the matter in the academic context might reasonably conclude that a standard faculty contract or agreement comprises the development of courses, including online courses, and that

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170 Laughlin, supra note 146, at 570.
171 Id.; Kwall, supra note 91, at 17.
172 Laughlin, supra note 146, at 572. Professor Kwall raises an interesting concern: in examining whether the “regular business of the hiring party” should be determined in light of the mission of the institution, that is, whether it is primarily devoted to research or to teaching. See Kwall, supra note 91, at 18-19
173 Wadley & Brown, supra note 122, at 426.
175 647 F. Supp. 1326, 1327 (N.D. Ind. 1986).
such courses therefore fall within the scope of the faculty member’s employment.\textsuperscript{176} At least one commentator argues that the production of such work falls squarely under the terms of the Copyright Act: “Without an explicated right to the copyright of materials prepared or developed under the auspices of the employer, arguably the faculty members statutorily is an employee working within the scope of employment and waives any right to retain copyright ownership of any materials developed.”\textsuperscript{177} This holds for written materials as well. The late Professor Todd Simon, of Kansas State University, argued that in the great majority of universities, faculty members are expected to publish scholarly works, such as books, articles, or monographs, within their area of expertise; and such publications “are expected to meet standards both of quality and quantity, and occasionally, frequency.”\textsuperscript{178} His argument further contends that: “the explicit and implicit agreements in the typical faculty employment agreement today support the idea that scholarly writing is within the course of employment as anticipated by the [Copyright Act].”\textsuperscript{179}

Professor Simon highlights certain features of these agreements that are explicitly provided in standard faculty employment contracts, such as the requirement that a professor teach a certain number of subjects or courses (i.e., a given course load), and that a professor engage in research, writing, and scholarship in her field.\textsuperscript{180} Thus, scholarly writing can be argued to fall within the scope of the faculty member’s employment. Other contractual provisions that support this position include (i) compensation packages that are predicated upon a certain degree of scholarly enterprise; (ii) promotion and evaluation materials that require faculty to show they have spent significant time undertaking research, creative, and professional activities; and (iii) the provision of secretarial support, computer facilities and services, and library resources to facilitate scholarly productivity.\textsuperscript{181}

Often more implicit features involving the production of scholarly work are found in the employment agreements between institutions and their untenured faculty. As Professor Simon points out, “publishing the results of scholarly efforts is peculiarly important to junior faculty

\textsuperscript{176} Le Moal-Gray, supra note 20, at 994.
\textsuperscript{177} Id.
\textsuperscript{178} Simon, supra note 146, at 502.
\textsuperscript{179} Id. at 486.
\textsuperscript{180} Id. at 503.
\textsuperscript{181} Le Moal-Gray, supra note 20, at 1001.
members, because, usually, a professor must publish to gain tenure at all. Whether the tenure publication requirement is express or not, every new faculty member knows he must ‘publish or perish.’” ¹⁸²

Other commentators look to the history and philosophy of the work-made-for-hire doctrine to support their argument that online courses fall within a faculty member’s scope of employment. Two commentators, for instance, adopt this stance: “‘scope’ is defined to include only those works of a sufficient degree of importance to both parties to make the ownership of the copyright a likely object of dispute. In most cases...the works that should emerge from such an inquiry will likely be those in which the employer has a strong economic interest.” ¹⁸³

b. No, Under the Academic Exception...But Is the Exception Still Good Law?
The “teachers exception,” or “academic exception,” is a court-created doctrine that carves out a narrow ground for allowing faculty to retain copyright in the works they produce without falling into the parameters of the works-made-for-hire doctrine. This exception was developed under the Copyright Act of 1909, but it is not clear whether it survived after the enactment of the Copyright Act of 1976. ¹⁸⁴ Although the Copyright Act of 1909 provided that the “the word ‘author’ shall included an employer in the case of works made for hire,” ¹⁸⁵ it did not define the terms “works made for hire” or “employer”; and in cases involving academic disputes, courts defined the terms narrowly so as to exclude academics from the doctrine’s purview. ¹⁸⁶

A seminal state court case on this ground is Sherrill v. Grieves, in which an instructor who taught military sketching, map reading, and surveying to the U.S. Army wrote a textbook on these subjects. ¹⁸⁷ Prior to publishing the textbook, Sherrill gave the U.S. military permission to print a pamphlet incorporating the section he had produced on military sketching. ¹⁸⁸ The defendants published an allegedly infringing work, and, when sued, argued that Sherrill did not own the

¹⁸² Simon, supra note 146, at 503.
¹⁸³ Wadley & Brown, supra note 122, at 407
¹⁸⁴ See McSHERRY, supra note 138, at 107
¹⁸⁷ Id.
¹⁸⁸ Id. at 686.
Copyright because his efforts constituted a work for hire. The court held that Sherrill did indeed own the copyright, reasoning that while he was employed to teach the subject contained in the pamphlet, he was not “obligated to reduce his lectures to writing.”

In another important state court case that also supports the teacher exception, Williams v. Weisser, an anthropology professor at the University of California at Los Angeles sued under California common law copyright to prevent a commercial publisher of class notes from transcribing and publishing the oral lectures that he had delivered in his class. In defending its transcriptions of the class notes, the defendant publisher argued that copyright in the professor’s lectures was owned by the university under the work-for-hire doctrine. The court held that Williams, and not the university, owned the common law copyright in his lectures.

Did the “teacher exception” carved out under common law copyright survive the enactment of the 1976 Act? On the one hand, dicta from an important Seventh Circuit decision seems to indicate that it is reasonable to consider it still extant. In Hays v. Sony Corp. of America, two public high school teachers who taught business classes wrote a manual on the operation of the word processors used at the school at which they taught. The school district later purchased new word processors from Sony, and asked Sony to modify the teachers’ manual to render it compatible with the new equipment. Sony complied with the school district’s request, and created a manual that directly incorporated sections of the teachers’ original manual into its text. Upon discovering the use of their work, the teachers sued Sony on grounds of copyright infringement. The district court held that the manual constituted a work made for hire, and that

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189 Id. at 686-87.
190 Id. at 687.
192 Id. at 543. Prior to the 1976 Copyright Act, common law copyright protected unfixed and/or unpublished works. See Lape, supra note 38, at 235 n.42.
193 Williams, 78 Cal. Rptr. at 543.
194 Id. at 542, 546.
195 847 F.2d 412 (7th Cir. 1988).
196 Id. at 413.
197 Id.
198 Id.
199 Id.
its copyright was therefore owned by the school district.\textsuperscript{200} The Seventh Circuit court dismissed the case on procedural grounds, for want of timely appeal.\textsuperscript{201} However, in dicta, while the court acknowledged that the manual did constitute a work made for hire under the 1976 Copyright Act, it also stated that “the reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were.”\textsuperscript{202} The Hays court further noted that “a college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings, whether through publication or otherwise.”\textsuperscript{203}

In light of the Hays dicta, some commentators consider the common law-derived “teacher exception” to survive to date, exempting the work of professors from falling into the category of works made for hire.\textsuperscript{204} As Professor Russ VerSteeg states: “Judge Posner’s dicta in Hays…illustrates the judiciary’s reticence to accept the work-for-hire doctrine at face value in an educational context.”\textsuperscript{205} Another commentator bases the argument for survival of the teacher exception on policy grounds. Among these policy grounds are: academic freedom; the expectation of faculty that their salaries will be enhanced by earned royalties; and the expectation of faculty that they have the freedom to move to other institutions and recreate their courses.\textsuperscript{206}

On the other hand, and despite the Hays dicta, it is more likely that the teacher exception has not survived the promulgation of the Copyright Act of 1976. One point is that the Williams decision is no longer viable precedent because the Copyright Act, under Section 301, preempts state common-law copyright.\textsuperscript{207} In other words, Section 301 of the Act “washes away the Williams

\begin{footnotes}
\item[200] Id. at 416.
\item[201] Id.
\item[202] Id.
\item[203] Id.
\item[204] See e.g., Lape, supra note 40, at 238.
\item[206] Laughlin, supra note 146, at 578-79.
\item[207] 17 U.S.C. § 301(a) (2000). (“On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright...are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”)
\end{footnotes}
rule.” Another, broader point is that the revisions to the Copyright Act that were made between 1909 and 1976 strengthened the common law presumption that employees own the copyright to the work of employees by requiring a writing, signed by both parties, to rebut the presumption that ownership vests in the employer.

Another critical case, also issued by the Seventh Circuit, underscores this position. In Weinstein v. University of Illinois, a pharmacy administration professor at the University of Illinois at Chicago brought a lawsuit over the publication of a scholarly article concerning a clinical program for practicing pharmacists. Plaintiff Weinstein sued his co-authors, university administrators, the university, and its trustees, claiming that the publication of the article with revisions, and with his name listed third among the three co-authors, deprived him of property without due process. The court, reading and interpreting the university’s copyright policy, held that Weinstein, along with his co-authors, owned the copyright to the article in question. The university’s copyright policy stated, in part, that its faculty and staff members retained copyright in works they produced as authors, except in situations where the work was created “as a specific requirement of employment or as an assigned University duty.” The Seventh Circuit Court in Weinstein observed that absent this policy, the Copyright Act’s works-made-for-hire provisions would be “general enough to make every academic article a ‘work made for hire’ and therefore vest exclusive control in universities rather than scholars.”

The opposite problem from that of the work-for-hire provisions of the Copyright Act potentially encompassing too much academic work in its scope would be that the teacher exception might be expanded to encompass too much academic work in its scope. Some commentators have noted this concern, and have indicated that the potential for overly-broad exemption of academic work from the work-made-for-hire doctrine might unfairly privilege faculty ownership of academic

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208 Simon, supra note 146 at 507.
210 Weinstein v. Univ. of Ill., 811 F.2d 1091 (7th Cir. 1987).
211 Id.
212 Id. at 1092-93. The plaintiff brought suit under 42 U.S.C. § 1983, which subjects to liability every person who deprives another of constitutional rights while acting under color of law. Id.
213 Weinstein, 811 F.2d at 1094-95.
214 Id. at 1094.
215 Id.
work, at the expense of universities that may expend costly resources to enable its production. As Professors Wadley and Brown from Washburn University argue: “although undoubtedly warranted at the time, the [teacher]...exception may be so broad that it would likely exclude all the works produced by the faculty and staff employed within an educational context from the work-for-hire doctrine and, as a result, may unfairly discount any legitimate claims to authorship the academic employer may have.”

Two federal decisions, both issuing from Colorado, demonstrate that such a concern is a real one, and may well be indicating that courts are moving away from, if not outright jettisoning, the teacher exception. In Vanderhurst v. Colorado Mountain College District, a veterinary professor prepared course materials “on his own time with his own materials,” however the court held that the course materials were works made for hire, and therefore owned by the university, because the creation of the courses was “fairly and reasonably incidental to his employment.”

In University of Colorado Foundation, Inc. v. American Cyanamid Co., two professors at the University of Colorado Health Sciences Center were contracted to perform studies on patients’ absorption of iron from a multivitamin produced by American Cyanamid. The professors published an article regarding the results of the study in a medical journal. The plaintiffs -- the University of Colorado Foundation, the University of Colorado, the Board of Regents of the University of Colorado, and the two professors -- together asserted that the regents “are quite obviously the owner, because the Article is a ‘work made for hire’ by the coauthors done within the scope of their employment.” In other words, the plaintiffs asserted -- and the defendants and court agreed -- that the professors’ article was a work made for hire. The court also agreed that there was no evidence to rebut such ownership.

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216 Wadley & Brown, supra note 122, at 431.
218 Id. at 1307.
220 Id. at 1390.
221 Id. at 1391.
222 Id. at 1400 (quoting from Plaintiffs’ Reply Brief Supporting a Motion for Partial Summary Judgment at 29 n. 55).
223 Id. at 1400.
224 Id.
The status of the teacher exception, then, is unresolved. As one commentator rightly observes, “what is clear is that without an explicit statutory foundation the exception can no longer simply be assumed.”\textsuperscript{225} Ambiguity is rife with respect to academic work. “No clear definition for traditional scholarly work exists.”\textsuperscript{226} Equally importantly, no clear distinction exists between “independent academic effort” and “collaboration” between faculty members and their institutions. This ambiguity is only heightened in the context of expensive and complex endeavors such as the creation of online courses and course materials, which often require extensive university resources supporting the faculty -- such resources including the provision of staff, computers, and software -- to enable the development, use, and dissemination via new media for teaching.\textsuperscript{227} Finally, as Professor Georgia Harper of the University of Texas concludes, “the mixed holdings of these cases indicate that [university] policy probably is the best way to resolve the ambiguity.”\textsuperscript{228}

3. So, Who Owns Copyright in the Electronic Course?

It is reasonable to conclude that at present copyright in faculty work will most often be found to belong to the university, on the basis of the following factors: (i) the definition of works-made-for-hire under the Copyright Act of 1976; (ii) the Supreme Court’s holding in \textit{CCNV v. Reid}, and the thirteen-factor test the Court sets forth to determine what constitutes a work-made-for-hire; and the federal courts’ definition of the “scope of employment.” Nonetheless, as some commentators contend, it may still remain an open question how a court will rule when deciding whether the copyright in a specific scholarly work rightly belongs to the faculty member who produced it or to the institution at which it was created and which may have supported its creation. As one commentator notes, perhaps wryly, “while four of the thirteen factors weigh in favor of the faculty member and four of the factors weigh in favor of the university, the

\textsuperscript{225} McSherry, supra note 138, at 107.
\textsuperscript{226} See Klein, supra note 32 at 170.
\textsuperscript{227} McSherry, supra note 138 at 107.
remaining five factors have equities on both sides.” Professors Wadley and Brown of Washburn University add: “the reality is that some works may involve a level of university involvement from which one might infer an intent to treat it as made-for-hire, whereas other works may not warrant such a determination. In the former case, the work should be included within the scope of the doctrine and in the latter case, it would not be included.”

To resolve the ambiguity, and to stave off potential disputes, university policies and collective bargaining agreements are now being carefully drawn to delineate “brighter boundaries of ownership,” particularly with respect to distance education courses and materials. Many of these agreements concentrate upon a key Reid factor -- the manner and means of production -- which specifically assess faculty members’ use of institutional resources in the creation of their work. “University policy statements and collective bargaining agreements are reposing in the institution ownership of faculty-authored works for which the university provides an extraordinary measure of equipment, facilities, staff assistance or compensation.” As the growth of distance education continues, it remains to be seen whether the institutional support of online work will require further clarification of copyright ownership in university policies and agreements, and in faculty buy-in to such delineations of copyright in their academic work.

III. MODERN INTERPRETATIONS OF COPYRIGHT POLICY

A. Competing Ownership Interests

The ambiguity that remains inherent to copyright law in the educational sector, as outlined above, leaves open the question of question of who owns copyright in academic works. This question is only exacerbated by the ever-accelerating race to develop online courses. Academic courses and related course materials do not seem to fit squarely into already-existing policies on intellectual property. On the one hand, courses and materials are arguably analogous to textbooks, prepared and most often owned by professors, and to which universities will rarely

230 Wadley & Brown, supra note 122, at 413.
231 Klein, supra note 33 at 171.
233 For general reference, see Klein, supra note 33.
claim ownership rights. On the other hand, courses and materials are also arguably analogous to inventions, such as scientific or technological innovations, to which universities typically claim the patent rights and at least some, if not all, of the associated licensing income. As a result of these competing “visions” of the nature of academic coursework, faculty and institutions are able to lay opposing, and often contentious, claims over the ownership of online courses and their related materials.

For their part, faculty members proffer practical and policy reasons for claiming ownership in courses. In sheerly practical terms, they consider the potential monetary value that their courses may yield, and feel that if it is possible, it should by right be theirs. But equally, faculty are concerned that if they cede ownership of the course and its related online materials, they will perforce cede control over both course content and dissemination of the course -- including the manner of distribution, revisions, and derivative works -- which in turn would ultimately compromise their academic freedom. The cornerstone tenet of academic freedom, as articulated in the 1940 Statement of Principles on Academic Freedom and Tenure by the American Association of University Professors, is as pertinent today as it was when written: “Teachers are entitled to full freedom in research and in the publication of results, subject to the adequate performance of their other academic duties.” As one commentator has explained, “[f]aculty copyrights are being constructed as badges of autonomy, independence, and control.”

Finally, faculty argue that the development of courses and related digital materials is particularly arduous and labor intensive. Developing and adapting the course for new technologies, maintaining online platforms and/or chat rooms, responding to asynchronous emails from course participants, and so forth, require effort that can far exceed the ordinary scope of faculty responsibilities. While sometimes remunerated by universities, this work can be uncompensated.

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235 Laura Lape, supra note 40 at 265.
236 See Guernsey & Young, supra note 227 at A22.
237 See AAUP Statement on Academic Freedom, supra note 139.
238 MCSherry, supra note 138 at 102.
if it is seen as merely part of the ordinary course of a professor’s duties. Many faculty will argue that the additional labor can and should be compensated by the rewards that flow from ownership of the online courses that they prepare and maintain.239

But from another perspective, universities, too, have a powerful interest in claiming ownership in the courses they offer.240 This interest is commonly monetary, particularly when the institution has incurred the costs associated with creating, developing, and disseminating the course and its materials online.241 Ohio State University, for instance, raised this concern when it began requiring its graduate students to submit their doctoral dissertations electronically, so that the dissertations might be posted and made available online.242 Ohio State had historically held some IP rights to dissertations and other graduate student work in the sciences, in large part because university grants and equipment sustained the bulk of graduate research and underwrote its scholarship.243 Drawing analogy to the practice in the scientific disciplines, the dean of the Graduate School at Ohio State asserted that the university likewise held an ownership right in the scholarly work of graduate students in the humanities.244 The dean supported his claim by adding that graduate students would produce their scholarly work in order to fulfill an academic requirement, and often while being employed as salaried teaching assistants or receiving assistance such as scholarships, funding grants, awards, or other forms of support.245

Universities are also wary about possible future ramifications of courses offered online. As former president Graham B. Spanier of Pennsylvania State University stated: “universities may

239 ARTHUR LEVINE & JEFFREY C. SUN, BARRIERS TO DISTANCE EDUCATION 4 (2002).
240 See Lape, supra note 40 at 264-65 (“The interest taken by universities in faculty copyright is primarily monetary, as demonstrated by the universities’ interest in holding copyright in technologically complex work....”).
241 Laughlin, supra note 146 at 561.
243 Id.
244 Id. Ohio State’s policy caused some faculty members to raise concerns regarding the intellectual property rights of their students. As one professor said, “[o]ur concern is whether this [policy] is going to take control of the copyright out of the hands of the student and into the hands of the university.”
245 Id.
see some of their faculty developing software for other educational institutions, who in turn sell it, perhaps in competition with the home institution’s program.\textsuperscript{246}

One way in which institutions and faculty try to clarify and resolve these competing interests is to include carefully delineated copyright ownership provisions not only in their faculty handbooks and manuals but also in their employment contracts. For instance, in 2002, the Massachusetts Society of Professors, the union that represents the faculty of the greater University of Massachusetts system, began negotiations with the university to determine and spell out rights and responsibilities in distance education courses.\textsuperscript{247} While some of the union’s demands, such as limiting student enrollment in online classes to fifteen students, was subject to lengthy negotiation, the ownership of courses was surprisingly easily settled.\textsuperscript{248} The administration willingly granted faculty members the right to retain ownership in, and control over, the online courses and their related materials.\textsuperscript{249} Along similar lines, in 2003, the state university system in New Jersey was subject to negotiation among the member institutions and the faculty union.

\subsection*{B. Intellectual Land Grab: Cultural Commons vs. Micropayments}

Outside the academic sector, the copyright ownership debate has been much contested, encompassing in its scope every imaginable creative industry. In music, litigation has been brought against the Girl Scouts of America,\textsuperscript{250} seeking to require the organization to pay royalties for the songs its members sing around the campfire, and the Recording Industry of America has brought thousands of copyright infringement lawsuits against Internet users who freely download songs on the Internet.\textsuperscript{251} In film, a band of independent film producers has fought against a ban imposed in 2004 by the Motion Picture Association of America on sending

\begin{footnotesize}
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\item \textsuperscript{246} Guernsey & Young, \textit{supra} note 234 at A23 (internal quotations omitted).
\item \textsuperscript{247} Dan Carnevale, \textit{Union Seeks Agreement with U. of Mass. on Distance Education}, CHRON. HIGHER EDUC., Sept. 27, 2002, at A50.
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} \textit{Id.}
\item \textsuperscript{250} Robert S. Boynton, \textit{The Tyranny of Copyright?}, N.Y. TIMES MAG., Jan. 24, 2004, at 40, 42.
\item \textsuperscript{251} David Kravitz, \textit{Copyright Lawsuits Plummet in Aftermath of RIAA Campaign}, WIRED.COM (May 18, 2010, 1:24 PM) www.wired.com/2010/05/riaa-bump (noting that the Recording Industry Association of America brought copyright infringement suits for illegal file sharing against 18,000 individuals from 2003 to 2008).
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DVDs to voters for annual film awards. As one journalist has noted, “[i]n less than a decade, the much-ballyhooed liberating potential of the Internet seems to have given way to something of an intellectual land grab, presided over by legislators and lawyers for the media industries.” One can legitimately expand the comment to include all the creative industries as well.

The push-back to this “intellectual land grab” has been swift and strong. On one side, a coalition of scholars, activists, and interested stakeholders are seeking to reform copyright law, arguing that the recent efforts to increase copyright protections across the board, while allegedly aimed at fighting copyright infringement and piracy, will ultimately erode the public domain and undermine society’s ability to create and share ideas. Perhaps the best-known proponent of the “free culture” movement, Professor Lawrence Lessig of Harvard University, has long invoked Thomas Jefferson as the intellectual forebear of this societally-oriented position. Professor Lessig and his fellow free culture reformers support allowing individual creators only a limited time to profit exclusively from their intellectual property, as is consonant with the intellectual property provisions of the Constitution. The free culture advocates “stress that borrowing and collaboration are essential components of all creation and caution against being seduced by the romantic myth of the ‘author’: the lone garret-dwelling poet, creating masterpieces out of thin air.” Thus, they argue, a limited period of exclusivity for the creator is all that is warranted; once the limited copyright has lapsed, the work would go into the cultural commons, part of the great shared public domain.

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253 Boynton, supra note 250 at 42.
254 See LESSIG, supra note 12. See also Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), available at http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html (“If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.”).  
255 See LESSIG, supra note 12. See also Boynton, supra note 250 at 42, 43.
256 Id. at 42
257 See LESSIG, supra note 12.
Advocates of strong copyright respond by arguing that the individual creator’s incentives and compensation for creation are integral to the Constitutional protection of intellectual property rights. On this view, “permission culture” would better serve all its constituents, including creators, collaborators, and users. In permission culture, consumers purchase leases to artistic works, affording them restricted access to, and use of, copyrighted creative works, such as books, songs, films, and so forth. The permission culture model may be most readily exemplified by Apple’s iTunes music store, through which consumers may download songs -- with somewhat restricted access -- for somewhere between $0.99 and $1.39 each. Such a leasing model may also be expanded, with the aid of sophisticated digital rights management technology. For instance, one proposed business plan allows a consumer to “play a song on [her] computer for one price; and transfer it to [her] MP3 player for a slightly higher fee.”

Some legal scholars find greater policy justification for the “micropayments” scheme of the permission culture than the cultural commons landscape of the free culture movement. For instance, Professor Jane Ginsburg of Columbia University Law School argues: “Copyright cannot be understood merely as a grudgingly tolerated way station on the road to public domain….Much of copyright law in the United States and abroad makes sense only if one recognizes the centrality of the author, the human creator of the work. Because copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert.” Building upon this position, Professor Paul Goldstein of Stanford University Law School suggests the broad scope that creators’ rights and rewards may span: “the logic of property rights dictates their extension into every corner in which people derive enjoyment and value from literary and artistic works….copyright should extend into every corner of economic value where the cost of negotiating a license is not insurmountably high.”

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258 See Boynton, supra note 250 at 42.
259 See Boynton, supra note 250 at 42-43
260 For example, a song from iTunes may only be downloaded onto five devices upon any one purchase.
261 See infra, Chapter 3.
262 See Boynton, supra note 250 at 45.
A middle ground between the cultural commons and permission culture positions -- one which seeks a compromise between the rights of creators and the interests of users -- also has its advocates. Professor William Fisher of Harvard University Law School has proposed a compensation scheme that draws upon the traditional compulsory licensing model of music composition, in which composers are paid when their works are recorded or performed. Under Professor Fisher’s compulsory licensing proposal, a central office would register all works capable of being transmitted online, such as music, film, and books. This central office would monitor the number of times a work is accessed and used, and then compensate the creators based on the frequency of usage. A fifteen percent tax would be collected from the sale of devices that are customarily used for copying and storing music, such as blank CDs, MP3 players, and CD burners -- and these tax revenues would pay for the creators’ compensation. Professor Fisher has estimated that this proposal would raise $2.4 billion, but critics have contended that the amount is insufficient when compared to the estimated $11 billion in revenue that is made by the music industry in the United States alone. Another such licensing arrangement, following Professor Lessig’s proposal, is the “Creative Commons License”, which allows authors to reserve certain rights while waiving others under four basic agreements that can be mixed and matched: (i) securing attribution when their work is used by someone else; (ii) denying use of their work for profit without permission; (iii) preventing alterations to their work; and (iv) permitting use of their work only if the new work is offered to the public under the same terms.

C. Reason to Compromise: “Show Me the Money”

A major reason that faculty members and institutions compete over copyright ownership of courses is that they consider the online distribution of courses in distance education venues to hold the potential for great profit in the commercial market. As Professor Alan Dershowitz of

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265 WILLIAM FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2007); see also Boynton, supra note 250 at 45; Ethan Smith, Can Copyright Be Saved?, WALL ST. J., Oct. 20, 2003, at R1.
266 FISHER, supra note 265; see also Boynton, supra note XX at 45
267 This is the model employed by the Spotify. http://www.spotifyartists.com/spotify-explained/.
268 FISHER, supra note 265; see also Boynton, supra note XX at 45; Lohr, supra note XX at 5
269 FISHER, supra note 265.
270 See LESSIG, supra note 12. See also Id.
Harvard University Law School has pronounced, “what distinguishes the Internet from everything else is the number of zeroes,” “the money is so overwhelming that it can skew people’s judgment.” Yet according to Professor Lessig of Stanford University Law School, only about two percent of all works protected by copyright continue to produce revenue for the owners of their copyright. Thus, a disconnect may exist between the stakeholders in the educational copyright debate -- particularly institutional administrators and faculty members -- so that a compromise may be struck between free access to copyrightable courses and materials and a system of micropayments to remunerate the creation, maintenance, and dissemination of such courses and materials online.

Both sides should be instructed as well by actual real-life examples of online distance education ventures that have failed to generate profits for their participants, irrespective of the copyright ownership of courses so disseminated. Early on, while investigating the potential capacity for revenue that online courses might represent, the Massachusetts Institute of Technology (“MIT”) commissioned a study by consultants Booz Allen Hamilton (“Booz Allen”). The Booz Allen study concluded that little to no market would exist for offering MIT courses online for a fee. Soon thereafter, MIT decided to make the primary materials from its courses available online for free; eventually, this would evolve into their world-famous Open Course Ware project, in which all of MIT’s courses would be systematically uploaded to their site and offered for free to the greater public. Thus, MIT found renown for its visionary project to open its education to all comers, while not wasting its resources chasing an elusive profit motive in online courses.

MIT was fortunate, or wise, enough to avoid the fate of some of its peer institutions, which remained persuaded that distance education would open up vistas of yet-untapped riches. In January 2003, Columbia University announced that it would close Fathom, its for-profit distance-learning venture that had been created with the express purpose of selling Internet-based

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courses and seminars to the public.\textsuperscript{275} Columbia had opened Fathom in 2001 with twelve partners -- including the London School of Economics and Political Science, the University of Chicago, and the Woods Hole Oceanographic Institution -- and with a hefty investment of $14.9 million.\textsuperscript{276} But at the close of its business, the Fathom venture had netted a mere $700,000 in fees from other institutions and from sales revenue.\textsuperscript{277} This mirrored New York University’s (“NYU”) similar loss a few years earlier. NYU closed NYUOnline in November 2001, three years after being heralded as the first large nonprofit university to create a for-profit venture intended to sell Internet-based courses.\textsuperscript{278} The sudden deflation of the “Internet bubble” soon thereafter abruptly finished off NYU’s plans to pursue investment in developing and marketing its courses in any kind of for-profit venture.\textsuperscript{279}

Still another cautionary tale is found in the online ventures undertaken by the School of Management at the State University of New York at Buffalo (“SUNY Buffalo”). In the fall of 2001, the business school at SUNY Buffalo ended its Internet-based MBA program after only thirty-five students enrolled in its two pilot courses.\textsuperscript{280} Enumerating the costs associated with such a venture, Howard G. Foster, then assistant dean for academic programs at the business school, pointed out that “[e]ach course has to have an instructor, a graduate assistant, technical people to be there in case the connection breaks down, as well as someone to design the course.”\textsuperscript{281} In order to recover these costs, the business school at SUNY Buffalo would have needed to charge approximately $23,000 for the two-year program, or more than double the in-state tuition rate at the time for their traditional MBA program, a prohibitive increase.\textsuperscript{282} In this same era, other large distance-learning ventures, including Virtual Temple and United States

\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} NYU Shuts Down an Internet Venture, N.Y. TIMES, Nov. 30, 2001, at D7.
\textsuperscript{279} Id.
\textsuperscript{281} Id.
\textsuperscript{282} Id. A contrasting example is Concord Law School, an online-only for-profit institution, which at the same time charged $7,000 per year for a four-year program, or two-to-three times less than the annual tuition at traditional law schools. Martha Neil, Virtual Lawyers: Online Law School Produces Its First Graduating Class, 88 A.B.A. J. 27 (Dec. 2002).
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Open University, were compelled to close their doors.\textsuperscript{283} This only served to highlight “the immaturity of the e-learning market and the risks that await the commercial online ventures of traditional institutions.”\textsuperscript{284}

The case against profitability of distance-learning ventures is not closed, however. Indeed, some studies have suggested that offering online courses may be a break-even proposition, or may even generate profits. The Pew Grant Program in Course Redesign has funded thirty technology-based ventures whose objective is to maintain or increase quality while reducing costs.\textsuperscript{285} Some of the program’s results have indicated that institutions may yield an average savings of 41% -- and in some cases as high as 86% -- through the careful design and restructure of resources for learning environments.\textsuperscript{286} Further studies undertaken by the Alfred P. Sloan Foundation in 2000 examining the financial costs and potential profitability of distance learning at six universities -- Drexel University, Pace University, Penn State University, Rochester Institute of Technology, University of Illinois at Urbana-Champaign, and the University of Maryland University College -- concluded that most of the universities under study were at least close to the break-even point.\textsuperscript{287}

IV. CAMPUS COPYRIGHT POLICY AGREEMENTS

A. List of Shared Rights, In Writing

Aside from the issue of whether online academic courses will generate profits, universities and faculty alike are best served when they have put in place clear and well-delineated copyright

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\item \textsuperscript{284} JOHN C. HITT & JOEL L. HARTMAN, DISTRIBUTED LEARNING: NEW CHALLENGES AND OPPORTUNITIES FOR INSTITUTIONAL LEADERSHIP 5 (2002).
\item \textsuperscript{285} \textit{Id.} at 7.zs
\item \textsuperscript{286} \textit{Id.} See also Carol A. Twigg, \textit{Improving Learning & Reducing Costs: Redesigning Large-Enrollment Courses}, THE PEW LEARNING AND TECHNOLOGY PROGRAM, 4-5 (1999), available at http://www.center.rpi.edu/PewSym/monol.pdf (arguing that universities can use technology to reduce the costs of instruction).
\item \textsuperscript{287} Sarah Carr, \textit{Is Anyone Making Money on Distance Education? Colleges Struggle to Figure Out How Much They Are Spending on Online Programs}, CHRON. HIGHER EDUC., Feb. 16, 2001, at A41.
\end{itemize}
\end{footnotesize}
agreements that respect the various stakeholders’ rights and allocate their responsibilities and rewards. As academic copyright has been at play for well over a decade now, many institutions have established policies that can serve as models for such copyright agreements. Provisions governing the allocation of ownership, control, and income rights related to courses are proving essential to the development of distance learning, whether undertaken for profit or offered in an open source model. Following are the significant points that academic copyright agreements elucidate.

In accordance with the Copyright Act, academic copyright agreements are reduced to writing.\(^{288}\) The American Association of University Professors (“AAUP”) and the American Association of Universities (“AAU”) agree on the importance of putting policies in writing. In its Statement of Copyright, the AAUP states: “[i]t is…useful for the respective rights of individual faculty members and the institution -- concerning ownership, control, use, and compensation -- to be negotiated in advance, and reduced to a written agreement.”\(^{289}\) Likewise, the AAU’s Intellectual Property Task Force’s recommendation for policy development for intellectual property and new media states that “[t]he university should have a formal written policy (one that is easily available for review by members of the community) that describes clearly the bases of distribution of revenues derived from new media content.”\(^{290}\)

The written agreement should delineate not only copyright ownership but also the rights and methods for using a work. This approach is advocated by Georgia Harper, senior counsel at the University of Texas System and a national expert on copyright. As she explains, sound copyright policies address “the use of others’ copyrights and the creation, ownership, and management of institutional copyrights.”\(^{291}\) Such policies, then, address who owns the works and who has the right to use and exploit them.\(^{292}\) As Harper sums up, “a policy that recognizes and focuses upon

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\(^{288}\) 17 U.S.C. 204
\(^{290}\) See AAU Framework, supra note 177.
\(^{291}\) Harper, supra note 221 at 6.
\(^{292}\) Id. at 7
the parties’ interest in a work, rather than just on who owns the work, will better serve everyone’s needs.”

Harper’s position is equally espoused by Beryl Abrams, associate general counsel of Columbia University, who believes in separating copyright ownership and control. As he has stated: “there is a legitimate basis for separating copyright ownership from control, and use and distribution of any revenues that arise from commercialization of a work. If those different ideas are addressed, I’m not sure you have to really come down firmly and say that any new media works are necessarily works for hire.”

Two commentators from Washburn University have similarly posited that copyright policies may not necessarily conform to the strict contours of the Copyright Act, but may instead meet the reasonable expectations of institutions and faculty in order to fulfill the purpose of the copyright laws. As they state: “[a]voiding any blanket application of the work-for-hire doctrine would reinforce the parties’ normal and legitimate expectations regarding the ownership of particular works as well as promot[e] the larger policies of copyright law and academic freedom which favor information dissemination.”

Generally, academic institutions’ copyright agreements regarding copyright in courses that may be offered through distance education programs address the following concerns:

- definitions of the property incorporated in the policy;
- delineation of copyright ownership, particularly defining what is considered a work for hire by specifying which works are within or outside a faculty member’s scope of employment;
- rights to distribute the work, and the allocation of any resulting profits;

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293 *Id.* at 9

294 Coping with Copyright in the Digital Age, Trusteeship, Sept./Oct. 2000, at 28, 32. See also AAU Framework. Note that an important distinction exists between the ownership of intellectual property and the allocation of returns derived from the licensing or sale of that property

295 Wadley & Brown, *supra* note 122 at 420. See also Michele J. Le Moal-Gray, *supra* note 20 at 1032. As LeMoal-Gray states: “[w]hile still recognizing the legal bases of ownership, colleges and universities that wish to maintain a traditional academic culture will, most likely, provide for faculty members to retain ownership of their instructional materials. Through the use of well-crafted, collaboratively developed, contracts or license agreements, faculty would own their work, while still providing the institution with flexibility in the manner in which the courses were offered. *Id.*
- rights to future use;
- rights to derivative works;
- licensing rights;
- rights of fair use, including specific time limits on future use;
- rights of distribution; and
- the recommendation, or requirement, that the parties enter contracts that clarify ownership, control, and the right to revise, commercialize, and create derivative works.296

Institutions have learned that specifically drafting agreements governing the allocation of academic copyrights is essential, even when well-established patent policies are already in place. Illustrative of this fact is an incident that arose in 1988 at Princeton University. A committee on intellectual property at Princeton suggested that electronic courses were most analogous to computer programs, and should therefore be governed by the university’s patent policy, under which the university has the right to claim ownership over intellectual property (i.e., patents) created with its resources.297 Professors in the computer science department objected to this characterization, arguing that it would give the university control over extensive online materials used in their courses.298 An open letter, signed by fourteen faculty members, stated that “the proposed policy has potentially far-reaching effects that will inhibit, rather than encourage, the production and dissemination of new knowledge.”299 In response, the Princeton intellectual property committee changed tack, and suggested establishing a new policy for online courses apart from copyright and patent policies.300

**B. Work Made For Hire Redux: Statutory Language and Substantial Control**

In crafting their copyright policies and agreements, academic institutions focus on the issue of ownership. This compels them to articulate a clear response to the open-ended question posed by the Copyright Act: what is a work made for hire in the academic context?

296 See Le Moal-Gray, supra note 20, at 1025; Lape, supra note 40, at 265-66; Harper, supra note 221 at 8.
297 Guernsey & Young, supra note 72, at A22.
298 Id.
299 Id.
300 Id. at A23.
As previously discussed, the Copyright Act articulates a two-pronged test to determine whether an author’s work constitutes a work made for hire.\(^{301}\) Under the second prong, a university’s copyright policy may unambiguously designate a faculty member’s work as a work made for hire when it is “specially ordered or commissioned for use” in one of nine specific categories. The enumerated categories that are most pertinent to higher education are: (i) a contribution to a collective work; (ii) a supplementary work; (iii) a compilation; and (iv) an instructional text.\(^ {302}\)

Contingent to this designation is the requirement that the parties “must expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”\(^ {303}\)

In less clear-cut circumstances, any determination of copyright ownership is subject to interpretation of the first prong of the work-made-for-hire provision of the Copyright Act: “a work prepared by an employee in the scope of his or her employment.”\(^ {304}\) Some policymakers strongly suggest that universities are best served by drafting their copyright policies with an initial presumption that faculty have ownership in their work. This policy preference does not align perfectly with existing law, which offers a reasonable case for universities asserting copyright ownership in faculty work, particularly with regard to distance education courses. However, advocates for faculty ownership of copyright argue that traditionally faculty are privileged with respect to copyright ownership in the work they create. Further, they argue, “what is essential is that the university allocate to itself only those aspects of the copyright in which it truly has an interest.”\(^ {305}\)

Among these policymakers, the AAUP, in its Statement On Copyright, clearly advocates for a presumption of faculty ownership. It states: “it has been the prevailing practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member’s own initiative for traditional academic purposes. Examples include class notes and syllabi, books and articles, works of fiction and nonfiction, poems and dramatic works, musical

\(^{303}\) Id.
\(^{304}\) Id.
\(^{305}\) See Lape, supra note 38 at 268.
and choreographic works, pictorial, graphic and sculptural works, and educational software, known as ‘courseware.’ This practice has been followed for the most part, regardless of the physical medium in which these “traditional academic works” appear, that is, whether on paper or in audiovisual or electronic form…. this practice should therefore ordinarily apply to the development of courseware for use in programs of distance education.”

306 Notwithstanding this pronouncement, however, the AAUP does recognize that the university may fairly claim copyright ownership in work created by faculty that falls into three categories: (i) special works created in circumstances that may properly be regarded as “made for hire”; (ii) negotiated contractual transfers; and (iii) “joint works” as described in the Copyright Act.

307 In contrast, the AAU’s Intellectual Task Force argues in its AAU Framework for the “management” position in recommending that “the university should own the intellectual property that is created at the university by faculty, research staff, and scientists with substantial aid of its facilities or financial support.”

308 The AAU Framework defines “substantial aid” to include “intellectual, financial, and reputational capital.”

309 Many universities, while acknowledging the AAUP’s perspective, adopt the AAU’s position when fashioning their copyright policies. For example, as seen in a survey from as early as 1990 involving seventy research universities revealed that in forty-two of the policies universities claimed ownership of faculty work when there had been “substantial use” of university resources. Sixteen of these forty-two policies, however, excluded the use of certain common resources from consideration, including libraries, offices, salaries, classrooms, laboratories, and secretarial aid.

C. Protecting Specific Faculty Rights

306 AAUP Statement on Copyright.
307 Id.
308 AAU Framework, Section II
309 Id. at n.5
310 See Gorman, supra note 129 at 307.
311 Lape, supra note 40, at 252, 257.
312 Id. at 257.
Even when a university claims the copyright to online courses, individual faculty members who created and developed such courses may retain significant rights and privileges. The AAUP, in its Statement on Copyright, recommends that at a minimum faculty retain “the right to take credit for creative contributions, to reproduce the work for his own instructional purposes, and to incorporate the work in future scholarly works authored by that faculty member.”313 With respect to distance education courseware, the AAUP suggests that faculty members also retain rights over future use, “not only through compensation but also through the right of ‘first refusal’ in making new versions or at least the right to be consulted in good faith on reuse and revisions.”314

At least one commentator, Professor Robert Gorman of The University of Pennsylvania Law School, has expressed agreement with the AAUP position: “should it be determined that ownership of courseware lies with the university, [policies or agreements] can expressly reserve to the faculty member any number of important rights, both economic and ‘moral’: to share future royalties, to be given due credit on the courseware, to have the right of first refusal if the lectures are to be updated in later years, and to have the right to use the material in the professor’s own courses and publications.315

One example that highlights many of the provisions enumerated by the AAUP is the University of Michigan’s copyright policy. While some works are owned by the university, faculty still retain an interest in the use of such works and in receiving credit for participation in such works.316 Moreover, faculty employed by the university retain the right of first refusal with respect to proposed new versions of their work.317

The University of Washington’s copyright policy allows a faculty member to retain the right to revise a course she has created. Its policy provides that “as long as the author...remains an employee of the University, the author may: (a) request reasonable revisions of the materials prior to any instance of internal use, or (b) ask that the materials be withdrawn from internal use

313 AAUP Statement on Copyright.
314 Id.
315 Gorman, supra note 129, at 309.
317 Id.
if revisions are not feasible.”

Consonant with these provisions, as one commentator notes, a faculty member may retain the right to demand credit for her work or, alternatively, to have her name removed as the creator if she disagrees with revisions made by the institution.

Some copyright policies protect the rights of departing faculty members who, upon changing institutional affiliations, seek access and use of the courses they created and taught. Two means of providing for such rights are licenses and royalties. As defined by the copyright policy of the University of California at Berkeley, licenses are “a contract in which a copyright owner grants to another permission to exercise one or more of the rights under copyright.” The same policy defines royalties as a “payment made to an owner of a copyright for the privilege of practicing a right under the copyright.”

One option, which follows certain long-standing policies of academic publishers, allows a departing faculty member to receive a non-exclusive, royalty-free license to use her work in classes she teaches at her new institution. Alternatively, the original institution may retain authorship and copyright in the course, but at the same time negotiate a license for use with the faculty member’s new institution. The license may contain a variety of faculty rights. For instance, the Michigan Policy provides that its departing faculty members “have the right to be consulted in good faith on reuse and revisions (e.g. for online instructional materials or courseware).”

It is always the case that faculty members and institutions can enter into contractual agreements on many, if not all, of these provisions. For instance, the UW Policy allows the university to

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319 Laughlin, supra note 146, at 580-81.
321 Id. Section III.G.
323 Le Moal-Gray, supra note 20, at 1034.
324 Michigan Policy, Section I.C.2
retain the right to continue to use a faculty member’s work internally after she leaves the institution, “unless the author/producer and the University agree in writing on special conditions for subsequent internal use of the materials and the procedures for their revision.”\(^{325}\) Pursuant to provisions in the UW Policy, faculty members can only secure full protection for their work if they obtain an agreement stating that their works are not considered works made for hire and are not produced in the course of employment.\(^{326}\)

**D. Protecting Specific University Rights**

Customarily, even when parties agree that a faculty member owns copyright in her course, the university that provides her supporting resources retains some measure of control over the course materials. As at least one commentator has indicated, if the university provides an “extraordinary measure of creative or financial input,” it may reasonably negotiate to secure reimbursement from, or a continuing share in, royalties; or it may negotiate to obtain a license to revise, update, and use the materials within the institution, without paying royalties.\(^{327}\) Some institutions prefer reimbursement over licenses to use, as reimbursement can minimize contentious negotiations among parties. However, other institutions will opt to negotiate licenses to use, which afford access to any income generated by continuing use of the underlying materials.\(^{328}\)

In the realm of academic patents, the technology transfer offices of many universities commonly reserve a “shop right” in patentable materials, while dividing royalties among the institution and the creative faculty member.\(^{329}\) The shop right doctrine of patent law allows an employee to retain rights in the underlying patent, while the employer is entitled to use the patented device, process, or invention to the extent necessary for business purposes.\(^{330}\) Commentators such as Professor Gorman are in favor of using a shop right approach with respect to academic

\(^{325}\) UW Policy, Section 2.E.2.a(3)  
\(^{326}\) Simon, *supra* note 146, at 509.  
\(^{327}\) Lape, *supra* note 40, at 261. *See also* Laughlin, *supra* note 146, at 580 (noting that ownership policies may, however, lead to difficult negotiations between the interested parties).  
\(^{328}\) Lape, *supra* note 40, at 261.  
\(^{329}\) Gorman, *supra* note 129, at 308-309.  
\(^{330}\) Simon, *supra* note 146, at 511.
copyright. However, such an analogous use of the shop right doctrine has been rejected in other creative industries. For instance, employees in the motion picture and music industries, in which copyrights can retain their value for many years, proposed including shop rights in the Copyright Act. Such proposals, however, were expressly rejected by Congress.

Notwithstanding the discouraging examples of the film and music industries, several policy reasons argue in favor of allowing an institution to retain a shop right in online materials created by its faculty. One such reason is the protection of student expectations in the availability of courses and course materials. On this ground, institutions have good reason to retain a “perpetual, non-exclusive license to use of the videotapes, computer files, or other media comprising the distance learning program.” Another such reason is the protection of the institution’s interest in the event that a faculty member departs for another institution. On this ground, and as proposed by the ACE Distance Education Report, institutions reasonably receive a non-exclusive, royalty-free license to use the work for instruction, with possible restrictions on commercialization of the work.

The AAUP is a proponent of allowing universities to retain a shop right to online courses that were initially costly to develop. The AAUP suggests that the institution may reasonably require reimbursement for “unusual financial or technical support,” irrespective of allocations of copyright ownership among the interested parties. It proposes that reimbursement may be “in the form of future royalties or a non-exclusive, royalty-free license to use the work for internal educational and administrative purposes.”

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331 Gorman, supra note 129, at 308-309.
333 Id.
334 Laughlin, supra note 146, at 580.
335 ACE Distance Education Report, at 5. As noted, this closely adheres to the traditional model of academic publishers.
336 AAUP Statement on Copyright. These costs might include computer support, library, secretarial, and research expenses, materials, and other administrative overhead. See Le Moal-Gray, supra note 20, at 1034 n.231.
337 Id.
338 Id.
One example of a shop right provision is found in the University of California at Berkeley’s Policy on Copyright Ownership, in the section regarding the release of university rights. It states: “[t]he University may release its ownership rights in copyrighted work to the originator(s) when, as determined by the University: (a) there are no overriding or special obligations to a sponsor or other third party and (b) the best interests of the University would be so served. Such release of ownership rights must be contingent on the agreement of the originators) that no further effort on, or development of, the work will be made using University resources and that the University is granted a free-of-cost, nonexclusive, worldwide license to use and reproduce the work for education and research purposes.”

In a provision that bears close resemblance to a shop right, one commentator has proposed establishing a right of “teacher inception” in a work created by a faculty member pursuant to her teaching duties and on her own initiative, rather than at the institution’s instigation. The right of teacher inception, which may be provided either in individual contracts or in collective bargaining agreements, grants the institution a “nonexclusive, nontransferable, royalty-free license to use the copyrightable works for nonprofit educational purposes.” The teacher then would hold all other copyrights.

Finally, institutions typically own their web servers, and seek to protect their interests in such web servers. In this regard, it is common practice in university copyright policies to stipulate that all information and files saved on the server become property of the university.

E. Additional Contract Provisions

First and foremost, universities’ comprehensive copyright policies delineate ownership rights and protect vital faculty and institutional interests. These policies also clarify the terms and

339 Berkeley Policy, Section VII
340 VerSteeg, supra note 205, at 410-11.
341 Id. at 411
342 Todd D. Borow, Note, Copyright Ownership of Scholarly Works, Created by University Faculty and Posted on School-Provided Web Pages, 7 U. MIAMI BUS. L. REV. 149, 165 (1998).
conditions of ownership, and specify the allocation of any returns that may flow from the exploitation of copyright in academic work.

1. Licenses

Universities customarily grant licenses when they commercialize an online course, typically by selling the course to another institution or on the open market. Illustrative are the license provisions in the copyright policy of the University of Washington. The University of Washington Copyright Policy, specifying the licensing rights of faculty members, states: “[l]icensing or sale of...materials for external use shall be preceded by a written agreement between the University and the author or producer specifying the conditions of use, and including provisions concerning the right of the author or producer to revise the materials periodically, or to withdraw them from use -- subject to existing agreements -- in the event revisions are not feasible.”

At the Massachusetts Institute of Technology (“MIT”), licenses play a key role in the creation of the OpenCourseWare project, in which MIT is placing all primary materials of its courses online, and making them available to the general public for free. Faculty involvement in the project is voluntary and those faculty members who participate in the project sign a licensing agreement that allows MIT to distribute their course materials on the OpenCourseWare website, but the retain the copyright to the materials.

2. Royalties

As in the case of licenses, royalties come into play when universities commercialize an online course. In such cases, the AAU’s Intellectual Property Task Force recommends that the “long-

343 UW Copyright Policy, Section 2.D.2.b.
345 Id.
standing custom” under which faculty members receive and retain royalties on their courses “whether distributed in print or electronically... should not change.”\textsuperscript{346}

The University of Washington divides royalties between itself and its faculty when it sells noncommissioned materials developed by professors. As explicated in the UW Copyright Policy: “a sharing of royalties and income is appropriate because of the author’s provision of creative efforts on the one hand and the University’s provision of salary, facilities, administrative support, and other resources.”\textsuperscript{347}

The University of California at Berkeley addresses licenses and royalties together, stating: “[t]he university may assign or license its copyright to others. Royalty or income received from such transactions may be shared with the originator(s) of such works, as determined by the appropriate Chancellor, Laboratory Director, or Vice President, taking into account the originator’s contribution, the University’s costs, any provisions imposed by sponsors or other funding resources, and any other applicable agreements concerning the copyright.”\textsuperscript{348}

The University of North Texas grants royalties to its faculty members when their courses are taught by other professors at that institution.\textsuperscript{349} The amount of a given royalty depends upon, among other factors, the amount of technical assistance provided by the university; but a faculty member may receive up to 8% of the tuition paid by a student who takes the course when another professor teaches it.\textsuperscript{350} The creative faculty member also receives 50% of the license fee paid by another institution to use the course.\textsuperscript{351}

\textbf{3. Early Disclosure}

\textsuperscript{346} AAU Framework, Section II.
\textsuperscript{347} UW Policy, Section VIII.
\textsuperscript{348} Berkeley Policy, Section VII.
\textsuperscript{349} Jeffrey R. Young, \textit{At One University, Royalties Entice Professors to Design Web Courses: At North Texas, Online Education Pays Off -- Literally -- For Faculty Members and Departments}, CHRON. HIGHER EDUC., March 30, 2001, at A41.
\textsuperscript{350} \textit{Id.}
\textsuperscript{351} \textit{Id.} It is perhaps noteworthy that the institution charges students supplemental fees to pay for the faculty member’s royalty.
Some copyright policies include an early-disclosure provision that requires faculty members to inform the dean or chair of their department that they are developing online material. This disclosure may be particularly useful if the faculty member intends to sell the work, and/or when the faculty member is receiving outside funding to pay for the development of the work.

One example of an early-disclosure provision can be found in the Carnegie Mellon Copyright Policy, which states: “[t]he creator of any intellectual property that is or might be owned by the university under this policy is required to make reasonably prompt written disclosure of the work to the university’s provost, and to execute any document deemed necessary to perfect legal rights in the university and enable the university to file...applications for copyright registration when appropriate. This disclosure to the provost should be made at the time when legal protection for the creation is contemplated, and it must be made before the intellectual property is sold, used for profit, or disclosed to the public.”

Comprehensive copyright policies at universities often include other important provisions, including: (i) Joint Works; (ii) Time Limits; (iii) Dispute Resolution; (iii) Conflict of Interest; and (iv) Assignment.

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352 See AAU Framework.
353 Id.
354 Carnegie Mellon, Copyright Policy, Section 4-1. Note: This policy is in transition as of March 1, 2015.
CHAPTER 3: MUSIC

INTRODUCTION: RISE OF USER-GENERATED CONTENT

Since the advent of the Internet, digital technology has transformed the way that music users listen, consume, and otherwise interact with music content. One feature of this digital era is the rise of websites that contain user-generated content (“UGC”), which has added complexity to the broader debates regarding music copyright today. This has been referred to in shorthand as Web 2.0, or the “explosion of blogs, social networks, and video-sharing sites [that have] allowed any Internet user to become a journalist or filmmaker or music star.” These technological resources, including websites such as YouTube, MySpace, and Facebook, enable users to create and distribute a variety of content, such as original works, commentary and criticism, and creative derivations or re-interpretations of existing works.

The vast majority of websites that enable and host UGC are popular among users, but struggle to become profitable in the beginning. In 2009, for instance, Facebook announced that it had become cash flow positive yet not profitable. It took another four years for the social media platform to become profitable. YouTube also has a long road to attaining profitability.

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revenue shortfalls, however, are belied by the sweeping scope among users, including not only viewers but also creators of content. Among viewers, user-generated websites are emerging as increasingly powerful locales for the sharing and consumption of content. In terms of viewership, for instance, YouTube reported over one billion users, as well as 6 billion hours of videos viewed in 2014.\(^7\) Similarly, Facebook demonstrated impressive membership in the last dozen years or so,\(^8\) stating that it logged more than 1.39 billion monthly active users in 2014,\(^9\) leading to its market valuation reaching as high as $200 billion.\(^10\) In terms of creative use, the statistics of Web 2.0 and the major UGC websites are equally impressive: the estimated total number of creators of content on such websites grew from 83 million in 2008 to 115 million in 2013.\(^11\)

Despite the increasing dominance of the largest UGC websites, viewership rather than profitability remains the current illustration of their strength, as well as a clear indicator of user interest in creating and sharing content via their channels. Generally, of course, profitability serves as a strong measure of company success and industry vitality. But unusually in this case the growth of UGC websites highlights a different aspect of the music industry: their emergence has spurred enormous changes in the creation and distribution of music, and as a result a transformation of music industry business models that is as permanent as it is ineluctable. The rise of Web 2.0 has had a profound effect on cultural industry business models, particularly due to the fact that UGC often appropriates, interprets, imitates, or simply contains a range of copyright-protected content. Music was one of the first and foremost industry sectors to

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8 *See generally* Arewa, *supra* note 3, at 432-433.


10 Tim Bradshaw, *Facebook Market Value Tops $200bn*, FORBES (Sept. 9, 2014), http://www.ft.com/cms/s/0/ecc0f050-37a3-11e4-bd0a-00144feabde0.html#axzz3SVpxSlj.

experience this phenomenon, in which record numbers of users gained access to broad swathes of musical works for various purposes, such as dissemination, critique, and/or creative re-use. Peer-to-peer ("P2P") file sharing among younger music users offers one widespread example of such practices, which precipitated a large-scale transformation—and some would contend devastation—of the recording industry. The changes in user consumption practices led by the initial P2P ventures such as Napster, Grokster, and their progeny were widespread, and did not end with the court-driven demise of several of the larger sites. In part, imitators such as BitTorrent came to replace the initial contender, continuing to the present day to offer a venue for file sharing, some of which may well infringe on existing copyrights. But user patterns and preferences were profoundly shifted in part by the changing digital landscape and the potential for cultural access that it unlocked. Other cultural industries, such as entertainment and media, have taken note of these changes, and along with the music industry continue to argue that P2P file sharing remains a critical obstacle to improving their sustainability and growth. However, the critique of online music sharing does not account for changes in both the competitive business environment and the culture at large, including the patterns, practices, and preferences that users have come to express through the mediated venues of online websites. Likewise, other cultural industries would be better served by more closely considering the example of shifting user behaviors in the music arena, in order to understand better how cultural production has been transformed and even now continues to be subject to exploration, innovation and reform.

The changing shape of the music industry reflects broader trends that have affected many other cultural industries, including film, publishing, television, cable and music. Many of these industries are also controlled by large conglomerates, which may have multiple stakes in the

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13 See id.


Music stands to impart vital lessons to these cultural producers, who are only now coming to recognize and adapt to changing patterns of behaviors among the various stakeholders in the creative market, including industry players, end users, and creators. These learning experiences naturally extend to the purview of copyright. Traditionally, dominant business models among cultural firms, particularly during the pre-digital era, relied upon intellectual property as a means of controlling content under copyright, and thereby controlling revenue streams flowing from copyright’s protections. In the pre-digital era, to a large extent, control was at least partially predicated upon industry players’ privileged and exclusive access to technologies and business structures that undergirded the creation, reproduction and distribution of content. The unauthorized access, use, reproduction, and appropriation of cultural content in pre-digital times, while not unheard of, remained relatively limited due to the lack of tools available to its consumers. In the digital era, to the contrary, new technological tools make access and use of content far more available to the average end user. The Internet has proved a truly disruptive force that radically alters the balance between those who generate and own cultural content and those who consume it. As a result, the digital era has had a profound and lasting impact on cultural production and the business models of cultural industry participants.

Copyright regulates both the creation and distribution of creative works, among others, as well as the display and performance of such works. The digital era has ushered in technological innovations that fundamentally challenge the framework and implementation of copyright itself. Borrowing, appropriation for transformative purposes, and other practices that steer perilously close to copying are well-established practices across many creative cultural sectors. Sharing

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16 See generally Arewa, supra note 3, at 433 (citing DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 1 2 (2007)).
17 Id. at 433-34.
18 Id. (citing LAWRENCE LESIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 69 (2008)).
21 Arewa, supra note 3, at 434 (citing JESSICA LITMAN, DIGITAL COPYRIGHT 111 (2001)).
23 See Arewa, supra note 3, at 434 (citing Olufunmilayo B. Arewa, From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context, 84 N.C. L. REV. 547, 571-72 (2006)).
and copying of existing works, particularly for personal use, have likewise been long accepted practices in these same sectors. Yet intellectual property policies and practices have not fully accommodated the full range of these collaborative, sharing and creative practices. The digital era, in enlarging the scope of the problem, also serves to highlight the pressing need for copyright to reconsider its recognition of new user practices, preferences, and creative urges.\footnote{See generally Arewa, supra note 3, at 434.}

The music landscape has been fundamentally altered on both the creation and the distribution side of the aisle. On the distribution side, as mentioned, the Internet has afforded creators and users alike an increasing number of new avenues for the dissemination of content.\footnote{Id. at 462 (“Technological changes on the distribution side have also proven to be disruptive, fundamentally compromising many existing business models.”).} The alternate channels for distribution are liable to impinge upon pre-existing distribution channels that were established prior to the advent of the digital era, and that were intended to serve as exclusive, and generally commercially oriented, means of distribution.\footnote{Id.} The tension arising between these highly distinct distributive venues continues to spark conflicts between uses that were once deemed personal—and therefore typically outside commercial industry scrutiny and control—and those that are seen as primarily commercial, such as the exploitation of copyrighted content for revenue.\footnote{Id. at 472 (“[B]ehaviors that were commonplace in earlier eras, such as personal private copying, are increasingly demonized and characterized as impermissible or illegal, or as piracy.”).}

Thus, for example, the long-established practice of making “mix tapes” as a means of sharing music among friends—which finds a loose analogy in the ripping of CD mixes—becomes more problematic when music tracks are not only copied and shared among a few friends but rather among an entire website of users, known and unknown to the originator of the mix.

But interestingly, it is not only the music distribution side of the equation that has been altered. On the creation side, the newly gained access to a host of resources has often been accompanied by new incorporation of music’s “building blocks” in contemporary creative works. For instance, artists have experimented with “sampling” prior works; DJs are mixing various short excerpts of music tracks in dance mixes and medleys; and many artistic hopefuls online are bringing their

\footnote{24 See generally Arewa, supra note 3, at 434.} \footnote{25 Id. at 462 (“Technological changes on the distribution side have also proven to be disruptive, fundamentally compromising many existing business models.”).} \footnote{26 Id.} \footnote{27 Id. at 472 (“[B]ehaviors that were commonplace in earlier eras, such as personal private copying, are increasingly demonized and characterized as impermissible or illegal, or as piracy.”).}
own interpretation or transformation of earlier musical pieces. This movement is by no means completely novel: to an important extent, creative and transformative use of music existed in the pre-digital era, particularly in niche and collaborative communities that emerged and grew outside the reach of major cultural industry firms. Artistic and cultural movements such as punk, hip house, and rap generally had their roots and their earliest audience well outside the purview of the corporate industries. In some instances, these artistic movements were later incorporated into the mainstream of music, commercialized within established business structures, and brought into the industry’s scope of control. The industry intervention, and its subsequent intermediation, afforded these artistic movements and communities access to wider audiences and to larger-scale commercialization. The process, which continues to date, still relies upon cultural industry firms to intermediate the transition of subcultural, underground movements to a more centralized and commercial culture. But today, digital era technologies are beginning to take an ever-increasing part in the process of bringing subcultures into the mainstream—and in so doing, may take an ever-larger share of the role that cultural industry players formerly had to themselves. The elision of music creators, producers, distributors, owners, and users is coming to a pivotal point in the making of music, which in turn is leading to collisions between spheres of operation and influence that were, in the past, kept separate and distinct in many respects. Equally importantly, while contributions on UGC websites were once likely to vary considerably with respect to the quality of production and other features, they are likely to improve, thanks to the increasing availability of technologies that enable the creation of

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28 Mashups and remixes became very common in the 2000s, leading to questions about whether such works violate copyright. See generally Elina Lae, Mashups—A Protected Form of Appropriation Art or a Blatant Copyright Infringement?, 12 VA. SPORTS & ENT. L.J. 31 (2012).

29 Arewa, supra note 3, at 434-45.

30 Id. at 434 (citing MATT MASON, THE PIRATES DILEMMA: HOW YOUTH CULTURE IS REINVENTING CAPITALISM 16, 21 (2008); Andreana Clay, Keepin’ It Real: Black Youth, Hip-Hop Culture, and Black Identity, 46 AM. BEHAV. SCIENTIST 1346, 1348 (2003)).


32 Id. at 435.

33 Id.

34 Id.

35 Id. (citing MASON, supra note 30, at 6)
high quality content with vastly improved production values, some of which approach a professionalism comparable to that once achieved only by music’s record labels.\textsuperscript{36}

In the context of these sweeping changes to cultural creativity and its associated business practices, the role of copyright law has become increasingly contested and fraught.\textsuperscript{37} Prior to the digital era, the scope and duration of copyright were notably expanded, based in part on vision of copyright grounded in property rhetoric which, according to commentators such as Neil Netanel, tends to prioritize the individual entitlement over the broader public interest.\textsuperscript{38} The property rhetoric underlying copyright’s expansion was bolstered by the business realities that saw cultural industry firms hold the reins of control over the creation and distribution of most creative content. The ecosystem of music in the pre-digital era did have some critical points of contention, such as that associated with the advent of new technologies allowing widespread copying and distribution of music, such as the introduction of the piano player and piano rolls.\textsuperscript{39} Yet the emergence of digital technologies, catapulting a far greater number of music industry participants and consumers into the fray, has challenged the delicate balancing act of copyright, and its central business practices and norms, to an unprecedented degree.\textsuperscript{40}

Digital era innovations have made content increasingly accessible to end users, in increasingly compact, affordable, and high quality forms, such as digitized compact discs (CDs) and digital video discs (DVDs).\textsuperscript{41} Further innovations, such as the compression of digital files in formats such as the MP3 have reduced the storage space required to hold such files, enabling users to accumulate more content with greater ease.\textsuperscript{42} Compressed digital formats facilitate the copying and dissemination of files, which may carry music, films, audio recordings, and other cultural content.\textsuperscript{43} While some critics have argued that the sound quality of compressed MP3 files may be

\textsuperscript{36} Id.
\textsuperscript{37} Id. (citing JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 4 (2006))
\textsuperscript{38} Id. (citing NEIL WEINSTOCK NETANEL, COPYRIGHTS PARADOX 7 (2008)).
\textsuperscript{39} Id. at 436 n.23.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 463 & n. 25 (“A list of twentieth century technologies that have facilitated copying might include the Xerox machine, VCR, various tape player technology ranging from 8-track tape cartridges to DAT,
compromised, many digital music consumers have shown that they are prepared to sacrifice some amount of quality in exchange for greater convenience and quantity available at a reasonable price. The widespread adoption of these technological tools has enabled nonprofessional music users to make and distribute digital copies with relative ease, and at very low cost, thereby exacerbating the impact of copying on the music industry and its pre-digital era business models.

The new music landscape reflects the profound disruption to existing assumptions and practices that prevailed throughout the industry prior to its digitization. In response to this disruption, established industry players have leaned heavily on copyright law as both a defense and a ground for attack against digital era business competition, on the one hand, and changing user practices and preferences, on the other hand. But disruption alone may not suffice as a reason for legal intervention, primarily because disruption may represent a key feature of entrepreneurial innovation, whether undertaken individually or effected on a collective scale. Further, the ability to confront and master the challenges of disruption may represent a critical factor in business success. Copyright law must take the disruptive nature of innovation into account when mediating content ownership and access in the cultural industries, particularly as many begin to confront similar challenges to those faced by the music industry in the immediate past. To a great extent, the cultural industries have played a major role in shaping the contours of modern copyright law, which has yielded highly complex copyright rules and practices that

digital file formats such as MP3 (MPEG-1 Audio Layer 3), MPEG-2, MPEG-4, and devices to play digital file formats such as MP3 players, DVD players, and CD players.”.

46 Id.
47 Id. at 437.
48 Id. at 446-37.
49 Id. at 437 (citing CLAYTON M. CHRISTENSEN, THE INNOVATORS DILEMMA, xi-xxi (2003); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 132 (1942)).
50 Id.
reflect, to a significant degree, the accommodation of industry needs, concerns and priorities.\textsuperscript{52} Music most clearly reflects this layering of complex copyright law and copyright ownership, as well as the prevalence of arcane, complicated regulatory and licensing structures that are difficult for the average consumer of culture to navigate, let alone master.\textsuperscript{53}

\section*{I. DIGITAL MUSIC AND DIGITAL ERA BUSINESS MODELS}

Digital music file-sharing garnered significant attention in the creative industries for two reasons. First, the rise in digitally enabled sharing of music tracks occurred just as sales of music CDs (or bundled music tracks) underwent a precipitous decline.\textsuperscript{54} Further, the use of technology to copy and disseminate musical works was the first notable example of massive content sharing in the creative sector.\textsuperscript{55} As such, it gave notice to other content-rich industries—such as movies, television, newspapers and media, book publishing, and so on—that the technologically-enabled onslaught of user-sharing had arrived, and was likely here to stay.

\subsection*{A. Decline in music sales linked to infringing activities}

One of the primary reasons that the digital era in music garnered such attention was the stark report of declining music sales that immediately followed the wide-scale adoption of Napster and its fellow peer-to-peer music-sharing networks.\textsuperscript{56} In 2008, thirty-three percent of music tracks

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{52} \textit{Id.} (citing LITMAN, supra note 21, at 23 (“About one hundred years ago, Congress got into the habit of revising copyright law by encouraging representatives of the industries affected by copyright to hash out among themselves what changes needed to be made and then present Congress with the text of appropriate legislation.”)).
\item \textsuperscript{53} \textit{Id.} (citing AL Kohn \& BOB Kohn, Kohn On Music Licensing (3d ed. 2002); Lydia Pallas Loren, \textit{Untangling the Web of Music Copyrights}, 53 CASE W. RES. L. REV. 673, 675 (2003)).
\item \textsuperscript{54} \textit{Id.} at 440. The extent to which these two phenomena were causally related shall be explored in this paper.
\end{itemize}
\end{footnotesize}
were digital tracks, while the number of CDs purchased declined by seventeen million.\textsuperscript{57} Overall music sales fell by thirty percent between 2004 and 2009.\textsuperscript{58} This trend continues to date.\textsuperscript{59} Music audiences are increasingly inclined to listen to music through various digital media forums, including file sharing, social network sites, and online music services.\textsuperscript{60} While some of these digital venues are legitimate purveyors of music, others promote unauthorized sharing and downloads. The prevalence of such infringing activities is indisputable: by one measure, taken in 2008, the industry representative IFPI estimated that ninety-five percent of all music tracks downloaded were appropriated by users who did not pay for the downloaded content.\textsuperscript{61} The disparity between legitimate and illegitimate music listening is likewise astonishing. To illustrate, consider that, while authorized single downloads of music tracks increased by twenty-four percent between 2007 and 2008, reaching 1.4 billion downloads,\textsuperscript{62} and by ten percent in 2009,\textsuperscript{63} reaching 1.5 billion downloads, the unauthorized download and sharing of music tracks in 2008 reached an estimated 40 billion files.\textsuperscript{64} The recording industry has vigorously argued that the unauthorized downloading and sharing of digital music tracks is the primary factor contributing to the music industry’s decline.\textsuperscript{65}


\textsuperscript{58} Id. (citing IFPI, DIGITAL MUSIC REPORT 2010, at 3 (2010), www.ifpi.org/content/library/DMR2010.pdf).


\textsuperscript{60} Id. (noting a fifty-four percent increase in digital music consumption).


\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Id.

\textsuperscript{65} Id. (citing Felix Oberholzer-Gee & Koleman Strumpf, \textit{The Effect of File Sharing on Record Sales: An Empirical Analysis}, 115 J. POL. ECON. 1, 2 (2007); see also Stan J. Liebowitz, \textit{File-Sharing: Creative Destruction or Just Plain Destruction?}, 49 J.L. & ECON. 1, 24 (2008)).
B. Misunderstanding the source of competitive advantage in media; Bundling tracks into CDs; Decline in bricks-and-mortar retail music stores

Major music industry players continue to draw a straight-line causal connection between file sharing online and decline in industry-wide sales. This asserted causal connection is a mainstay of the lobbying efforts, legal strategies, and policy measures that the recording industry embraces and promulgates, principally by its chief representative, the Recording Industry Association of America (“RIAA”). This reasoning, however, has been vigorously disputed by a number of leading copyright analysts, whose empirical studies and commentary suggest that the root causes of the music industry’s declining sales are far more complex, and therefore challenging to resolve, than mere online activities such as file sharing. Some commentators argue that there are many features of the digital era that might have been better understood, managed, and adapted to by major music industry players, and that greater flexibility and innovation in existing industry business models and strategies might have ameliorated the industry’s overall positioning in recent times. It seems highly plausible that online music downloads are not the sole, or perhaps even the primary, force precipitating the decline in record sales. Other factors may include the decreased ability of industry players to bundle music tracks into compilations, such as albums or CDs, thereby compelling users to purchase entire albums that include songs they might not want in order to obtain the songs they would actually like to buy. Further, market saturation of CDs, as well as a real decline in available physical retail locations where users can purchase music, are also major factors that hamper sales vitality in the music sector.

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66 Arewa, supra note 3, at 440.  
67 See id. at 440–41 (citing Felix Oberholzer-Gee & Koleman Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis, 115 J. POL. ECON. 1, 3 (2007)).  
68 See id. at 441 (citing JONATHAN A. KNEE, BRUCE C. GREENWALD & AVA SEAVE, THE CURSE OF THE MOGUL: WHATS WRONG WITH THE WORLDS LEADING MEDIA COMPANIES 35 (2009) (“In media, particularly since the advent of the Internet, misunderstanding the source of competitive advantage often leads managers to inadvertently construct bridges for competitors when they think they are actually strengthening the moat.”); id. at 85 (“The Internet may be somebody’s friend most notably, the consumers of media but it is not the friend of incumbent media companies.”)).  
C. Changing models for other media and content-rich industries

The digital file sharing of music tracks, made possible by a host of online networks, gave rise to a key change in user practices, experiences, and expectations: the immediate availability of virtually all recorded music, at low to no cost, became the recognized standard and norm. This major shift in the understanding of music consumers had a profound, and likely irreversible, impact upon the economic value of music. It exerted a downward pressure on the price that users were and are to this day willing to pay to own or access music. It affected the unit of music that is marketable, breaking down the bundled tracks of CDs to the individual song or performance track. And it brought sales of music tracks—even at relatively modest prices, such as a dollar per song—into direct, often fatal, competition with online downloads of such tracks at the one price that is impossible to beat—free. As important as the economic shift was a normative shift: many users came to expect that music should be free, and to demand that music copyright owners justify the price, even any price, at which music might be sold. Further, even perfectly reasonable justifications such as the importance of compensating musicians for their labor, keeping music production sustainable, and paying a “fair” amount for creative effort and output, have not met with sufficient buy-in among music consumers and listeners to reverse the persistence of illegal file sharing. This may indicate that the normative shift is permanent, or that it may not be countered with reason alone.

It is now apparent that changes in consumer behavior and industry business practices across the music sector set the stage for similar patterns of change in other content-rich industries. In the music context, the ability of digitally savvy users to gain access to entire libraries of works—on an immediate, low- or no-cost basis, and without intermediation (other than technology)—has

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70 Id. at 441.
71 Id.
72 Id. at 442.
73 Id. at 470.
74 Id. at 454.
75 Id. at 454-55.
totally changed user expectations. Similarly, the access of online users to a huge range of media sources—including media materials available in print or via wire services, such as newspapers, magazines, and news alerts, which were formerly available only for purchase (or through libraries, which had earlier purchased them)—has altered user expectations, to the point where users now expect media resources to be available instantly, completely, and almost or entirely cost-free. This widespread availability of media online, while quite possibly a boon to consumers, has nonetheless had the devastating effect of undermining the entire business models of providers, including the vast majority of newspapers, wire services, and other media outlets. Indeed, since the advent of the Internet, newspapers and other providers have struggled to find new business models that once again entail users paying for content, advertisers paying for ad placement, and sales generating revenue as was unequivocally the case for so long. The user expectations that content will be readily available at little to no cost clearly reflect the new realities of a post-digital era, in which the Internet efficiently and inexpensively allows the creation, production, distribution, and appropriation of a vast array of content, sometimes via unauthorized means or infringing practices (for example, the unlawful sharing of copyrighted content via P2P networks such as BitTorrent). Taken in conjunction, these new user expectations and technological innovations have delivered a major blow to content-rich industries. Many industry participants, from music to publishing to media to other fields, have found that their ability to control the pricing of their content-based products, as well as their ability to protect the uses of their copyright-protected materials, are significantly undermined by these digital era transformations. And to date, no creative industry has yet been able to muster a decidedly viable response to the challenges of the new Internet-enabled reality.

77 Arewa, supra note 3, at 441-42.
78 Arewa, supra note 3, at 470-71 (explaining similar impact on the press).
80 Id.
81 Id.
The digital music era has found its counterpart, on at least as large a scale, in the digital video field. Among the major technological drivers of these changes have been the advent of the Internet, the expansion of online bandwidth, and the availability of BitTorrent technology. These features have enabled the sharing and distribution of even the large-sized video files that require extensive bandwidth to be conveyed. As in the case of music file sharing, users of video files have learned to expect fast, cheap, and plentiful access to digitized content, while industry members have striven to respond with increasingly protective measures and lines of defense. One distinguishing factor in the case of media industries is that they have been alerted to the pitfalls of changing technologies and user practices and expectations precisely by the earlier example of the recording industry’s digital musical experience. Indeed, it is this experience that the media industries are seeking to learn from and, where possible, avoid. While initial areas of dispute over media file sharing involved UGC on sites such as YouTube, further conflicts have arisen over P2P sharing of video files. Clashes between users and industries have been accelerated by technological advances, such as the enhanced bandwidth capabilities mentioned earlier. But they also point to innate and ever-growing disparities between the legal and social constructs that prevailed in earlier pre-digital eras and the laws, practices and norms that have now evolved in these wholly digital times.

**D. Copyright Law vs. Norms**

At present, copyright laws and user practices and norms co-exist in uneasy tension, a state that some have argued has been exacerbated by the innovations and the widespread reach of the Internet. Copyright is always subject to differing, and often competing, interpretations of the contours of individual ownership, on the one hand, and collective sharing, collaboration, and to some extent rights in copying, on the other hand. The digital era highlights these battles, in part due to the scope of practices that technology enables, the potential impact on copyright

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82 Arewa, *supra* note 3, at 439.
83 *Id.* at 442.
84 *Id.*
85 *Id.*
86 *See id.*
87 *Id.*
88 *Id.*
89 *Id.*
ownership and its attendant rewards, the changing patterns of behavior and preference that it engenders, and the shifts in norms that it may cause to emerge. Many industry participants, especially in culturally rich fields such as music, describe a growing gap between copyright law and real world uses of content that are copyrighted or otherwise protected by intellectual property laws. These industry advocates point to a noticeable lack of compliance with copyright law that appears widespread in practice and growing in acceptance among content users. They argue that the disparity between protection and misuse calls for more stringent copyright laws that are more strongly and uniformly enforced. In contrast, other industry participants and observers have argued that if changes in user behavior and norms are driven by new technologies have begun to crystallize, their predominance would be better addressed by a thoughtful re-calibration of copyright law that takes into account the realities of the present day. They further propose improved consideration of industry-wide strategies and business models, which not only account for but also accommodate and respond to the preferences and patterns of consumption that users express through their digital interactions, purchases and creative output. These debates clearly highlight a central question: how should copyright law operate in this transitional digital era, and further, to what extent should the law account for, and perhaps adapt to, widespread practices that may previously have deemed to border on, or to constitute, noncompliance. Current industry approaches strongly advocate a “zero tolerance” policy of strictly curtailing any and all practices that are deemed noncompliant, even if such a policy may itself skirt the edge of restricting practices, such as personal use, that were previously considered “gray area” yet were deemed acceptable. The digital age has heightened these

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90 Id. at 434.
91 Id. at 443.
92 Id. (citing John Tehranian, Infringement Nation: Copyright Reform and the Law/Norm Gap, 3 UTAH L. REV. 537, 539 (2007)).
93 Id.
95 Id.
96 Id. at 472.
disputes, but it may have had the unintended effect of making both sides adopt somewhat more polarized positions. Nonetheless, both sides must recognize that the normative considerations may not be overlooked, but rather merit a central position in any resolution that is to be reached.

E. Digital Rights Management

Music is one among an array of cultural industries that has found its business model profoundly challenged by unauthorized copying and distribution of its content via the Internet. The recording industry, among the earliest to confront such large-scale activities, launched an early offensive based in technological innovation to thwart the digital threat. The development of digital rights management (DRM) and technological protection measures (TPM) were undertaken by the recording industry as a digital means of contending with an essentially digital problem. The industry adopted TPM technologies with the express intent of preventing unauthorized access to, and use of, digital works via complex DRM systems that were to be borne by all digitally recorded music. It quickly became apparent, however, that both DRM and TPM could, in almost all cases, be circumvented by technologically sophisticated users. Moreover, a large amount of music not bearing DRM-based protection had already been made available, and vied with protected tracks in the music marketplace. DRM also met with a great deal of strongly vocalized resistance among music listeners. This has proved an almost immediate public relations catastrophe. Thus, while the recording industry initially fought actively to deploy DRM, it soon found that technologically protective measures did little to stave off the downward spiral of the industry’s performance as a whole. In the end, many of the major record labels chose to permit distribution of authorized DRM-free digital music. The fact that music listeners did not approve of DRM, found it relatively easy to circumvent, and protested effectively against DRM-protected music lead to a significant development in the music industry: the recording industry heeded customer demand, and responded by eliminating DRM protection from much of its

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97 Id.
98 Id. at 443.
99 Id.
100 Id.
101 Id.
102 Id. at 445.
103 Arewa, supra note 3, at 445.
104 Id. at 444.
digitally recorded music.105 Such an accommodation was singular, and revealed an industry that was clearly struggling to deliver a viable product to its audience without fatally compromising its business model and goals.106

F. RIAA Lawsuits

As the music and other cultural industries have come to feel increasingly beleaguered by user-led forays into cultural appropriation, protection of their properties has correspondingly come to be seen as an essential means of securing their long-term vitality. The cultural industries, led by the music sector, have focused on copyright protection—via technological measures, on the one hand, and legal enforcement mechanisms, on the other hand—to safeguard rights and access to digitized cultural content such as music, films, image, and printed works. These protective measures include the enactment of laws that make it illegal to develop and use devices that circumvent TPMs.107 Such anti-circumvention preventions are codified in recent legislation, including the U.S. Digital Millennium Copyright Act of 1998.108 In addition to promoting various forms of TPM, such as DRM, and lobbying for expansive copyright laws favorable to industry interests, the music industry in particular has pursued two other strategies toward protecting its properties. One strategy has been undertaken on the public relations front: the pursuit of an aggressive education campaign that draws a moral and economic equivalency between digital file sharing on the one hand and theft and similar crimes against physical property on the other hand.109 Some critics of contend, however, that this strategy is hopelessly compromised by the historical practices of the music industry itself, which has arguably been

105 See Adam Pash, RIAA Says DRM is Dead, LIFE HACKER (July 20, 2009), http://lifehacker.com/5318289/riaa-says-drm-is-dead.
106 Arewa, supra note 3, at 444 (citing Nicola F. Sharpe & Olufunmilayo B. Arewa, Is Apple Playing Fair? Navigating the iPod DRM Controversy, 5 NW. J. TECH. & INTELL. PROP. 332, 343 (2007)).
107 Id. at 445-46; see also RIAA v. The People, supra note 15.
built on a culture of large-scale and often ill-compensated appropriation.\textsuperscript{110} In the words of one commentator, “The ability of the recording industry to define appropriate moral behavior with any degree of credibility is, however, significantly undermined by the past history of the industry and the ways in which the industry has, in the eyes of many, exploited a wide range of artists.”\textsuperscript{111}

The attempt by the music industry to characterize digital file sharing as “theft” or “piracy” has proved largely unsuccessful.\textsuperscript{112} It has also been paired with another strategy to protect content: the pursuit of aggressive litigation based on copyright infringement lawsuits, which may likewise be considered to have mixed success at best.\textsuperscript{113} Initially, the recording industry focused on pursuing litigation against technology companies that made digital music and file sharing technologies available to the music consumer.\textsuperscript{114} Subsequently, in the period from 2003 to 2008, the recording industry and its principal lobbying arm, the RIAA, turned its focus to litigation targeting individual users.\textsuperscript{115} The spate of lawsuits instigated by the RIAA represented a concerted attempt by the music industry to equate digital file sharing with theft and other illegal crimes against property. While the recording industry’s litigation strategy sought to convince users collectively that file sharing is simply a form of theft, it was also intended to instill in individual users a fear of potential legal actions and the threat of potentially ruinous damage awards.\textsuperscript{116}

\textsuperscript{110} Arewa, supra note 3, at 444.
\textsuperscript{111} Id.
\textsuperscript{113} See RIAA v. The People, supra note 15.
\textsuperscript{114} Arewa, supra note 3, at 444 (referring to the landmark cases of Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), and Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999)).
\textsuperscript{115} Id.
\textsuperscript{116} Arewa, supra note 3, at 445 (citing David Kravets, File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation, WIRED (Sept. 4, 2008), http://www.wired.com/threatlevel/2008/09/proving-file-sh (noting that the RIAA “admits that the lawsuits are largely a public relations effort, aimed at striking fear into the hearts of would-be downloaders,” but that the RIAA believes that “the lawsuits have spawned a ‘general sense of awareness’ that file sharing copyrighted music without authorization is ‘illegal’”).
As noted, both prongs of the music industry’s strategies to defend its intellectual properties—the RIAA’s consumer education efforts and its legal actions first against file-sharing technologies and further against individual file sharers—have yielded dubious success at best. Several results point to the questionable outcome of the recording industry’s approach: (i) an overall increase in digital file sharing activities since the various strategies were initiated;\(^\text{117}\) (ii) survey results indicating that most music users do not appear to equate file sharing with theft;\(^\text{118}\) (iii) notable public relations damage to the RIAA and the music industry in the perceptions of its consumers;\(^\text{119}\) and sustained opposition, both among users and commentators, to the industry’s attempts to characterize digital file sharing as the moral, economic and legal equivalent to theft.\(^\text{120}\) To illustrate just one of these outcomes, opposition to the characterization of digital file sharing as theft has been both vocal and colorful—for instance, several parodies of RIAA antipiracy videos have been widely circulated and popularly acclaimed.\(^\text{121}\)

The RIAA litigation strategy has proven successful insofar as it has enabled the RIAA to garner substantial settlements against individual infringers. For instance, the RIAA has obtained settlements averaging $4,000 from legal actions it has taken against more than 30,000 alleged infringers.\(^\text{122}\) Moreover, in recent years, the RIAA has also succeeded in gaining at least a few jury verdicts in favor of the recording industry. For instance, in October 2007, a jury verdict was made in favor of the recording industry.\(^\text{123}\) In the initial trial, a jury award was made of $222,000, based on an award of $9,250 per song for each of the songs found to have been

\(^{117}\) RIAA v. The People, supra note 15 (“However, virtually all surveys and studies agree that P2P usage has grown steadily since the RIAA’s litigation campaign began in 2003.”).


\(^{121}\) Id. (citing Finlo Rohrer, Getting Inside a Downloaders Head, BBC NEWS, June 18, 2009, http://news.bbc.co.uk/2/hi/uk_news/magazine/8106805.stm).


\(^{123}\) Id.
illegally copied. In a second trial in the same case, a second jury also ruled for the recording industry, and awarded a total of $1.92 million in damages, or $80,000 per song for each of the songs involved in the trial. The jury in the second file sharing case awarded the four record labels total damages of $675,000, pursuant to the alleged file sharer’s admission of having downloaded and distributed thirty songs.

Yet while proving successful against individual infringers, the RIAA litigation strategy cannot be called an undeniable success. One strike against it, as mentioned, is the enduring unpopularity of litigation amidst music listeners—which, it must be recalled, is the RIAA’s target audience and consumer base. Even the RIAA seems to have recognized this negative effect, and has even gone so far as to concede that it has “created a public-relations disaster.” Another equally important strike is that the RIAA has not for the most part been able to bring key allies, such as the main Internet Service Providers (“ISPs”), to join in its actions against potential infringers.

In 2008, the RIAA sought to enlist the aid of ISPs in blocking Internet access for those potential infringers seeking to make music available online. It also signaled that it would move away from relying upon litigation strategy as the primary weapon in its arsenal against online music downloading and distribution—perhaps thereby suggesting the costs of the litigation strategy ultimately outweighed its benefits.

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124 Id. The Copyright Act provides that infringers are liable for either actual damages and profits or statutory damages that may range from $750 to $30,000 per infringing act, and up to $150,000 per infringing act in cases involving willful infringement. 17 U.S.C. § 504 (2012).
126 Id. (citing Denise Lavoie, Jury Awards $675K in Music Downloading Case, MSNBC (July 31, 2009), http://www.msnbc.msn.com/id/32236444/ns/technology_and_science/).
127 Universities and colleges have acceded to RIAA demands and have helped them enforce legal action against their students. See, e.g., Katherine Mitchell, Burned: Students Hit with RIAA Suits, MICH. DAILY (May 20, 2007), http://www.michigandaily.com/content/burned-students-hit-riaa-suits.
128 See RIAA v. The People, supra note 15.
131 Id.
132 Id.
This last tactic might also indicate recognition by the RIAA of the underlying business and cultural realities that it must confront in this new digital era. Owing only in part to online music sharing, sales of music in the industry—primarily of CDs, but also of individual song tracks—continued to fall, although even despite widely followed litigation by the recording industry. These declining sales point to the challenges faced by longstanding and core industry business models. RIAA litigation could not perforce have a real effect upon the wider patterns of industry change, and likely served to deflect vital attention from the more profound and systemic problems arising from changing patterns of music use and consumption by its user base. It is not only notable that the recording industry’s reputation has been damaged, possibly irrevocably, among certain users. It is also vital to understand that the industry has betrayed a lack of comprehension of its users’ relationship to music, their interests, and their demands.

Today, cultural consumers often have access to sophisticated technologies and well-established networks that gain them access to music in hitherto-unimaginable ways. Consumers are able to participate in the distribution of music via online networks, with respect to both sharing and receiving an enormous array of content. Further, some users may have access to sophisticated technologies that offer them control over the actual creation of content, such as recording and production, which may approach a level of professionalism that was formerly unavailable outside the purview of the recording industry itself. These technological mechanisms, now firmly mastered by many determined and sophisticated users, have radically undermined the privileged access that cultural industry firms once held over the control, distribution, use, and creation of cultural content.

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133 Id.
134 Id. at 447 (citing to Posting of Jennifer Rice to CORANTE BRANDSHIFT BLOG, Law of Causality, http://brandshift.corante.com/archives/2005/05/18/law_of_causality.php (May 18, 2005) (“The backlash against the RIAA is the best case study of what happens when you try to forcibly change customer behavior. Customers will do whatever they want to do. If you can’t create a really compelling reason for them to change (other than passing laws to make their actions illegal), then give them another option that is more of a win-win. RIAA should stop fighting the inevitable and work towards a more realistic objective: ensuring a revenue stream for musicians regardless of distribution method. Sure, it requires more creative thinking. But it’s better than being hated.”)).
135 Id.
136 Id.
137 Id. at 447-48.
Unprecedently, then, the relationship of users to cultural content has been transformed by profound changes in the technological landscape. These changes are paralleled by a relative loss of control among cultural producers, of which music provides the first and foremost example.\textsuperscript{138} Clearly the music industry was reluctant to recognize, let alone adapt to, such overarching changes with shifts in its business models, strategies and practices. One fundamental mistake illustrating the problem was the recording industry’s inability to react swiftly and positively to market signals. First, its customers began to download individual digital music files, thereby indicating that they preferred to consume “unbundled” music in the form of single tracks, rather than music “bundled” into already-compiled CDs.\textsuperscript{139} Rather than reaching an agreement among record producers, the industry dragged its feet until Apple intervened and compelled a joint arrangement, to its immediate and ongoing benefit.\textsuperscript{140} Then its customers indicated that they were interested in digital music files that were DRM-free, or “unlocked”, which would enable them to use their legitimately-purchased music in a variety of ways (for e.g., copying on various devices, making “mix” tapes or CDs for personal use, and so on), as had been standard industry practice.\textsuperscript{141} In response, the music industry first refused to provide such a product, and then chose to pursue litigation against its customers, rather than to make such a product readily available.\textsuperscript{142} Still further, customers indicated that they would likely download music on legitimate music sharing services that “filtered” illegally downloaded songs, as technology might make possible. Rather than encouraging the development of such sites, the music industry opted to sue start-up companies that had built the underlying filtering technology that might have made them viable.\textsuperscript{143} This essentially forced start-ups out of business, and put an end to promising filtering technologies that may otherwise have presented real, legitimate alternatives either to the Napster progeny, on the one hand, or the Apple iTunes behemoth, on the other.

\textsuperscript{138} Id. at 436-37.  
\textsuperscript{139} Id. at 441 & n.51.  
\textsuperscript{140} Id. at 449-50.  
\textsuperscript{141} Id. at 443-44.  
\textsuperscript{142} See RIAA v. The People, supra note 15.  
In all these respects, the music industry evinced a remarkable refusal to meet consumer demand with responsive and forward-looking business practices. The industry likely added to its own problems by dragging its feet, only increasing the likelihood that unauthorized downloads of music would continue on a virtual black market. Again, the industry resorted to litigation strategies targeting the use and sharing of digital music files, seeking relief via statutory damage provisions in copyright that permit plaintiffs to recover damages of $750 to $150,000 per infringed work without showing actual damages.\textsuperscript{144} Such statutory damage awards, which some commentators have described as “frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive,”\textsuperscript{145} have also been regarded with a range of negative responses among music users, the industry’s consumer base.\textsuperscript{146} The lack of any pivotal strategy other than litigation also deprived record labels of a vital early opportunity to create a legitimate online music sharing service. Rather than collaborating to create an independent service, the record labels only acceded to arrangements that allowed the Apple iTunes music store to sell their content to consumers online. This not only gave Apple an enormous, and ultimately unshakeable, early mover advantage, but also allowed Apple to tether consumers to its devices, compelling users to purchase music within the Apple universe, subject to its terms, pricing, and overarching business model. The result has been striking: while the pricing of individual tracks remains singularly low and fixed—thereby depriving record labels of any potential profits from price discrimination and varied pricing—the vast majority of content sales continues to be made via Apple. Moreover, Apple itself is able to cross-subsidize the low value it ascribes to content with the pricing of its associated hardware devices, thereby locking in high margins on hardware sales, which stands only to Apple’s competitive advantage. In other words, through their reluctance to come to a deal amongst themselves, members of the record industry have effectively shut themselves out of the ability to effect the prices of their most valuable asset: their content.

\textbf{G. YouTube and UGC}

\textsuperscript{144} Arewa, \textit{supra} note 3, at 447-48.
\textsuperscript{145} \textit{Id.} at 448 (quoting Pamela Samuelson & Tara Wheatland, \textit{Statutory Damages in Copyright Law: A Remedy in Need of Reform}, 51 WM. & MARY L. REV. 439, 441 (2009)).
YouTube offers music an alternative model for how to adapt to the challenges of changing technology in the cultural industries. Note also that it is tremendously popular, completely free, and easy to use.\(^\text{147}\) YouTube, a free video-sharing site, has become the established market leader among video and movie websites. The scale of its relevance was signaled by the purchase of YouTube by Google in 2006 for a staggering $1.65 billion.\(^\text{148}\) YouTube has emerged as an important cultural force, capable of having a measurable impact on cultural, social, and even political sectors.\(^\text{149}\) Yet YouTube, unlike its more traditional counterparts in the cultural industries, does not rely primarily upon business models that derive licensing revenues—revenues that are generally fixed—from content. Rather, YouTube is built upon a business model that derives advertising revenues—revenues that generally increase as traffic to its website increases—from its content.\(^\text{150}\) The dynamism of the YouTube stream of revenues, based as it is upon monetization of viewer participation, is a key feature of the site. There is some argument that the YouTube business model, however dynamic, may also be limited in its revenue growth potential, due in part to flat advertising rates on the Internet generally, and in part to its own high operating costs.\(^\text{151}\) YouTube itself seems well aware of these concerns and is expanding its business model accordingly.\(^\text{152}\) Following on the model of Apple’s digital music forays, YouTube is actively seeking to enter partnerships with various content providers,\(^\text{153}\) to strengthen its leadership position among video websites and to ensure that its audience both grows and comes to depend upon it for a wide range of increasingly diverse content. Already, YouTube has

\(^{147}\) Arewa, \textit{supra} note 3, at 449 n.97 (quoting Michael Driscoll, \textit{Comment, Will YouTube Sail into the DMCA’s Safe Harbor or Sink for Internet Piracy?}, \textit{6 J. MARSHALL REV. INTELL. PROP. L.} 550, 562 (2007)).


\(^{150}\) Arewa, \textit{supra} note 3, at 448.


\(^{152}\) Arewa, \textit{supra} note 3, at 448-49.

\(^{153}\) \textit{Id.}
created an innovative and functional space for video viewing and sharing, which has been adopted by an enormous and ever-growing user base.154

II. BLACK MARKETS, LEGAL MARKETS, AND BUSINESS MODELS

A. Black Market as Expression of Customer Preference

The music industry, as has been characteristic of many of the cultural industries, has resisted recognizing generational shifts in the patterns and practices of music consumption among its user base.155 Technologically sophisticated users have been able to develop “black markets” in music, entailing the pervasive yet unauthorized appropriation and dissemination of copyright-protected content.156 In so doing, these users reveal a marked generational shift in music consumption, and at the same time demonstrate a newfound control of content that was not previously possible.157 But the emergence of new user-generated markets in music may also be seen as an expression of preference among younger music consumers. First, by disaggregating music compilations into single digital music tracks, users expressed a clear preference for consuming individual songs rather than entire CDs.158 Second, by making “mash-ups”, “sampling,” and other creative reworkings of musical works, users expressed a novel interest in gaining control over the use and re-use of original content.159 And third, in bypassing conventional music retailers and other intermediaries, users expressed their determination to obtain music as directly as possible, and at the lowest prices that might be obtained or devised.160

154 Id. (citing Driscoll, supra note 147, at 552 (“The reasons behind YouTube’s tremendous popularity are probably due to several factors. First, YouTube’s site is completely free. Second, the site is easy to use. Third, its servers hold videos that are in high demand, including infringing videos.” (footnote omitted))).
155 Arewa, supra note 3, at 449.
156 Id.
157 Id. at 470.
158 Id. at 470.
159 Id. at 439.
160 Id. at 471.
B. Resistance to Change by Music Industry

The emergence of a “black market” in music—including, but not limited to, Napster and its progeny—heralded important changes in user preferences, and should have signaled to the music industry that changes to its business model were pressing if not overdue. Yet quite to the contrary, the initial response of the music industry was hostility to the advent of the Internet, resistance to market forces, and entrenchment in its established positions and practices. These views were, perhaps surprisingly, openly expressed.161

Arguing along similar lines as Valenti, many players in the music industry actively sought to eliminate markets that were demonstrably popular among younger, technologically savvy users.162 As one forward-looking industry participant, Gerry Kearby, founder of Liquid Audio, an early Internet music venture, noted, recording industry executives at Sony and its peers were forthright in stating their opposition to online ventures, including the licensing of music content online.163 Kearby compared music industry members expressing their reluctance to change to a similar example of historic industry recalcitrance, characterizing them as “in effect, buggy-whip manufacturers, trying to keep the auto at bay as long as they could.”164165 And this position was shared among other major cultural industry players as well. For instance, in May 2009, in a panel discussion on the future of film-making, Michael Lynton, Chief Executive Officer of Sony Pictures Entertainment, summed up the film industry’s fundamental agreement with the anti-Internet viewpoint, stating:

I’m a guy who doesn’t see anything good having come from the Internet . . . ,

[which has] created this notion that anyone can have whatever they want at any
given time. It’s as if the stores on Madison Avenue were open 24 hours a day.

161 Jack Valenti was the head of the Motion Pictures Association of America and lead the movie industry during a time when technological changes were challenging the industry. See generally Richard Corliss, What Jack Valenti Did for Hollywood, TIME (Apr. 27, 2007), http://content.time.com/time/arts/article/0,8599,1615388,00.html.
162 Arewa, supra note 3, at 449.
163 Id.
164 Id.
165 Id. at 450.
They feel entitled. They say, “Give it to me now,” and if you don’t give it to them for free, they’ll steal it.\textsuperscript{166}

1. Apple’s Business Model

The resistance among recording industry participants to the advent of the Internet has extended to an array of business and legal decisions resonating to the present day. One of the earliest examples is the drawn-out negotiations among the major recording labels and Apple regarding licensing agreements for online content to be offered through the Apple iTunes Music Store.\textsuperscript{167} Yet while slow to enter into agreements with Apple, music content providers have proved relatively unsuccessful in creating new digital music business initiatives—perhaps thereby offering another suggestive instance of their inability to come to terms with the online music business model.\textsuperscript{168} Other early examples show recording industry players seeking recourse from all available legal means to suppress the emergence of online music markets that might potentially compete with their core business models.\textsuperscript{169} And one further example is the successful attempts by recording industry players to quash legitimate Internet music ventures that might feature innovative “filtering” technology designed expressly to thwart illegal downloading of appropriated content.

Taken together, the acts and statements of the music recording industry reveal its open resistance, if not outright hostility, to profound changes in technology, content distribution and control, as well as the user experience. These views percolated throughout the industry’s established business practices, and presented a critical early impediment to the record labels’ attempts to create and integrate new business models across the industry. It may have been virtually inevitable, then, that technology companies, such as Apple—rather than content providers, such as the major record labels—came to exploit the early-mover advantages that


\textsuperscript{168} Arewa, \textit{supra} note 3, at 450.

\textsuperscript{169} Id.
were waiting to be reaped in the digital music arena. Indeed, by aggressively pursuing the licensing of music content for online distribution, Apple quickly and decisively gained a leading market share through its iTunes Music Store, a position that has not been successfully challenged to date.\footnote{170}{Arewa, supra note 3, at 450.}

Yet the even dominance of technology companies such as Apple has not yet wholly eliminated competition among the diverse participants and business models in the digital content sector. One illustration of this phenomenon is that creative artists have begun to seek new, alternative business models for sharing and distributing their work online. These efforts may in part be seen as a concerted response to the limitations of the recording industry’s established business models, including plummeting sales of CDs and individual songs. But they may also be seen as a burgeoning interest among musicians in reaching out to their user base without the intervention of third-party intermediaries. Thus, for instance, artists such as Radiohead and Nine Inch Nails have begun to distribute music over the Internet, either at no cost at all or at a price determined by their users.\footnote{171}{Arewa, supra note 3, at 450.}

### 2. Hulu and YouTube

The slow response of the music industry to the changed landscape of the digital age, and the consequent loss of market position by music content providers, may prove instructive to other cultural industries, including book publishing and film production.\footnote{172}{Arewa, supra note 3, at 450.} These sectors are seeking to adapt their business models to accommodate the distribution of cultural content not only through physical channels, such as brick-and-mortar retail stores, but also via electronic delivery, such as entertainment and retail websites. The online retail model is relatively straightforward, and involves the sale of content on such sites as Amazon, Barnes and Noble, Netflix, and so on. The establishment of entertainment websites such as Hulu, a joint creation of NBC and Fox\footnote{173}{Id.}
that offers video content online, represents the concerted effort of cultural producers to tap into burgeoning audience demand for creative content.174

3. Legal Responses: Suit against YouTube

Like YouTube, Hulu relies mainly upon an advertising-based revenue model, while offering content for free. Industry concerns regarding the use of the Internet to disseminate content has given rise to legal responses to the success and scope of the websites’ activities. Thus, for instance, content providers continue to challenge YouTube and its users on legal grounds, claiming that they engage in infringing activities by posting copyright-protected materials on the YouTube website.175 Numerous legal actions have been brought against YouTube in which plaintiffs assert that copyright infringement has occurred with respect to content that users have uploaded, viewed and distributed on the YouTube website.176 These actions may be most costly when the major content providers become involved. For instance, a lawsuit brought by Viacom in 2007 against YouTube and Google sought $1 billion in damages.177 While Google won a summary judgment motion in June 2010, Viacom appealed the court’s ruling.178 The decision was reversed in part in 2012, and the parties once again appealed.179 The parties settled before the second appeal was decided.180 These ongoing challenges to YouTube, Hulu, and other online entertainment sources continue to reveal the efforts that content providers are making to straddle two goals that seem hugely paradoxical, if not outright incompatible: on the one hand, protecting their valuable assets and sustaining their revenue streams, while on the other hand, satisfying

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174 Id.
175 Arewa, supra note 3, at 451.
176 See, e.g., Tur v. YouTube, No. CV064436, 2007 WL 1893635, at *1 (C.D. Cal. June 20, 2007) (denying defendant’s motion for summary judgment in a case where a photographer claimed copyright infringement and unfair competition by YouTube when his clips were uploaded, viewed and distributed to without his consent).
177 Arewa, supra note 3, at 451.
their insatiable customer base, who has come to regard content as readily available, [mutable], and on offer at no or very little cost.

4. Lack of Clarity in Parameters of Copyright Doctrine—Particularly with Respect to UGC and YouTube

Sites such as YouTube, MySpace, and others, which offer their audiences access to music, videos, and other entertainment, may host a broad range of works, including UGC, which is actively uploaded by site participants. The array of works and activities that YouTube spans is extremely broad, and may well give rise to claims on the part of content owners that copyright infringement is not infrequently involved in their generation and dissemination. Such challenges to UGC practices and works serve to emphasize an inherent lack of clarity in the law with respect to the role that users play in both consuming and creating content. This lack of clarity is only exacerbated by the related ambiguities that blur the parameters of copyright doctrine, including the range of permitted personal uses of copyrighted works, the scope of fair use, and similar carve-outs to the standard protections that copyright affords. These fluid “gray areas” in copyright law, subject to judicial re-working, leave users who are interested in both consuming and creating content uncertain as to their rights and restrictions they face when engaging with content online. Moreover, they expose even the most dynamic sites, such as YouTube and its ilk, to potential challenges by aggrieved content owners who are vigilant in seeking to protect their copyrighted assets. While in many cases it is only appropriate to require content-sharing services to patrol their borders, it may also impose an onerous burden on new start-up ventures that are eager to explore innovative venues that enable creation, sharing,

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181 Scholars emphasized the lack of an appropriate conception of user role as a main impediment in enforcing copyright protections. See Arewa, supra note 3, at 452 n.114 (citing Julie Cohen, The Place of the User in Copyright Law, 74 FORDHAM L. REV. 347, 374 (2005) (“Copyright should recognize the situated, context-dependent character of both consumption and creativity.”)).

182 See id. (citing Jessica Litman, Lawful Personal Use, 85 TEX. L. REV. 1871, 1872 (2007) (placing readers, listeners, viewers, and the general public in copyright through the lens of personal use)).


184 See generally Steven Seidenberg, Copyright in the Age of YouTube, AM. BAR ASS’N (Feb. 2, 2009), http://www.abajournal.com/magazine/article/copyright_in_the_age_of_youtube (discussing the suit brought by Universal Music Group against a mother who used Prince’s song “Let’s go crazy” as a background music in a 30-second home video of her toddler).
distribution and other uses of creative content. The toll this takes upon innovation may not be measurable, but nor is it negligible.

5. Legal Responses: the Digital Millennium Copyright Act

Technological measures restricting the use of content—even acceptable and previously protected personal use or fair use—complicate the situation vis-à-vis cultural production.\textsuperscript{185} The Digital Millennium Copyright Act (“DMCA”)\textsuperscript{186} extends ISPs a potential safe harbor from liability for copyright infringement if certain statutory provisions are met.\textsuperscript{187} Under Section 512 of the DMCA, ISPs are granted safe harbor upon “expeditiously” removing any materials from their servers pursuant to a copyright owner notifying them in good faith that the materials are infringing.\textsuperscript{188} Under this same provision, no further legal action is required to prompt removal of the offending material.\textsuperscript{189}

The DMCA procedures for the removal of allegedly infringing materials by ISPs has been characterized by commentators as “an insufficient check on overreaching” that “creates an unacceptable shortcut around the procedures that are needed to decide whether speech is actually infringing.”\textsuperscript{190} It has also been argued that the copyright owners wielding Section 512 as an aggressive means to thwart supposedly infringing activities may have a further negative consequence of creating a chilling effect that may actually hinder the creation of new works.\textsuperscript{191} These controversial DMCA takedown procedures have increasingly been challenged in court by users. In 2007, plaintiff Stephanie Lenz brought a legal action against Universal Music Group, alleging that the company issued a DMCA takedown notice to YouTube despite knowledge that

\begin{footnotesize}
\begin{enumerate}
\item Arewa, supra note 3, at 452.
\item See 17 U.S.C. § 512 (2012); see also Arewa, supra note 3, at 452.
\item 17 U.S.C. § 512(1).
\item Id.
\end{enumerate}
\end{footnotesize}
use of the allegedly infringing song in her video was in fact a non-infringing fair use.\textsuperscript{192} In 2010, a California district court granted Lenz partial summary judgment, further permitting Lenz to pursue a claim for damages against Universal Music Group under DMCA Section 512(f).\textsuperscript{193}

\textit{C. Need for Middle Ground Solutions; Need for All Parties to be Represented at the Table}

UGC is emerging as a newly innovative part of the digital sphere. But UCG also highlight significant “gray areas” in copyright law that have not yet been resolved, owing in part to dissenting positions held by diverse stakeholders in the copyright industries.\textsuperscript{194} A baseline middle-ground solution offering guidelines for user generation, control, and distribution of digital content, as well as regulation of the digital arena, would likely best serve to clarify these gray areas and thereby to ensure that online innovation and institutions are able to emerge and grow.\textsuperscript{195} At the same time, however, as in other areas of copyright law, the lack of adequate representation of diverse stakeholders, including users actively involved in UGC, has tended to hamper the development of fair and well-balanced agreements regarding the digital use of cultural content.\textsuperscript{196} On one occasion, during discussions regarding proposed principles governing the use and treatment of UGC, commercial market participants openly recognized the lack of representative content owners and creators at the table.\textsuperscript{197} These industry members, which did not include YouTube among their ranks, would be unlikely to consider or accommodate the needs of participants who were absent, unable to contribute obvious gains to their benefit, or otherwise relatively powerless.\textsuperscript{198} This lack of representation among interested parties is hardly a

\textsuperscript{192} Id.; see also supra note 184.


\textsuperscript{194} Arewa, supra note 3, at 453.

\textsuperscript{195} Id. (citing CENTER FOR SOC. MEDIA, AM. UNIV., CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO (June 2008), http://www.centerforsocialmedia.org/files/pdf/online_best_practices_in_fair_use.pdf).

\textsuperscript{196} Id.

\textsuperscript{197} Id. at 453 (referencing Note, \textit{The Principles for User Generated Content Services: A Middle Ground Approach to Cyber Regulation}, 121 HARV. L. REV. 1387, 1387 (2008)).

\textsuperscript{198} Id.
new phenomenon in copyright law, as some commentators have noted: Jessica Litman, for instance, has painstakingly traced the tendency of copyright law to take shape through industry pressures and intensive political lobbying efforts that have culminated in pro-industry legislative changes. But the new centrality of the technologically savvy user, who exerts an unprecedented range of control over cultural content, may open a new chapter in the history of creative copyright. Indeed, as copyright continues to grow in importance to ordinary users, the day may yet come when users en masse seek to establish a critical place at the bargaining table so that they can shape copyright law in more balanced, representative and creative ways.

III. THE DIGITAL ERA AND THE COSTS OF COPYING

A. The Monetization of Content: Revenue Harvesting and Intellectual Property Value

1. Valuable Asset Model: Maximizing Revenues Derived from Intellectual Properties

Cultural industries such as the music sector today count their intellectual properties as their most valuable assets. The premium placed on cultural output valuation has grown ever more pervasive in connection with the rise of the digital era, giving additional authority to what one commentator has called the “valuable asset models” of culture in intellectual property. Valuable asset models “treat content as a valuable asset to be monetized through extraction of maximum amounts of revenues.” While cultural properties have certainly seen important growth in their market value overall, their increasing prominence is also driven by fundamental changes in the economic, social and business landscape worldwide. In the last quarter-century or so, cultural industries—including entertainment, information, and the arts—have gained enormous market share, and have become among “the most highly valued and discussed

199 Id. (citing Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 CORNELL L. REV. 857, 860-61 (1987)).
200 Id. at 453 & n. 125 (quoting a scholar’s observation that “copyright law is increasingly relevant to the daily life of the average American”).
201 Id. at 454.
202 Id.
Thus, in the post-digital era, the “valuable assets model,” and its emphasis on the maximization of value derived from intellectual property outputs and other intangible assets, has become a primary concern of businesses and policymakers alike.\(^2\) While assessing intellectual property assets is generally a useful business practice, it, like many such business models, retains its functionality only insofar as it accurately assesses and accounts for prevailing economic conditions. This is a real pressure point as far as a number of cultural industries are concerned. Many cultural industry firms have based valuations of their intellectual property assets on the industry licensing strategies, practices and outcomes of earlier pre-digital times.\(^3\) Whether such valuations are viable and sustainable is a matter of great debate in light of the changes in the business and cultural environment that emerging technologies continue to spur. At the forefront of such change are technological innovations that have made possible significant reductions in the costs of both copying and distributing cultural content, factors that have in turn contributed to an overall decline in the market value of content.\(^4\) These technological innovations have also served to reduce dramatically the value-add proposition of many industry intermediaries\(^5\)—such as record labels in the music industry—and thereby to exert further downward pressure on the value of cultural content.

### 2. Apple’s Business Model

Yet even as some industry intermediaries have lost their centrality, new intermediaries and industry participants have emerged to generate newfound value propositions. In the music industry, for instance, the demise of Napster and its progeny left open the opportunity for Apple to create the innovative online iTunes music store that proved immensely popular in its inexpensive sales of individual music tracks.\(^6\) Yet from the start, Apple premised the business model of its online music sales not on profits driven by sales of music tracks, but rather on cross-

\(^{203}\) *Id.* (quoting **DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 1** (2007)).

\(^{204}\) *Id.* at 454-55.

\(^{205}\) *Id.*

\(^{206}\) *Id.* at 454.


\(^{208}\) Arewa, *supra* note 3, at 448.
subsidies of its hardware by such music sales. In other words, Apple created an ongoing business model that sells music content, but does not rely on profits from such sales: rather it generates the bulk of its profit from the hardware devices, and supporting software, that organize, play, and distribute the music content that is sold.

The music industry can look to the Apple iTunes model as a positive example of cultural industry production and distribution that generates profits from the sales of both content and supporting distribution devices and mechanisms that make such content available to consumers. By making music recordings available and accessible to a great many consumers, and by offering such music at a price that most consumers find reasonable (based on their willingness to purchase music at such a price), Apple accomplishes two purposes: it secures its place as a key intermediary in the music marketplace, and it demonstrates a willingness on the part of consumers to pay for their music consumption. The success of Apple iTunes thereby offers at least one useful data point in the valuation of music content as a given intellectual property asset in the portfolio of music industry firms.

B. Shifts in User Expectations with Respect to Prices; Music Industry Players’ Refusal to Recognize and Accommodate Such Shifts

At the same time, however, Apple’s relative success must be considered in the greater context of the music landscape. Just prior to the development of iTunes, peer-to-peer music sharing services such as Napster emerged to make music readily available to listeners not merely on a low-cost basis, but for free. While Napster was not able to withstand court challenges, it marked the beginning of the emergence of many such peer-to-peer networks such as BitTorrent that persist to this day. These networks, affording the exchange first of music, then of videos, television clips, and so on, gave rise to a vital shift in consumers’ understanding of the cultural marketplace: that is, users came to develop both the belief and the expectation that content should be readily accessible, available and inexpensive or, in many cases, free. These new consumer expectations with respect to the pricing of content amount to a transformative force in

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209 Id.
210 Id. at 454.
211 See supra notes 79 & accompanying notes.
the market for cultural products.\textsuperscript{212} Significantly, these expectations are not typically factored into the business models, or the value propositions and assumptions that such business models are predicated upon, that were developed by many cultural industry players prior to the emergence of the online consumer experience. The music industry’s initial reluctance to recognize that users would flock to sites offering free music downloads reflects the beginning of this divergence between industry understanding and actual consumer behavior. The recording industry’s subsequent refusal to accommodate user preferences and expectations by creating online services offering single music tracks at a modest price—a logjam only broken by the forceful intervention of Apple, a technology company—is similarly illustrative of the industry’s insistence on adhering to conventional, yet now outmoded, business plans and practices.

In the early days of the digital era, music industry participants were compelled to come to terms with the fact that some of their content may have diminished in value—the CD, for instance, would likely never be marketable again with such success as the industry had known.\textsuperscript{213} As such pre-digital assumptions were overturned, the music industry came face-to-face with the reality of a new marketplace, in which products were disaggregated and sold at plummeting prices in seemingly ever-declining amounts.\textsuperscript{214} Upon consideration of the newly configured landscape, music industry leaders began to contemplate various changes to their core strategies. For one part, record labels began actively searching for new revenue streams not directly drawn from recorded music.\textsuperscript{215} The so-called “360 contract” became increasingly touted as an innovative source of multi-tiered revenues, drawing profits from the sale of concert tickets, band-related merchandise, and other ancillary products and services relating to live music performance.\textsuperscript{216} Newer business models are building upon musicians’ websites to create interactive experience,

\begin{thebibliography}{99}
\bibitem{212} Arewa, supra note 3, at 454.
\bibitem{214} See id.; see also supra note 59-60 & accompanying text.
\bibitem{216} Id.; Johathan Ostrow, \textit{Musician’s Guide to the 360 Record Deal}, M\textsc{usic T\textsc{hink} T\textsc{hank}} (June 8, 2010), http://www.musicthinktank.com/blog/the-musicians-guide-to-the-360-record-deal.html.
\end{thebibliography}
foster band (and “brand”) loyalty, and so on.\textsuperscript{217} Also musicians giving away music for free as a loss leader, to get listeners acquainted with their work, offer special tracks for loyal fans, bring people to their concerts, and so forth.\textsuperscript{218}

The innovative music market strategies described above, while drawing revenues from music performance, do not tap into music recordings, the primary intellectual property assets owned by the major music industry players, record labels. These industry participants, upon realizing that the value of certain recorded works might be at risk, began to seek out innovative ways to capitalize upon new uses of their owned content.\textsuperscript{219} The valuable asset model is predicated upon the idea that owners of cultural materials will exercise their intellectual property rights in order to maximize value, first by controlling the uses of their content and further by monetizing, to the fullest extent possible, the revenue streams flowing from such uses.\textsuperscript{220} In the music industry, the apparent diminution in the value of certain recorded works has led major industry players to consider new channels for deriving revenue streams from their properties.\textsuperscript{221} By seeking to institute pay-per-use systems wherever possible, music content owners are attempting to maximize the value of their assets by eliminating any uncompensated uses of content over which they have ownership or control.\textsuperscript{222} Some commentators have argued that these elevated levels of value maximization of cultural content stands in stark contrast to earlier eras, in which copyright law was “leakier” and afforded greater latitude to lawful noncommercial uses, such as private personal use.\textsuperscript{223} But content owners in creative industries, including the music industry, would

\textsuperscript{217} Karubian, supra note 215, at 401.
\textsuperscript{219} Karubian, supra note 215, at 396.
\textsuperscript{220} See generally Arewa, Arewa, supra note 3, at 454.
\textsuperscript{221} Id.
\textsuperscript{222} See id. at 455.
\textsuperscript{223} Id.
almost certainly counter that they are compelled to seek new revenue streams to compensate for losses they have sustained in the wake of many of the content uses, both infringing and licit, that have undermined their fundamental business model and profitability.

**C. Additional Revenues: Song Samples/Previews on iTunes**

Music industry firms are not only seeking to eliminate uncompensated uses, but are also striving to develop new, additional revenue streams deriving from uses for which compensation is already being made. In 2009, for instance, the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and other performance rights organizations (together referred to here as the "PROs")—all of which [are licensing organizations designed to] collect performance-based royalties on behalf of music composers, songwriters and publishers—joined forces to lobby Congress for changes in uses of portions of their content.\(^{224}\) These PROs considered the use of thirty-second samples or previews of their music to constitute unfairly uncompensated uses of their content, for which they should be duly compensated.\(^{225}\) The use of these samples or previews has been most prevalent in the Apple iTunes Music Store, which allows listeners to hear such thirty-second extracts of musical works prior to their determining whether or not to purchase the entire piece.\(^{226}\)

The PROs, which serve as the main representatives of music publishers and composers, are seeking payment of performance royalties for music samples or previews as one means of developing and exploiting alternate revenue streams to offset losses of revenues their members have withstood in this digital era. But their constituents are likewise seeking compensation from other sources in the broader entertainment and cultural industries. With respect to previews and samples offered through the iTunes Music Store, music publishers are asserting a claim to performance royalties not only when iTunes song samples are played, but also when music, movies, and television shows are sampled, previewed or downloaded. These music publishers


\(^{225}\) Id.

\(^{226}\) See id.
argue that playing previews, downloading content, and other such activities constitute a “public performance” that commands compensation above and beyond royalties or fees that have already been paid for the use of such materials. However, these industry players are already compensated for the use of content for which performance royalties are now being asserted. For instance, synchronization fees are levied on music that is incorporated into movies and television shows; performance royalties are commanded for the use of music in public film and television screenings; and mechanical license fees are charged for musical downloads. Copyright owners are entitled to receive mechanical license fees whenever their musical compositions are played on a “mechanical” device such as a CD, record, or tape, or used in certain digital formats.

D. Additional Revenues: Royalties from Radio Broadcasts Of Music

But music publishers and composers comprise only one subset of the music industry, and they are far from alone in searching out new alternative sources of profitability. In an effort to expand their revenue streams, the recording industry lobbied Congress in 2008 to enact legislation granting it the right to receive royalties from radio stations that broadcast its music, arguing that “broadcasting music without payment is akin to piracy.” These performance royalty payments, which would be made in addition to royalties already paid to record labels, would offer supplemental sources of revenue that the recording industry contends would also create parity among transmitters of broadcasters—not just terrestrial radio, but satellite, cable and Internet radio as well.

The position of the record labels is based on a perceived discrepancy in the division and collection of music royalties. Recorded music typically gives rise to two separate and distinct copyrights: (i) copyright in the musical composition, including music and lyrics, which is usually held by the composer, songwriter and/or music publisher, and (ii) copyright in the recorded performance of the work, or the “sound recording”, which is generally held by recording

227 See id.
228 See What is a Mechanical License, HARRY FOX, https://www.harryfox.com/license_music/what_is_mechanical_license.html.
229 Arewa, supra note 3, at 456.
230 Id. at 456-57.
companies.\textsuperscript{231} Under current law, broadcast radio stations are required to pay performance royalties to owners of copyright in the musical composition (that is, composers, songwriters, and/or publishers), but are not required to pay performance royalties to owners of copyright in the sound recording (that is, record labels).\textsuperscript{232} In contrast, other broadcast stations, including Internet music stations (“webcasters”) and cable and satellite radio, are required to pay performance royalties both to owners of musical compositions and to owners of sound recordings.\textsuperscript{233} The payment by webcasters of royalties related to performance rights is administered under a statutory licensing framework.\textsuperscript{234} The treatment of radio broadcasting, therefore, is treated as a sui generis exemption to which the recording companies object. They argue, therefore, that “fairness” would require terrestrial radio stations to pay them sound recording royalties whenever their songs are broadcast on the air.

1. Counter: Do Away with Sound Recording Rights for Webcasters

One counter-argument to the recording industry’s position is that music webcasting may in fact point the way to restricting, rather than expanding, the royalties that copyright owners can extract from music compositions they own.\textsuperscript{235} Due to the relatively recent development of Internet technologies (and the expansion of Internet bandwidth), music webcasters tend to be start-up ventures, such as Pandora, Rdio, and so on, and as such bear competitive disadvantages with respect to traditional radio broadcasters that are long-established in the field. However, Internet webcasters that broadcast music—and their counterparts in satellite radio—argue that their growth are unduly handicapped by having to pay performance royalties both to composers and to

\begin{itemize}
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id. at 457.
\end{itemize}
sound recording copyright owners.236 As noted above, traditional radio stations that broadcast music do not have to pay such performance royalties to sound recording copyright owners.237 This disparity, wecasters contend, creates an inherently inequitable system, in which the playing field is skewed in favor of established players at the expense of innovative new entrants seeking market share.238 Representatives of music wecasters, arguing against stalwart members of the recording industry, make the case that royalty rates for wecasters may critically undermine innovation and development in the online music industry.239 They further argue that this does a disservice to the consumer base of music listeners, particularly those who are technologically adept and eager to gain access to music and culture via the Internet.240

E. Additional Revenue Streams: Ringtones on Cellular Telephones

In further attempts at garnering royalty-related revenues for the music publishers and composers they represent, PROs have also challenged innovative communicative technologies other than the Internet. In 2009, ASCAP, one of the two largest PROs administering music performance rights and related royalties, brought a legal action against Verizon Wireless, arguing that its members should receive public performance royalties for ringtones.241 In its suit, ASCAP made the novel claim that each time a musical ringtone is played on a Verizon Wireless cellular telephone, it constitutes a “public performance” of the musical work, thereby requiring performance rights to be compensated.242 It bears noting that these public performance rights would be required in addition to the mechanical license fees that Verizon was already paying to the ASCAP members

237 Id. at 456-57.
239 Id.
240 Id.
241 Arewa, supra note 3, at 457 (citing In re Cellco Partnership, 663 F. Supp. 2d 363, 372 (S.D.N.Y. 2009) (“[It] is undisputed that Verizon pays mechanical license fees to ASCAPs members. . . . This litigation will resolve whether it must pay as well for the previewing of ringtones”); Mechanical and Digital Phonorecord Delivery Rate Adjustment, 71 Fed. Reg. 64303, 64304 (U.S.C.O. Oct. 16, 2006) (finding that certain types of ringtones are subject to statutory licenses under Section 115 of the Copyright Act), available at www.copyright.gov/docs/ringtone-decision.pdf).
242 Id.
holding rights in the musical works played as its ringtones. The Second Circuit rejected ASCAP’s reasoning, stating unequivocally that, “even when the downloading of a ringtone is considered as the first link in a chain of transmissions, it does not qualify as a public performance.” Nonetheless, the Verizon ringtone case remains an example of a legally-based business strategy on the part of music industry firms in the post-digital era that are intent on maximizing revenues from their intellectual property assets, even in addition to royalties they may already receive for the use and re-use of their copyrighted material.

F. Markets for Cultural and Entertainment Assets

The maximization of rights and related revenues in valuable intellectual property assets has seen particular growth in many cultural and entertainment sectors. The idea that such assets should be optimally harvested has become a paradigm giving rise to new markets in intellectual properties. Three critical developments reflect the powerful hold this paradigm has taken in these IP industries: (i) markets for cultural and entertainment have expanded; (ii) investment markets increasingly take account of the market value of intellectual property assets; and (iii) trading markets for intellectual property are emerging and growing. As a result, cultural and entertainment firms, in music and other sectors, place enormous value in their content as core assets vital to their success. As General Electric, parent to NBC-Universal Studios, stated in its 2006 annual report: “Entertainment assets are highly valued by investors.” And as Viacom likewise stated: “Our digital assets are becoming an increasingly important aspect of our business.”

Market value in intellectual property assets is fostered by the emergence of firms that specialize in creating liquid markets for intangible assets, such as Ocean Tomo. Similarly, markets in IP

243 Id.
244 Id. at 457 & n.143.
245 See generally id. at 454.
246 Id. at 458.
249 Id.; see also OCEAN TOMO, http://www.oceantomo.com/.
assets have expanded with the introduction of transactions involving the securitization of royalty streams from copyrighted works. Yet another instantiation of IP market value is the emergence of bond issuance transactions in intellectual properties. For instance, in 1997, the renowned musician David Bowie raised $55 million by issuing “Bowie Bonds,” asset-backed bonds collateralized by future royalties from twenty-five albums he recorded before 1990. While Bowie was the first popular artist to issue bonds backed by royalties from his copyrighted works, a number of musicians followed suit, including musicians Marvin Gaye (estate), James Brown, and Rod Stewart. Music market bond issuance transactions have also backed by the work of various songwriters, composers and music catalogs. Commentators have noted that the creation of markets in intellectual property assets has likely contributed to interests among music industry players in strengthening intellectual property rights in valuable intangible assets.

**G. Control Mechanisms**

Battles over music copyright in the digital era reveal an interesting dichotomy: while new technologies like the Internet allow users expanded access to music content, they also enable copyright owners to increase control over such content. DRM, for instance, extends a measure of control over content that has not precedent in earlier eras. And the continued use of DRM protection in some cultural content reflects one technological means of control; and although circumvention may, in theory, be an option, it is a costly and time-consuming one that may lie out of the reach of many ordinary users. But tight control over content, however unpopular among users—who for the most part, it must be recalled, constitute paying consumers of cultural products—remains highly desirable to content owners seeking to protect their valuable intellectual property assets and related revenue streams. As these properties appreciate in value, their copyright owners consider technological controls to be among the weapons in their strategic arsenal that secure revenue streams, and perhaps even make new revenue streams more

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250 [Arewa, supra note 3, at 458.](#)
251 [Id.](#)
252 [Id.](#)
253 [Id.](#)
254 [Id.](#)
255 [Arewa, supra note 3, at 459.](#)
256 [Id.](#)
attainable. Some cultural and entertainment industry members laud the rise in IP valuations and the increased strength of IP content controls as together creating new potential for industry-wide gains, or “the prelude to a new golden age of media.”\(^{257}\) As one industry giant, the News Corporation, described it in their 2006 Annual Report, “[t]echnology is liberating us from old constraints, lowering key costs, easing access to new customers and markets and multiplying the choices we can offer.”\(^{258}\)

**1. Pre-Digital Control = Control of Creation and Distribution**

Since digital technologies have transformed the cultural landscape, many industry firms have naturally looked to technology for control mechanisms that enable them to preserve and enhance the value of their copyrighted materials. But content control may be, and indeed has been, achieved without recourse to technological measures. The history of the music industry reveals that industry participants have long exerted control over the creation, distribution and re-use of musical works, and over the creators themselves who originated these works.\(^{259}\)

Historically, the music industry has been rife with contractual arrangements that reveal critical asymmetries in the bargaining power of various parties, resulting in systemic inequities in the allocation of intellectual property rights and economic rewards.\(^{260}\) Generally creators, for instance, have had relatively less power than recording industry firms, although some hierarchical disparities of power among creators have occurred. Illustrative are music industry business models that prevail at present, under which the highest-ranked popular musicians earn more than seven times as much from concert ticket sales than from record sales royalties.\(^{261}\)

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\(^{258}\) Id.


\(^{260}\) Id. (citing Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music, in HANDBOOK OF THE ECONOMICS OF ART AND CULTURE*, 669, 670 (noting that for the top thirty-five artists in 2004, income from concert tours exceeded income from record sales by a 7.5 to one ratio)).
Despite the fact that aggregate revenue from records exceeds aggregate revenue from concert performances by a factor of about five to one.\textsuperscript{262}

The historic treatment of musicians with respect to the allocation of music rights and the award of music revenues continues to date, and finds close parallels in many other cultural industry business structures, such as film and television, publishing, and so on. To some extent, it also throws into question the incentive narrative on which intellectual property law is predicated. Some commentators have suggested that it also reveals a divide between perception and reality in cultural production and its underlying valuable assets model: “while the ideology of copyright law might be to protect the artists, the reality of the music business is that such rights are, in effect, exercised by their publishers and record companies.”\textsuperscript{263} In the case of the music recording industry, control over creation and distribution was, and remains, a central feature in its business models and strategies for profitability.\textsuperscript{264}

IV. DIGITAL ERA DISRUPTION: THE INTERNET AND LOW COST DISTRIBUTION

A. Technology, Copying, and Dissemination: Copyright in the Age of Digital Reproduction

1. Technology and Copyright in History: White-Smith

The history of modern music, dating even to the start of the twentieth century, attests to a longstanding connection between technology and music copyright. An early example is the 1908 case of White-Smith Music Publishing Co. v. Apollo Co.,\textsuperscript{265} in which the Supreme Court scrutinized the newly-popular “piano rolls”—mechanized recordings of music to be played on

\textsuperscript{262} Id.
\textsuperscript{263} Arewa, supra note 3, at 460 (quoting Steve Greenfield & Guy Osborn, Copyright Law and Power in the Music Industry, in MUSIC AND COPYRIGHT 89, 99 (Simon Frith & Lee Marshall eds., 2d ed. 2004)).
\textsuperscript{264} Id. (citing Jason Toynbee, Musicians, in MUSIC AND COPYRIGHT 123, 124 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (“[C]ontrol over the means of exploiting music leads to a situation where most writers and composers are forced to sell on their copyright. No-one can make it without a publishing deal, something which always involves the assignment of rights”)).
\textsuperscript{265} 209 U.S. 1 (1908).
automatic player pianos\textsuperscript{266}—to determine whether piano roll technology created “copies” within the meaning of the extant copyright act.\textsuperscript{267} At the heart of the matter was an underlying uncertainty as to whether or not the copyright act extended to recorded music.\textsuperscript{268} The emergence of new player piano rolls and recording technologies, first heralded as innovations in the music industry, had rapidly come to threaten the sheet music industry, comprising a great many music copyright owners including composers and music publishers.\textsuperscript{269}

Alarmed by the inroads that sales of recorded piano rolls were making on sheet music returns, the concerned music composers and publishers petitioned Congress to give them an exclusive right to block the manufacture or sale of any “‘appliance especially adapted’ mechanically to record music compositions.”\textsuperscript{270} In opposition, piano roll manufacturers objected to the proposed legislative measures. Their concern, however, was not limited to the prospect of being compelled to share revenues in the sale of music with composers and publishers. Rather, they were most threatened by the growing market power of the Aeolian Company, which was financing the White-Smith litigation\textsuperscript{271} and which, in advance of the impending litigation over mechanical license rights, had purchased large blocks of rights from major music publishers.\textsuperscript{272}

In White-Smith, the Supreme Court found that piano rolls did not constitute copies.\textsuperscript{273} In the following year, Congress adopted the Copyright Act of 1909, creating a statutory basis for the mechanical rights that had been sought by music composers and publishers.\textsuperscript{274} At the same time, and partially to curtail Aeolian’s market power, Congress imposed a compulsory license upon mechanical license rights in music.\textsuperscript{275} The compulsory license stipulated that when copyright owners licensed their music to one piano roll or record company, they would be required to make music licenses available to any other company seeking to make its own piano roll or to record a

\textsuperscript{266} Arewa, \textit{supra} note 3, at 464.
\textsuperscript{267} \textit{Id.}
\textsuperscript{268} \textit{Id.}
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.} at 465.
\textsuperscript{271} \textit{Id.}
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} White-Smith Music Publ g Co. v. Apollo Co., 209 U.S. 1, 18 (1908).
\textsuperscript{274} Arewa, \textit{supra} note 3, at 465.
\textsuperscript{275} \textit{Id.}
version of the music composition(s) at issue.276 These latter interested parties would in turn be required to pay copyright owners a statutory mechanical license fee, fixed by Congress at that time at two cents.277

The parallels between the concerns of music industry players in the White-Smith era and in the present-day digital era are evident: as new technologies emerge to challenge established business practices, industry participants strive to protect their revenue sources by seeking recourse in changing copyright laws.278 Often the disputes may be framed as the disruptiveness of new technologies, and demands may be made to restrict or shut down these innovative devices. But other strategies may involve efforts to shape copyright law to maximize the interests of those petitioning for its protections. White-Smith is but one in a line of cases and statutes that consider changing technologies that enable, facilitate or may even revolutionize reproduction and ask whether they should be left to grow, possibly transforming the industry unforeseeably, or instead reined in, possibly keeping the industry stable but at the cost of innovation.279

The end of the twentieth century, which earlier ushered in White-Smith and the subsequent generation of the mechanical license right, later saw new technologies for music reproduction expand both in scope and in reach to new audiences. These technologies had several distinct and novel advantages: (i) copying became far easier and faster, both individually and en masse; (ii) copying became more accessible to the average user (including not only music composers and performers but also listeners and sharers); (iii) copying became better, as the development of digital file formats greatly enhanced the potential for anyone, amateur or professional, to create high fidelity copies with a minimum of degradation in quality; and (iv) copying en masse became more ubiquitous, as the Internet compounded the effect of digital file format compression by allowing multiple copies to be disseminated inexpensively and universally.

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276 Id.
277 Id.
278 Arewa, supra note 3, at 465.
Technologies that make copying cultural content relatively easy, at least on a small scale, have certainly existed for some time. Piano rolls offer just one example of such “mechanical” copying; more recently, the advent of tape recorders, CD burners, DVDs, and similar recording devices offer ready means to copy content. The digital era, however, has thrown a spanner in the works by introducing digital file formats that allow users to make copies that are almost indistinguishable from original recordings, and to disseminate those copies on an unprecedented scale. Copying needs no longer to be restricted to older practices of making a single copy for individual, private use. One highly significant ramification of this development is the decentralization of established intermediaries in the music production process. Such a process of disintermediation has profoundly affected the copyright balance and forced industry players to come to terms with, and adapt to, changes in the industry that have ensued.\(^{280}\) On the one hand, incumbent industry participants have been compelled to consider these real shifts in business, technological, and cultural forces, and to reflect such changes in new business strategies and plans.\(^{281}\) Despite their fears of cannibalizing core business revenues by responding to innovation,\(^{282}\) music industry participants have been made to realize that without such dynamism, they stand at risk of becoming peripheral to music production and distribution. But on the other hand, emerging intermediaries have found new opportunities for growth, particularly when their business models are well positioned to capitalize on these critical changes in technologies, with respect to both cultural production and dissemination.\(^{283}\) And lastly, participants in the music sector who were previously unable to gain access to means of cultural production, distribution and control have gained a newfound visibility, as well as the potential to tap into innovative technologies to achieve their goals. Composers, musicians, performers, and their audiences have all seen new opportunities to participate in cultural production, in ways that were unimaginable just a generation ago.

\(^{280}\) This disintermediation is not limited to traditional media, but points to broader societal trends in the access to and dissemination of information. See Arewa, supra note 3, at 466 n.196 (citing Lawrence Solum, Download It While Its Hot: Open Access and Legal Scholarship, 10 LEWIS & CLARK L. REV. 841 (2006)).

\(^{281}\) Arewa, supra note 3, at 466.

\(^{282}\) Id.

\(^{283}\) Id.
B. Digital Era Piracy: The Meaning and Significance of Unauthorized Uses

1. “Piracy”; Strategic Use to Advance Maximum Monetization of Content

Increasingly, cultural industry players place the intellectual properties they own at the center of their business models and strategies. These business models characterize copyright-protected works as critical valuable assets to be monetized to the maximum extent possible, under the sole control of the copyright owners. They are further predicated on the idea that a pay-per-use or “metering” system extracts the maximum value of content by proscribing, and therefore eliminating, uncompensated use of cultural properties.284 In tandem with this business strategy, owners of copyrighted cultural materials have adopted a legal framework that likewise advances their interests. The legal strategy that cultural industry firms embrace involves characterizing any use of a copyrighted work that may be deemed an “unauthorized use” to amount to cultural “piracy.”285 The linguistic trope that links allegedly unauthorized use to “piracy” is a widely debated feature of the twentieth-century copyright debates,286 and vividly reveals a strategic decision to target all viable uses of cultural materials, not only with a view to controlling but also with an overriding interest in exploiting such uses for maximum profit.

2. Focus on User Behavior: Unauthorized Use vs. Fair Use

The “piracy” trope also reveals a new point of focus in the battle over control and exploitation of copyrighted materials: that is, user behavior in relation to such works. It is fairly clear that the expansion of access to copyrighted work that innovative technologies enable has given rise to an increase in unauthorized uses of copyrighted works that infringe the exclusive rights of copyright owners. An equally likely outcome is that at least some of these unauthorized uses merit

\[\text{Arewa, supra note 3, at 455.} \]
\[\text{Id. at 463.} \]
compensation to copyright owners.\(^{\text{287}}\) What remains hotly contested is which particular use constitutes an infringement rather than a fair use; and whether, and to what extent, a particular use that is deemed infringing should require a corresponding compensation to the copyright owner of the underlying work.\(^{\text{288}}\) Several commentators have observed a diminution in the scope of fair use, coupled with a shrinking definition of “personal use”, that would suggest a trend in copyright law toward the characterization of many digital practices as constituting unauthorized uses. Apparent increases in the scope of unauthorized use, as opposed to fair use, may be magnified by the impact of legislation resulting from aggressive industry strategies to tackle digital practices. For instance, some commentators argue that application to the DMCA may powerfully curtail or even annul the reach of fair use in the digital context.\(^{\text{289}}\)

3. Actual Effects of Unauthorized Use: How Much Does Substitution Effect Trump Sampling Effect

Copyright owners typically assert that unauthorized uses deprive them of just compensation for use of their creative work. However, it is arguable that the actual effect of unauthorized uses on owners’ compensation is proportionate to the extent to which such unauthorized uses substitute for, or displace, what would otherwise have been purchases of the copyrighted content. With respect to music—a creative field that has had ample opportunity to experience uncompensated uses of content, especially where digitally obtained—the displacement effect is debatable. Some studies suggest that unauthorized uses of digitized music have completely undermined normal compensation patterns in the industry, causing steep declines in music sales, losses to recording labels and artists, and other negative economic effects on music industry participants.\(^{\text{290}}\) These

\(^{\text{287}}\) Arewa, supra note 3, at 466-67.


studies substantiate the prevalent view among many music industry players that digital technology has directly deprived copyright creators and owners of their rightful compensation. But at least one opposing study suggests a more complex scenario: it finds that there is no direct relationship between digital file sharing and the decline of record sales in the music sector.\(^{291}\)

The empirical study cited above, showing a statistically negligible impact of digital music downloads on record sales, supports the position of commentators who argue that digital technology alone does not simply cause unauthorized downloads to increase and music owners’ compensation (derived from record sales) to decrease.\(^{292}\) They argue against the proposition that the “substitution effect” predominates in music: that is, many users repeatedly choose to make digital music downloads illicitly and at no cost, rather than properly purchasing music, thereby detracting from music sales and depriving content owners of their rightful returns.\(^{293}\) The substitution effect has been charted by several studies that find a link between unauthorized music downloads and decreases in recorded music sales.\(^{294}\) Rather than targeting the displacement of music sales, these commentators consider the prevalence of the “sampling effect” in music: that is, at least some users opt to make digital music downloads in order to sample music as part of a purchasing process, one that involves listening to music and selecting pieces that they will eventually decide to buy.\(^{295}\) In support of this proposition, commentators point to studies showing that unauthorized downloaders of music may in fact purchase more music than average users, suggesting that the sampling effect may come into play in their activities and eventual purchasing patterns.\(^{296}\)

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\(^{292}\) Id.

\(^{293}\) Id. at 467-68.

\(^{294}\) Id. at 467 (citing BPI RESEARCH & INFO., THE IMPACT OF ILLEGAL DOWNLOADING ON MUSIC PURCHASING 1 (Nov. 20, 2009), available at [www.ifpi.org/content/library/The-Impact-of-Illlegal-Downloading.pdf](http://www.ifpi.org/content/library/The-Impact-of-Illlegal-Downloading.pdf)).

\(^{295}\) Id. at 467-68.

Overall, the extent to which digital music downloads directly contribute to declines in music sales depends in large part on whether, and to what extent the substitution effect trumps the sampling effect. But the relative impact of these factors is notably difficult to ascertain. Copyright owners will argue that the substitution effect clearly predominates in the music sector. Yet at least one study, while focusing on the Canadian music industry, has found that the sampling effect may prevail over the substitution effect. The real impact of digital music downloads may remain shrouded, at least pending more accurate means of determining how music users’ practices shape outcomes in the industry. But a critical regard of the impact of digital technology on music is necessary, and may best be expressed by commentators who suggest that the root causes of declining music sales are complex, involving a broad swath of business and economic factors that affect music sales, prices, and owners’ compensation.

V. THE INTERNET AND SHARING: DIGITAL ERA USES AND GENERATIONAL SHIFTS

A. Changing Use Patterns/Practices

In music, as in other creative fields, cultural intermediaries continue to make concerted attempts at obtaining and exerting increased control over content protect by copyright. These efforts strikingly mirror historic practices by cultural intermediaries over the control of content. Some of these intermediaries are also similar to their predecessors in the ideological defenses they posit as grounds for exerting such control. But just as earlier accounts were predicated on an idealized narrative of musical practices, present-day accounts as well are liable to reflect a distorted view of earlier user practices and how they have come to change and evolve. These latter narratives fail to account for real cultural shifts, ushered in by digital era technologies, that are accompanied by equally powerful shifts in access, use, and participation across all sectors of music audiences. Likewise, business models and copyright enforcement strategies have been slow to recognize and respond to changes in user patterns and practices in the Internet era, both in music and in other entertainment sectors.

297 Id. at 467.
298 Id.
299 See, e.g., Authors Guild v. Google, 721 F.3d 132 (2d Cir. 2014).
B. New User Practices: Unbundled Music

Music offers one of the most vivid illustrations of changing user patterns and practices. Earlier recording and playback technologies, such as records albums, cassettes, and CDs, essentially compelled listeners to purchase music that had been recorded in a particular sequence, and then to replay that music in the given sequential order. A dramatic change, offered with greatest success by Apple (i.e., the Apple iTunes Store and the tie-in Apple devices of the iPod and its progeny) came to allow the purchase of individuated music “tracks,” or songs that had been disaggregated from sequential recordings. Apple managed this feat by bringing record labels together at the bargaining table and eventually facilitating an agreement among the major record labels. The agreement allowed Apple to sell a vast amount of copyrighted music content on its new iTunes Music Store, thereby operationalizing the sale of individual music tracks and transforming the entire music marketplace. The resounding popularity of the iTunes Music Store is evidenced by its staggering sales figures: in 2009, over 220 million single music tracks were downloaded on iTunes alone. These figures are compounded by Apple’s competitors, such as Amazon, Barnes and Noble, and so on, many of which now make music downloads equally accessible. In sum, 1.26 billion digital music tracks have been sold in 2013.

1. Unbundled Music: Objections from Some Artists; But Overall a Success

Digital music has allowed the sale of unbundled music to become common practice. Not all industry participants, including some artists and record labels, have been unequivocally supportive of these developments. For instance, several prominent artists, including Pink Floyd

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302 Id.  
303 Guarino, supra note 301 (noting that by November 2009, iTunes sold 220 million tracks, accounting for 73% of the total digital music-player market).  
and AC/DC, have voiced strong objections to the disaggregation of their albums, even going so far as to bring lawsuits seeking to preserve the sale of albums in their original, sequential form. In the case of Pink Floyd, brought in 2010, the lawsuit proved successful: the U.K. High Court ruled that Pink Floyd had the right to approve sales of its music in any configuration other than the original album form. But even these measures have not had an appreciable impact on the current practices of music audiences: the sale on single songs on iTunes, Amazon, and similar sites remain strong, and continue to be the prevailing channels for music sales today.

The Apple example has been heralded as the single most innovative force for change in the music industry. While preceded by technologies such as Napster that enabled the disaggregation of music, Apple singlehandedly compelled both the separation of music into digital tracks and the legitimate sale of such tracks via negotiated agreements among owners of copyrighted music content. Apple further advanced this new model for the music industry by developing the iPod and its progeny, devices that not only facilitated the consumption of single songs but also offered new approaches to such consumption. Among such innovations is the iPod “shuffle” function, which enables users to listen to all or some segments of digital music tracks that are contained on an iPod in a random, shuffled order. The shuffle function has, like iTunes itself, proven immensely popular among audiences and critics alike. But taken together, these new


306 Arewa, supra note 3, at 470.

307 Id.

308 Id.

309 See Arewa, supra note 3, at 470.

310 Id. (citing Joseph P. Kahn, All Shook Up: Our Listening Habits Are Being Revolutionized by the iPod Shuffle, BOSTON GLOBE, Apr. 5, 2004, at B8, available at http://www.boston.com/news/globe/living/articles/2004/04/05/all_shook_up/ (noting that users find that playing music in shuffle mode “can be aesthetically stimulating, even liberating . . . because the software’s shuffle-play capability juxtaposes them in intriguing ways”); Alex Ross, Listen to This, NEW YORKER, Feb. 16 & 23, 2004, at 154, available at http://www.therestimentoise.com/2004/05/more_to_come_6.html (“I have seen the future, and it is called Shuffle—the setting on the iPod that skips randomly from one track to another. I’ve transferred about a thousand songs, works, and sonic events from my CD collection to my computer and on to the MP3 player. There is something thrilling about setting the player on Shuffle and letting it decide what to play

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technologies and features have unmistakably changed the user experience with respect to the purchase, consumption, access, and experience of music. Digital technologies almost certainly make unbundled record albums and freely available single song tracks more widely available than did bricks-and-mortar record stores. At the same time, however, licit digital download sites face a host of competitive venues and practices, including wholly legal music “streaming” via digital radio, as well as peer-to-peer music-sharing networks that mimic Napster and, like their predecessor, may infringe music copyrights either willfully or negligently. Thus, while digital downloads now dominate the music marketplace, the blend of legal and illicit venues and practices has unclear, yet likely overall negative, consequences for music industry sales and revenues.\textsuperscript{311} The overarching conclusion, at any rate, is clear: digital music technology has transformed user consumption patterns indelibly, and the transformation has an impact on existing business models that prevail throughout the industry.

\textbf{C. Analogous Industries: Video Clips (Film); Aggregated News Content (News)}

Music is by no means the only cultural industry to have been transformed by innovative technologies. One instance of radical disaggregation of content in the film industry is the video clip, popularized by users of YouTube and similar websites.\textsuperscript{312} The video clip allows users to select, and possibly to share via online uploads, a segment of video content. Highly popular sites such as YouTube offer a great many users the opportunity to gain access to these video clips. The communities of viewers created by YouTube may be enormous, and their active engagement in so-called “clip culture” reflects its ongoing, and growing, appeal. The rise of video-clip sharing reveals that the film industry has been revolutionized along similar lines to the music industry, with respect both to how users gain access to cultural content and how much content they actually experience and consume.\textsuperscript{313}

\textsuperscript{311} Id.
\textsuperscript{312} Id.
Similar trends may be observed not only in culture and entertainment but also in media and journalism. Print journalism, for instance, has been affected by trends toward the disaggregation of content that are similar to those found in music. Prior to the digital era, individual newspapers primarily served particular regions (with a few national exceptions, such as the New York Times and the Wall Street Journal), and were printed in formats intended for continuous, sequential reading and consumption. Services such as the Associated Press (“AP”) and Reuters aggregated news that could be broadly disseminated; and syndication offered content that likewise could be dispersed to various markets. Nonetheless, most newspapers remained primarily localized, distinct, and over time sustained their brand value. The digital era has ushered in new possibilities for a broader and more diffuse use of news content that is no longer limited to specific newspapers and their websites. Broadly speaking, digital technology has encouraged much news consumption to migrate from print sources to the Internet. This movement has contributed to a critical erosion of revenue, if not readership, throughout the newspaper industry. Aggregation sites such as Google News or Newser and news feeder services such as Really Simple Syndication (“RSS”) offer users direct access to news content that had otherwise been available through individual newspaper websites. Individual online blogs that incorporate news and information from various sources also enable users to consume such content without recourse to newspapers, whether print or online. These trends have altered user preferences as well: as one commentator notes, “though readers want news, they do not necessarily want it from a traditional paper, and are using multiple sources.” None of these sources, however, contribute to the revenue of traditional newspapers: in fact, by directing users away from newspaper websites, they even deprive newspapers of critical viewership, or “eyeballs.” The reduction in newspaper website visitors is devastating to the industry, in large part due to the fact that advertisers, which have long been newspapers’ greatest and most stable

314 Arewa, supra note 3, at 471.
315 Id.
317 Arewa, supra note 3, at 471.
318 Id.
sources of revenue, base their advertising rates on the number of visitors ("eyeballs") that a newspaper can deliver to the advertiser.\textsuperscript{321} The Internet, therefore, is clearly responsible for undermining the entire traditional business model of the newsprint industry; and its effects on the industry today are as unmistakable as they are entrenched and unimaginably hard to change.

The devastating impact of the Internet on the traditional business model of the newspaper industry has been driven in part by shifting user preferences and patterns of content access and use.\textsuperscript{322} But once such user practices are changed, they may prove extremely hard to dislodge or even re-direct. Newspapers have struggled, for instance, to persuade online readers to pay for content, whether via traditional subscription models or per-article metered payment plans.\textsuperscript{323} For the most part, online newspaper paywalls have not succeeded in preventing readers from gaining access to news content; nor have they persuaded readers en masse to resume paying for content.\textsuperscript{324} To the contrary, a great many news readers continue to find easy recourse in the multiple outlets afforded by the Internet, some of which have been described above.

Traditional news content providers are increasingly aware of the threat to their industry, and to journalism in general, that these changing patterns of news consumption represent. In response to this perceived crisis, some news providers are looking to intellectual property rights challenges that they hope will defend existing business models\textsuperscript{325}. Thus, for instance, the Associated Press ("AP") brought suit against All Headline News ("AHN"), a U.S.-based wired service, asserting copyright infringement and "hot news" misappropriation claims.\textsuperscript{326} Despite the outcome of this and similar intellectual property cases involving news and journalism industries, the outlook for protection of news on copyright-based grounds is generally unpromising. Present day reality,

\textsuperscript{321} Id.
\textsuperscript{323} See Peter Preston, Newspaper Paywalls Spring up, but Not Much is Concrete, GUARDIAN (Mar. 16, 2014), http://www.theguardian.com/media/2014/mar/16/newspaper-paywalls-spring-up-not-much-concrete.
\textsuperscript{324} See Michael Wolff, The Tipping-Point for Paywalls does not Fix Newspapers’ Larger Crisis, GUARDIAN (Apr. 1, 2013), http://www.theguardian.com/commentisfree/2013/apr/01/tipping-point-paywalls-newspapers-crisis.
\textsuperscript{325} Arewa, supra note 3, at 471 (citing Complaint at 8, The Associated Press v. All Headline News Corp. et al., 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009) (No. 08-0323) (discussing hot news misappropriation and copyright infringement)).
with its vast and unwieldy diffusion of news across the Internet, would alone weigh heavily against our striving to return news content to its original sources and/or providers alone. It seems much more likely that incumbent business models in the news industry will be compelled to change. But how they will change, and how they will regain their revenue-generating properties, remains to be seen.

**D. Creative User Practices**

The digital era has affected the music industry from top to bottom, changing virtually every aspect on the production side, from creation to compilation to dissemination, as well as on the consumption side, from listening to purchase to use and re-use. Music industry firms have struggled to come to terms with the disaggregation of music that technology makes possible: first by trying to preserve the album format of sequential songs, then by struggling to agree on terms of licensing rights, sales and pricing of individual music tracks. The industry has also fought to stave off incursions against its revenue streams by Internet downloading and peer-to-peer music sharing, at least some of which comprise illegal and infringing practices.

Aggressive copyright lawsuits, and public relations attempts at raising user awareness of copyright infringement and its related costs, are strategies that the music industry has wielded—with disputable degrees of success—to thwart free music copying and promote licit music purchasing. A large part of the problem with these tactics, however, is that changes in user practices are liable to drive changes in user preferences and perceptions. The popularity of peer-to-peer sharing of digitized music tracks gave rapid rise to a shift in user perceptions: the idea that music could, and perhaps should, be available readily and at no cost, became deeply entrenched in the early generation of Internet audiences, and seems to persist to the present day. Among many listeners, the idea that such uses constitute copyright infringement, often at great cost across the industry, does not appear to be paramount in their understanding, let alone reflected in their behavior. Moreover, the perceived heavy-handedness of music industry lawsuits seeking broad damages to compensate for the costs of copyright infringement, coupled with the often overtly admonitory tone of public relations campaigns against music “piracy,” seems to have failed to shift user perceptions and practices. For the most part, music listeners
seem to remain unswayed by these clarion calls for change: some listeners still seek new peer-to-peer networks that offer free music sharing; some turn to Internet radio for music streaming; and some continue to buy music tracks on a variety of music services. Overall, however, the decline of music sales since the advent of the Internet offers certain evidence that the music industry’s copyright-based efforts have not gained much traction in the market.

E. Access and Control

Another problem with the use of copyright-based lawsuits, public awareness campaigns regarding infringing acts, and other strategies based in wielding control via intellectual property-related avenues, is also driven by digital changes that afford both new possibilities for access and potential for control. The Internet grants ready access to an unprecedented range of cultural resources, such as music archives, clips, recordings, and so on, that may offer a creative user a vast array of building blocks for creating new musical works. Early generations of Internet users have discovered innovative ways of building on this rich cultural domain, including new musical techniques such as sampling, quotation, mixing, and so forth. These new creative expressions tend to prevail among younger users and creators, revealing a generational shift that has yet to be fully embraced and adapted to by cultural providers in music and other fields. It is likely that, over time, the music industry will come to terms with digitally sophisticated users, both by accepting their user base and through bringing such users into the ranks of their management and leadership. These steps may lead to greater openness in new creative practices and perceptions of copyright’s role with respect to some of these practices. Even today, a certain recognition that copyright law may require some restraint with respect to cultural “quoting” has begun to emerge. The extent to which a culture of openness and sharing can co-exist with robust copyright protections still remains in dispute, however, and its borders are likely to remain contentious even as creative access and borrowing push the boundaries of culture’s norms.

327 Arewa, supra note 3, at 471.
328 Id.
329 See supra note 28 (discussing mash-ups).
A countervailing force to access, however, is control. That is, the unparalleled access to cultural resources that music listeners and users now enjoy is bounded not only by resistance on the part of copyright owners, but also by new possibilities of control over such resources as a whole.\textsuperscript{331} New technologies expand the range of tools that copyright owners may use to control access to, and use of, their copyrighted materials. On the one hand, such control mechanisms may be helpful in checking unwarranted uses of copyrighted material, particularly those uses made without proper attribution, compensation of copyright owners, and/or without heed to their overall negative effect on content-rich industries.\textsuperscript{332} On the other hand, the expansion of such controls may be problematic, as in certain cases of overly broad restriction of uses of content that have historically been considered both legitimate and normatively acceptable.\textsuperscript{333}

Controls of content that are over-reaching may have a pernicious effect on creative output by impeding users’ legitimate access to a rich cultural domain. But such attempts at enforcing rigid controls are also injudicious in their underlying characterization of a host of user activities as “piracy,” irrespective of whether such activities involve permissible behavior, such as gaining access or copying of materials for personal and private use. This broad-brush approach to characterizing creative user activity as “piracy” can hinder the critical differentiation among behaviors that might rightly be deemed infringing and those that might be perfectly valid.\textsuperscript{334} Moreover, when coupled with technological controls that do not distinguish between such divergent behaviors, the over-broad sweep of these restrictions runs counter to current copyright doctrine and threatens the careful balance between rights and restraints that copyright law constantly strives to calibrate and sustain. Still worse, a campaign against a range of content uses paired with an arsenal of strict controls may serve to lock up creative resources and practices that might otherwise contribute to a fully realized creative realm, both in individual users’ creative experiences and in the greater cultural landscape.

\textit{F. New Choices for Users and Creators}

\textsuperscript{331} Arewa, \textit{supra} note 3, at 471.
\textsuperscript{332} Arewa, \textit{supra} note 3, at 471-72.
\textsuperscript{333} \textit{Id.}
\textsuperscript{334} Arewa, \textit{supra} note 3, at 472.
Above all, digital era technologies have expanded the array of choices available to cultural creators and users alike.\textsuperscript{335} Musical offerings, for instance, have been disaggregated into single units that are available to users in various digital formats (such as MP3 and other compressed formats), rather than being pre-packaged by record labels into composite, single-format (i.e., recorded) albums.\textsuperscript{336} This enables users to exercise greater choices over their consumption of music, with respect to format, means of listening and purchase, and devices used for access to music. Moreover, it gives follow-on creators greater access to music on which they may choose to build their own creations, via such digital mechanisms as Garage Band and other online applications.\textsuperscript{337} The technological and business innovations that have arisen in the digital era also have also expanded the ability of users and creators to express their preferences via the choices that they make when consuming music and other cultural content. During the digital era, for instance, many users have implicitly expressed a preference for ease of access and use of music to the quality of musical sound reproduction, as evinced by the resounding popularity of devices that convey music in an MP3-compressed format, such as the Apple iPod players and similar devices. The emerging dominance of MP3-based devices has been to some extent driven by new entrants in the music marketplace, whose innovative products have proven appealing across music audiences. At the same time, once audience appreciation allowed the MP3 player to gain significant market share, yet another set of entrants have been able to offer newly innovative products or to offer key improvements on existing products, such as a host of applications that enhance the music listening and consumption experience.

In similar fashion, music creators have been able to disintermediate their original works, and to expand the range of choices that lie within their purview.\textsuperscript{338} Prior to the digital era, only a very few creators had the option to disseminate their music without recourse to the powerful distribution agency of record industry labels. The advent of online music distribution has afforded more creators the ability to seek alternate channels for producing, marketing, and selling their output.\textsuperscript{339} While at present most music creators have not fully tapped the potential of

\textsuperscript{335} Arewa, supra note 3, at 472.
\textsuperscript{336} Id.
\textsuperscript{337} Id.
\textsuperscript{338} Arewa, supra note 3, at 473.
\textsuperscript{339} Id. at 337-38.
the Internet for direct outreach to their audiences and consumers, there appears to be some impetus in the direction of such disintermediation. For instance, many musical talents begin by seeking audience recognition among Internet audiences, rather than seeking to sign a contract with music agents at the outset of their careers. Others are seeking to distribute music directly to audiences via Internet sales of digital tracks or CDs. Another interesting new strategy has been mapped by the heavy metal band Iron Maiden, which freely allows “piracy” of its music, and then chooses the sites for its live performances based on the locales that have evinced the greatest piracy of their music. This strategy allows the band to profit more from live performances, sales of merchandise, and other ancillary revenue sources, rather than from sales of music tracks alone. As a whole, these strategies reflect a growing sense that music creators may flex their muscles through the independent agency granted them by digital means.

**G. Lack of New Business Models**

Prevalent in cultural sectors such as music is the understanding that the Internet has opened new avenues for the creation and dissemination of original works, in ways that have the potential to empower both users and creators of cultural content. However, it does not appear that this understanding has extended to the development of innovative business models that accommodate and adapt to the emerging landscape of cultural production. Owners of copyrighted cultural content, in the music industry and elsewhere, are generally continuing to adhere to traditional business practices: in music, for instance, record labels continue to seek out new talent, to enter into standard contracts with their artists, and to protect their copyrighted works from encroachments, whether perceived or real. Some changes have been made on the margin, for instance with respect to music marketing: several record labels now take advantage of the Internet to generate recognition for upcoming artists. Similarly, some record labels may offer online sales of their artists’ CDs, and even on occasion single tracks, both in conjunction with live performances or events and on a stand-alone basis. But these steps arguably do not represent

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340 See infra Chapter 4, subsection I.A.1.
341 See infra Chapter 6, subsection I.F.3.
342 Arewa, supra note 3, at 472 (citing Ethan Smith & Peter Lattman, Download This: YouTube Phenom Has a Big Secret, WALL ST. J., Sept. 6, 2007, at D1 (noting that YouTube sensation Marié Digby is signed by Hollywood Records, who helped her devise her Internet strategy)).
innovative business models; rather, they seem to be standard practices that have been translated wholesale into digital form, such as generating word-of-mouth buzz, offering direct sales, and so on. It is possible that changes in technology may drive changes in the music industry, as occurred with the advent of Apple and its music-related devices. In such a case, however, the music industry will again be playing catch-up with technology, and may find itself at a similar disadvantage to that which it faced vis-à-vis online music sales of digital tracks. For the cultural content industries, the rear-guard position may lead to a further disintermediation that gives creators and users still more agency over their works, and possibly even greater power over the copyright in cultural works.

Digital technologies in cultural realms such as music afford users and creators alike the ability to generate, transform, and disseminate content in both original and varied forms. These abilities are neither wholly new nor unique to the digital era: they existed in earlier times and were made possible by earlier techniques. Musical manipulation, for instance, occurred as simply as the recreation of folk tunes by interested composers—Bartok, Mahler, Dvorak, and countless others are famous for their cultural appropriation of folkloric works.\(^343\) Musical dissemination occurred as simply as the conveyance of early American music by a host of artists from genres such as R&B, blues, country, rock and folk music—the Rolling Stones, Eric Clapton, and many other mainstream artists are known to have drawn from the great repository of American roots music.\(^344\) One difference today is that such uses are intermediated, and for the most part facilitated, by technology. Another difference is that copyright law interjects debate as to when such recourse to creative resources may be authorized or unauthorized, and whether the scope of such recourse may be expanded or contracted for the overall greater good. But even debates over the import and scope of copyright law are often grounded in earlier debates that still remain compelling regarding the centrality and value of culture and its institutions, the appropriate uses of cultural resources by would-be creators, and the benefits and drawbacks to democratization of culture in our society.\(^345\) Such debates reflect, to a certain degree, the strong interest that cultural

\(^343\) See generally Arewa, supra note 3, at 473.

\(^344\) See generally Arewa, supra note 3, at 466.

arbiters have in defining and shaping both culture and its creation. When tied to one of the fundamental goals of copyright law—to foster and incentivize creation—debates over the digital era, while divided and fraught, are critical to the construction of a system that rewards creators and benefits users. But when such debates become mired in defenses of a system intended to bolster traditional business practices on the part of inflexible industry stalwarts, they become less defensible, protecting threatened revenue streams via rigid application of copyright law rather than conceiving innovative revenue-building practices that keep copyright evenly balanced between owners’ rights and users’ freedoms.

CONCLUSION: ADDING VALUE IN THE DIGITAL ERA

A. Need to Recognize “Black Markets” in Music

Copyright in the digital era has yet to be shaped to foster new business models that accommodate and adapt to current technological realities and cultural changes. Music offers a powerful illustration of the stasis that a vital industry is in the midst of experiencing, in spite of almost two decades of profound disruption. Although some shifts have already altered the contours of its landscape, the music industry continues to stand by its standard responses: litigation against any incursions into copyrighted work, and a campaign against all but the most restrictive user practices of listening, purchasing and access for creative re-purposing. In the music context, copyright merely offers a defensive strategy for thwarting non-conventional “black market” uses of music, even if such a strategy might hinder uses that would otherwise be considered acceptable under traditional policies and norms. Yet to the contrary, music industry players might well find it more profitable to recognize the existence of such “black markets”, and to perceive such markets as strong indicators of user preferences, interests and desires. At an earlier critical juncture in the music industry’s trajectory, this would have meant scrutinizing file sharing services such as Napster, acknowledging that music listeners were interested in listening to individual song tracks rather than entire compiled albums, and seeking a price point at which music consumers would be willing to pay for such tracks. Today, this might entail a closer scrutiny of music streaming, sharing, and creative music composition such as sampling, mix-ups, and so on, and seeking business models that drive compensation to copyright owners for a viable
share of such activities. In terms of copyright law, this would likely also involve elucidating more finely-tuned distinctions between authorized and unauthorized uses of cultural materials, and basing determinations of which uses are truly infringing on an application of copyright law that is better calibrated to today’s realities and practices.

B. Need to Support Sequential Innovation

Copyright law comprises multiple goals, including but not limited to giving incentives to the broadest possible range of creators to generate the broadest possible range of creations that will contribute to a rich sociocultural domain. Activities such as borrowing, collaboration, sharing, and appropriation generally serve to foster sequential innovation, a norm in the creation of much original copyrightable work. These activities must be accommodated as fully as possible by copyright law, which calls for the careful assessment of the potential value of creative works, including those that are built on sequential or cumulative innovation. Such sequential innovation may, however, give rise to an information asymmetry: uncertainty about the value of follow-on innovation, which in turn may give rise to holdout problems.\(^{346}\) For this reason, technological change may necessitate greater openness of access, particularly when it serves to provide building blocks for future innovation among creators, but also when it drives changing practices and norms among users. One example from music, while relatively minor, is illustrative: music sampling, in which snippets of a work are offered to users through services such as iTunes—allowing them to listen to a short segment prior to downloading and purchasing the work—is increasingly becoming a standard feature in sales and purchasing practices. Music publishers, upon becoming aware of the popularity of sampling, have been seeking remuneration even for the snippets that are offered for listening via previews. The practice of sampling, however, now allows users to listen to music prior to being required to purchase the music, and presumably encourages users to listen to a range of choices without the commitment of payment until they have chosen the work that they wish to own. Essentially, sampling not only facilitates user purchasing decisions, but also drives changes in user practices and experiences. The very question of remuneration for samples, therefore, must be considered in the context of innovative

\(^{346}\) Arewa, supra note 3, at 466.
changes in the music industry. And similarly, the conception and interpretation of rights in sampling snippets must be considered—and questioned—in such a context as well.

C. Need for Changing Business Practices

Changing technologies, especially when achieved on a sweeping scale, may necessitate novel business strategies and adaptive business practices undertaken on an industry-wide basis. The advent of the Internet has enabled a host of changing cultural practices, including the creation of UGC, allowing users to participate actively in the production and dissemination of musical content—roles which once lay exclusively in the purview of music industry publishers and other professionals. At the same time, the rise of UGC as a creative social undertaking encourages users to engage actively with earlier cultural offerings and to reshape them in myriad original ways. These new user approaches to creativity, both past and evolving, underscore the importance of maintaining a rich public domain that offers access to the building blocks of culture, in music and in many other creative arts.347

It is critical that the music industry respond to evolving user practices such as UGC with approaches that are tailored to the digital era. The recent history of such innovative responses as the iTunes Music Store, online music streaming services, and so on, reveal the potential power still held by the industry with respect to tapping into user preferences and deriving profit from well-conceived products that satisfy user needs. Notwithstanding these examples, however, the music industry has at times appeared intransigent, slow-moving, and even obstructive in its response to changing demands. For instance, the challenge presented by Napster did not drive the industry to create a competitive peer-to-peer sharing network that might enable the legitimate exchange of music with properly devised control and metering mechanisms. Rather, the industry rose en masse, via its representative agency, the RIAA, to thwart and actively pursue follow-on P2P sites, and to block all such activities with little regard to whether or not the totality of their practices were infringing or permitted. Further, lawsuits pursued by the RIAA against individual users—while possibly valid, even viable, in asserting infringing activities—have often seemed to

347 See generally Arewa, supra note 3, at 474.
present a suboptimal approach to new user behaviors, at once alienating users and failing to change fundamental user behaviors, perceptions and norms.

A far more successful, and indeed profitable, approach to adapting to the new realities of a digital world would likely entail a fundamental reconfiguration of music industry practices, and possibly a transformation among industry participants themselves. For instance, new industry players, such as online music agents are beginning to emerge, offering a direct nexus between talented artists, online music delivery services, and interactive audience sites. These agents are similar to traditional industry representatives in some of their practices, but are not always formally associated with the major record labels. This enables them to engage in direct online marketing, and to sign artists to more flexible, individualized contracts. Newer contractual arrangements, such as the “360 contract,” give artists a modest royalty from their recordings, but give them a greater share in ancillary sales, such as related merchandise, ticket sales at live performances, and so on. More flexible approaches to reaching profitability in the music industry are also beginning to prevail with respect to music dissemination, purchasing and pricing. For instance, streaming services allow users to listen to music online at various price points: in the Pandora model, listeners may opt to listen to music along the lines of traditional radio—listening for free, with intermittent advertisements—or at a “premium” level, listening to music for a small cost but without ad interruptions. Some music, such as Spotify, services permit users to listen to music, and then to purchase songs as they wish. While iTunes has set a relatively low bar as to the pricing of songs, some online music subscription services continue to experiment with pricing terms, offering, for instance, an “all you can eat” subscription service that invites users to pay a flat-rate monthly subscription fee that allows users to download as much music as they choose.

While some of these business models, as well as those still to emerge, may require pricing and other contractual terms that are lower than those associated with pre-digital era standards—and

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348 See supra note 216 and accompanying text.

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thereby create ongoing pressures to achieve profitability—they are also more likely to succeed in the newer digital economy than outmoded practices that do not account for user preference and new usage norms. Similarly, new normative efforts, such as efforts to persuade contemporary music listeners, consumers and creators that legitimate, non-infringing uses of music are fair practices that reward original creators—and that only certain gray area uses are tolerable with respect to both originators and follow-on creators—must also be vigorously pursued by music industry players. Persuasion, rather than prosecution, has already been seen to be more effective in bringing music audiences into the fold, and will likely lead to users accepting the terms of payment that their consumption will inevitably require. But such efforts must be joined with a scrupulous consideration of the fine divide between authorized and unauthorized uses of musical works. Some unauthorized uses, while perhaps touching upon copyright infringement, may be more productively deemed acceptable with respect to novel creation and relatively harmless in terms of cost to the originator. Sampling of works, for instance, when used as a means of enticing new listeners to purchase works, may serve as an example of such a gray area practice that is at once useful and relatively cost-free. One vital way to meet the challenges of the digital area, therefore, is to prioritize which uses are and should be authorized, to determine which unauthorized uses truly present the greatest threats to the viability of the industry and its participants, and to make determinations regarding follow-on uses with regard to these distinctions. The music industry has been slow to agree that the delicate balance must be calibrated anew, in order to meet the challenges of the present digital day. But it is only by developing such distinctions among practices, and by shaping new business models predicated on a better understanding of user demands and preferences, that the music industry can regain its vitality and relevance to modern culture, and thereby begin to regain the grounds of its ongoing profitability and eventual growth.

D. Need for Changing Legal Frameworks

As the digital era changes business contexts, it is bound to alter the legal framework of intellectual property rights as well. The operation of copyright in the music sector has always been subject to alteration: the early advent of written music, followed by the emergence of recorded music, for instance, necessitated first a grant of copyright in original musical works and
then a more complex scheme of rights in recorded works, “covers” of works by non-originating artists, and so on.\textsuperscript{352} As in the case of complex recordings in other creative sectors, such as recorded films, increasing sophistication in technology, coupled with increasing ease of personal access and use, virtually mandated re-negotiations of copyright’s parameters. These changes drove such cases as the Betamax dispute, in which the Supreme Court determined that personal non-infringing use would remain a protected practice.\textsuperscript{353} More recently, it has been driving disputes in the copyright arena over a range of music practices, such the scope of legitimate online downloads, sampling practices, rights in ring tones played on cellphones, fair use of music extracts, and many others. These disputes call attention to the pressing need for an ongoing process of accommodation, negotiation, and recalibration of rights that are more contextually suited to new technologies and the practices they engender.

One controversial response to emerging technologies, newly competitive business practices, and changing user practices has been a strong effort on the part of music industry participants to lobby for increases in legal control over content, as well as approval of technological controls that further lock up content and meter its use. These efforts are in large part driven by copyright holders who remain convinced that stricter copyright measures will allow them to recover the maximum possible returns from as many forms of access and use of content as possible. Yet revenue maximization, while an understandable goal of copyright owners, fails to take into account the interest of users in having access to a rich range of cultural products, both for listening pleasure and at times for creative use. When the cost to copyright holders of access to their content is relatively minor, and the potential benefits to content users may be great, merely defaulting to strict copyright enforcement may not result in a net enhancement of welfare, despite the potential for some lack of rent maximization. In the case of music sampling, for instance, a rich genre of musical creativity—wherein new artists made use of snippets or melodies drawn from prior works—the strict enforcement of copyright led to licensing issues, as the cost of seeking permissions for each snippet proved too costly or onerous to the sampling artists. The disputes over sampling effectively put a halt to the creation of the nascent genre, which many consider a diminution of contemporary music’s creative output.


\textsuperscript{353} \textit{Id.}; see Sony v. Universal, 464 U.S. 417 (1984).
The early demise of music “sampling” suggests that thwarting emerging musical movements is suboptimal because it may close off future innovations that are unknown, as in the analogous case of sequential innovation in culture, technology and elsewhere. Similar to business practices, copyright policy and regulations, must be responsive to social and cultural changes and leave room for novel, experimental explorations of musical works and styles. On occasions when experimentation draws upon earlier cultural resources, copyright should weigh the effect on copyright holders of the access and use that newer creative efforts may entail against the need for such efforts to be realized and fostered. The balancing act of copyright is paramount when taken in the greater context of cultural production, as in the case of music which has repeatedly shown that musical innovation is often predicated on reference to prior artists and their works. “Standing on the shoulders of giants,” as Bertrand Russell put it, may call for the artistic liberty to speak directly to, or to quote, or to riff on, one’s cultural predecessors. In the context of music, user practices in the current digital era reflect the tradition of cultural quotation, and show that it is thriving and contributing to new cultural production. While artistic copyright holders may see such practices as a threat to their profitability and viability, they may in turn choose someday to draw upon their peers in creating new copyrightable materials. This can only happen if music copyright remains flexible and recalls that access and use of prior materials is as much a priority in incentivizing new works as is upholding the rights of existing cultural copyright holders.
CHAPTER 4: ANALYSIS

INTRODUCTION

In this section, I consider the primary commercial concerns that always preoccupy creative content industries, but are exacerbated by disruptive innovation and the competitive pressures it imposes in new and increasingly complex ways. I then suggest some equally important concerns that the content industry should also weigh into the balance but that may elude its full recognition for various reasons, such as lack of value given to intangible and unquantifiable goods, an inability to pinpoint and therefore easily articulate shared values and norms (for instance, academic freedom), a resistance to commodification (or to admitting that commodification is occurring), uncertainty about the parameters of professional work (for instance, engaging in open source endeavors that may or may not be institutionally sanctioned), or just plain oversight. Drawing on the earlier industry case studies, I conclude by examining some of the features of these challenges and considering how they play out in the disrupted landscape with which the creative content industries are confronted.

I. WHAT ARE THE CONTENT INDUSTRIES AFRAID OF?

A. Unfair Skewing of the “Innovation Lottery”

Creative industries are faced with the common conundrum that underlies the rationale for IP protection: whether the risks they assume in creating new works will be satisfactorily compensated by adequate returns.1 The nature of creative work, however, tends to raise the threshold of risk, in that its audiences are often taste-driven and taste is notoriously hard to predict. Fashion and music, for instance, are but content-rich industries that must gauge the receptivity of their audiences to new output, and that rely for commercial viability on popular

appeal. Making matters more complicated, these and other creative industries must constantly issue new works, as audience tastes continually gravitate to fresh and original creations. In less volatile fields, such as education, taste may be somewhat less of an arbiter of preference, and may be less subject to change. But even in these fields, consumers are constantly seeking new outputs, and sometimes new outlets, for the works these industries produce. They may also substitute criteria of taste with equally subjective notions of quality, experience, value, and associative goods\textsuperscript{2}—such as the benefits of interchange with members of the creative community—for assessing whether the industry’s offerings are worth their while.

In order to remain commercially viable, then, creative content industries must play the “innovation lottery” game for high stakes.\textsuperscript{3} This calculus is compounded when technology transforms an industry’s landscape in various ways: for instance, it can open up entire new venues, facilitate new means of production, alter delivery streams, and fundamentally change consumer and user practices.

### 1. High Fixed Costs of Production

For the major content producers (such as media and entertainment companies, record labels, newspapers, or educators), making content will always be an expensive proposition. In the music industry, for example, finding and producing the next big act in pop or rock music still costs a record label a significant initial outlay, coupled with the usual uncertain payoff.\textsuperscript{4} The high fixed costs of production must be at a minimum recouped and preferably exceeded if music producers are to remain profitable and commercially viable in the long term.\textsuperscript{5} The need to clear their margins can lock music producers into certain business strategies and positions, such as being


\textsuperscript{3} See generally F.M. Scherer, The Innovation Lottery, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 3 (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First, eds. 2001).

\textsuperscript{4} See NAVIGATING THE MUSIC INDUSTRY: CURRENT ISSUES & BUSINESS MODELS 183-201 (Dick Weissman & Frank Jermance, eds. 2003); see also Death of the Middleman, LIVING ECONOMICS, [https://livingeconomics.org/article.asp?docId=278](https://livingeconomics.org/article.asp?docId=278).

compelled to sell their product at certain price points or levels of magnitude (that is, needing to produce best sellers or hits that generate a certain volume of sales or downloads), relying on advertising support, being beholden to certain outlets for release such as radio broadcasting, searching for the greatest possible venues for release of new product, actively pursuing new revenue sources such as ringtones and music licensing royalties (such as seeking royalties for recordings played in smaller venues, including restaurants, gyms, and so on), seeking to monetize merchandising and ancillary rights, seeking to lock best-selling artists into long-term contracts, and a host of other business choices that are calculated to maximize the returns from music production in order to offset its considerable costs at the outset.

The commercial motivations that underpin the music industry, due in no small part to its high fixed production costs, are not in the least uniformly negative: they can spur pro-competitive behaviors, foster profit maximization, amply reward talented creators and diligent producers, and perpetuate the generation of new content that satisfies consumer demand. At the same time, however, these factors taken as a whole arguably lock the industry into a paradigm that is fixed in certain requirements, such as compelling a high volume of sales and licensing, focusing attention on immediate rewards as opposed to nurturing developing talent over a longer career, and so on.\(^6\) Aside from the effect that these necessities may have on the quality and nature of music that is being produced (for instance, it may induce producers to favor high-selling acts, and may even encourage a certain uniformity of product that is bland yet satisfying to mass audiences\(^7\)), the need to clear high fixed costs may well constrain the traditional music industry to a model of production and commercialization that is open to challenge in the new Internet-driven economy.

The mandates of traditional music production are not liable to change anytime soon. But technology is opening up new realms of content production to more innovative and nimbler generators of content, who are creating output that is less expensive to produce and deliver, yet still satisfying to music audiences and consumers. This is posing a direct challenge to the established industry which is only likely to escalate as newer, more savvy musicians emerge with

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\(^6\) See NAVIGATING THE MUSIC INDUSTRY, supra note 4, at 275-299.

greater awareness of the Internet and increasing abilities to tap its resources and tools for creating, mixing, editing, releasing, and delivering music product to audiences everywhere.

There are several instances in which new artists have shown they can ably use technology to self-produce, self-promote, and self-market. Justin Bieber, a hugely popular young musician (at the time of this writing), wrote recorded his own songs, and then uploaded video clips of his performances on the Internet video file-sharing site YouTube. He developed his name recognition to such an extent that he was signed by a major record label, which now produces his music commercially. Bieber’s initial efforts at self-promotion saved upfront costs for the record label, which did not have to make an initial outlay to make, package, market or nurture the artist. But Bieber did eventually sign with the label. Other artists, such as independent musician Ingrid Michaelson, also found recognition through Internet self-marketing, but did not subsequently sign with a record label. Rather, she created her own recording company, and until very recently has self-marketed her own music. Other musical acts, such as the heavy metal band Metallica, relies primarily on direct sales of music online, streaming, and live ticket sales to sustain themselves. The band assumes much of the costs of production, which are greatly reduced by technology. Recently, Metallica announced that it had re-purchased copyrights in its earlier catalogue and that it intends to be solely responsible for the dissemination of that previously recorded work.

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10 Id.
11 See infra Chapter 6, subsection I.F.3.
12 Id.
13 Id.
14 Id.
15 Id.
16 Similarly, in the case of journalism, newspapers have traditionally made large outlays, primarily on labor (journalists, foreign correspondents, etc.) and printing costs. Technology enables their new emerging competitors to occupy the news space via online dissemination, rather than through print media. Online blogs, websites, portals, newsfeed services, and so on can either generate their own work at lower costs (pooling resources, volunteering, etc.) or aggregate the news sources, and put out a competitive product at a lower cost of production. Particularly where such online sources are reputable (for example Politico, ScotusBlog, or Slate) and cost nothing or next-to-nothing to use, they offer real competition and direct challenge to the business model of traditional journalism. See infra Chapter 6, subsection IV.E.3.
In the case of education, production costs are also high, fixed, and relatively immutable.\textsuperscript{17} Consumers (that is, students and the parents who usually financially support their education) typically want and demand the presence of real-space institutions to mediate and direct their education. Such institutions are extremely expensive to operate and maintain, and their educational model is based on charging high prices (that is, tuition plus fees and room and board) to compensate for those high costs. Again, the Internet disrupts this model by presenting a divergent model of production that has the potential to be commercially viable without requiring large and ongoing production costs. The online educational model reduces such costs dramatically, in part by eliminating real-space constraints, and in part by achieving economies of scale by teaching more students in more concentrated courses and programs.\textsuperscript{18} Most online Massive Open Online Courses (MOOCs) have tended to entail major start-up costs, at least up to present.\textsuperscript{19} Once such costs are allocated, however, they may be expended over time, amortized, offset with budgetary or operating earmarks, or separately funded.\textsuperscript{20} If and when MOOC programs become easier to reproduce, and eventually more self-sustaining, initial production costs are likely to drop, and ongoing costs will stabilize, and self-sustaining models may be contemplated.\textsuperscript{21} As these cost savings begin to occur, and as their development is undertaken by less-than-traditional institutions (such as for profit institutions and start-ups), it is possible that a new business model with much lower costs of production, much greater volume, maybe lower quality (maybe not), and at a much cheaper price, becomes a new paradigm for education delivery to a certain segment of the market.\textsuperscript{22}


\textsuperscript{18} See Alistair Inglis, The Changing Costs of Delivery of Distance Education Programs, in HANDBOOK OF DISTANCE EDUCATION 507, 509-13 (Michael Grahame Moore, ed., 3d ed. 2013).

\textsuperscript{19} See supra Chapter 2, subsection II.A.3-4.

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} The probability of MOOCs competing with traditional institutions will most likely occur when they culminate in degrees or credentials that are accepted by the higher education sector (such as accrediting institutions) and, perhaps more importantly, the job market. See Kevin Carey, Here’s What Will Truly Change Higher Education: Online Degrees that are Seen as Official, N.Y. TIMES (Mar. 5, 2015), \texttt{http://www.nytimes.com/2015/03/08/upshot/true-reform-in-higher-education-when-online-degrees-are-seen-as-}.
2. Devaluation of Content

Innovative technologies can throw the value proposition of revenue-producing content into question. While new revenue streams may be available, they are not necessarily immediately recognizable. But when realized by competitors to traditional content producers, they confront the industry with the possibility of transformation of the commercial landscape, the road map to profitability and sustainable long-term growth. Music offers a sharp example of the potential technology can have for devaluing content and thereby undermining traditional sources of revenue. Online file-sharing services enabled users to copy music files, which are shared freely and often illicitly among innumerable users, at no cost. Such file sharing evades payment for the use and reuse of music tracks to both artists and copyright holders. In so doing, it decreases revenues across the industry. While the exact amount of the decline in music sales is debated in music circles, many agree that such music “theft” is rampant. Another consequence of such sharing is a new pattern among users who have come of age at the same time as the emergence of peer-to-peer (P2P) file sharing. These users are comfortable with file sharing as a practice, and some are unwilling to consider the ramifications of having access to creative works for free. Indeed, many express an outright reluctance ever to pay for creative content. This represents not only a devaluation of present content but also a real threat to the value of future content among new user bases. While alternative revenue streams, such as live performance ticket sales, and merchandise sales, may compensate for these losses, the depreciation of the value of recorded copyrighted material that remains significantly at risk.

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24 Indeed, some believe concerns are inflated and do not reflect healthy changes in the world of content. See, e.g., LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY, 143-55 (2008).
25 Ku, supra note 5, at 273.
26 The film and television industries are facing a similar threat of devaluation of content via technologically-enabled file sharing as well. For instance, film, TV, and video content are uploaded daily onto online sharing sites and networks, such as YouTube, BitTorrent, and others. Only some of these sites screen for illegally shared content, and some openly state that the illicit sharing of popular creative works is not their concern.
Education is also seeing a threat to the devaluation of its content. MOOCs represent free content in this sector, which is available to all interested users. At present, MOOCs do not threaten the value proposition of education, if such value is defined as primarily inhering in a degree-bearing program for which tuition is paid. MOOCs are not presently offered on a for-credit basis, and therefore cannot even contribute to a degree-bearing program; they are stand-alone courses taken primarily for interest only. But pressure on universities may soon lead to some of those courses becoming creditworthy, whether for course credit, transfer credit, credit toward degree completion, or even en masse as a degree. These developments would no doubt exert downward pressure on traditional education prices, even while universities remain compelled to sustain online programs due to various factors, such as popular demand, the need for cheap lecture courses, the desire to stay current with educational trends, and an internal interest in pedagogical innovation. As in the case of music, free MOOCs may reshape users’ expectations, behaviors and norms. Learners may become increasingly convinced that education can and indeed should be cheap, easy, limitless, and in certain cases free. With the emergence of new possibilities in monetizing MOOCs, such as networking, job placement, or certificates, it may be the case that MOOCs introduce a new model for commercial viability that does not depend on tuition for viability but rather on a panoply of offerings, both instructional and vocational. If realized, this would be a ground-breaking change to the entire sector, suggesting that it is not only the value of the university’s content that is placed at risk by the evolution of MOOCs—the educational value-proposition as a whole may come under challenge.

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27 See supra Chapter 2, subsection II.A.3-4.
28 Id.
30 In the publishing sector, the borrowing and lending of e-books in lending libraries, while analogous to the activities of traditional libraries, allows new opportunities for private users to copy and disseminate copyrighted written materials on a far greater scale. One can imagine online P2P file-sharing sites for e-books that may eat into e-book sales. As in the case of digital music, such copying would be cheaper, easier, faster, and could be distributed to large audiences.

Journalism is facing similar challenges arise with respect to changing user practices and preferences that lead to the substitution of some newsprint for free online materials. This change is enabled and supported by the emergence of blogs, group sites like Talking Points Memo, Politico, The Huffington Post, and so on, which are generally produced at lower costs than traditional media. See infra Chapter 6, subsection
Fashion design is also confronted with challenges to the market value of its original content. Even though not protected by copyright, fashion designs are challenged by the possibility of immediate copying that can be enabled by technology, which undermines the industry churn on which fashion relies.\textsuperscript{31} Haute couture, valued by wealthiest customers due to its exclusivity, is at its peak value particularly when it first hits the runways and may be purchased only on bespoke basis. But technology allows rivals of original designers the means to photograph, reproduce, and disseminate copies of haute couture creations with incredible fidelity, rapidly, and accuracy.\textsuperscript{32} This drastically undermines the window of exclusivity on which original designers depend.\textsuperscript{33} Such copies are so high-quality and virtually indistinguishable from originals that they undermine the value of owning originals that have the look and feel of the best goods, further undermining the value of elite and/or luxury goods.\textsuperscript{34} In a world where everything can be swiftly copied, distributed, and discarded if not immediately popular or trendy, the key process of establishing fashion exclusivity, a means of signaling what is at the top of the market, becomes cloudy and unreliable. Similarly, the vital function of price signaling, notably pricing exclusive goods to commandeer stratospheric prices only available to select customers, becomes less effective and less efficient. This can prove detrimental to the industry as a whole, which is based

\textsuperscript{32} See id.  
\textsuperscript{33} Id.  
\textsuperscript{34} Id.
in, and relies upon, trickle-down effects of signaling and churn. Rapid copying and large-scale dissemination by knock-off designers and brands is facilitated by new technology, such as undetectable cameras that can take high-resolution photographs of runway designs, graphic design software that can recreate original designs, and Internet channels that can market and disseminate knock-offs. These and other technologically facilitated practices together serve to undermine traditional fashion designers’ hegemony in the market, particularly at the high end of the consumption spectrum.35

Original designers may still have some means of retaliating, or of forestalling losses by changing their marketing strategies and other business practices. For instance, one possible recourse is creating newer, more affordable labels in which they sell cheaper, more mass-produced items that still retain key elements of their haute couture designs, thereby essentially knocking-off their own high-end creations. In this regard, designers may capitalize on one upside of rampant copying, which is that they are afforded increased name recognition when their works are swiftly delivered to the masses by copyists. Such name recognition could make their secondary or bridge lines desirable and popular, and could ensure their longevity in an increasingly fickle and changeable market. Nonetheless, while designers may be compensated for some losses by disseminating various versions of their own designs, they are not always able to recover from the loss of exclusivity that they enjoy at the top of the fashion pyramid, particularly as the window of exclusivity dwindles to the point of disappearance.36 Thus, the fashion industry remains well aware that it is vulnerable to the erosion of its value proposition, especially with respect to its highest-end goods that are meant to command the largest margins and to secure the viability of original designers and their enterprises, fashion houses, and brands.

3. Devaluation of Middlemen and their Functions
(Some Possible Long-Term Outcomes)

Among the many stakeholders of content-rich industries, intermediaries or middlemen serve multiple purposes in producing the raw material of artistic creation into finished, credentialed

36 See generally Chapter 1, Part I (discussing the “fashion pyramid”).
products that are brought to market. The term is used loosely here to designate the many entities and individuals active in the commercial process. Technology can make it possible for creators to take on themselves such intermediary functions; and it can further help creators to usher commercially finished products into the hands of users. This threatens the business model of intermediation to an unprecedented degree. Although intermediaries still exist in many creative industries, and in some cases may not be doomed to falter in the immediate future, many are still up in arms at the prospect of impending technologically induced obsolescence.

Intermediaries abound in the mature music industry. Record labels, talent scouts, marketers, all play multiple roles: for instance, finding new talent; representing composers and performing artists; producing commercially packaged albums and songs; marketing and promoting the work of musicians; and enabling and assisting with the production live performance concerts. In exchange, these parties are paid through upfront signing fees, royalty streams, and contractual payments. In the case of record labels, they hold the copyright in the original compositions created by their artists; and they often retain rights in the catalog of artists’ prior works. But some composers and musicians are beginning to take control in their own output, and to retain the rights and royalty streams that such output generates. Artists may use digital technology on many counts: to create, edit, and finish their work; to promote their work online; to sell copies of albums, songs, tickets to their live performances, merchandise (such as T-shirts and other promotional materials) and other products online; to manage their royalty streams via performing rights organizations; to reach and interact with audiences, thereby building brand loyalty; and so forth. These practices dispel with the middleman altogether, and place control of both the creative process and creative control in the hands of the artist alone.

4. Devaluation of Credentialization

38 Ku, supra note 5, at 306-311.
40 Id. at 341.
41 Id. at 14-20.
42 See Ku, supra note 5, at 308-311.
In other fields, middlemen traditionally play important roles of credentialization, serving notice to audiences that a creative work is well-regarded by knowledgeable, reliable, and credible authorities and critics (that is, that the work has met their standards for quality, authenticity, veracity, and/or creativity). Middlemen such as newspapers, peer-reviewed journals, publishers, libraries, fashionable taste-makers, artistic critics, and the like signal to broad audiences what is most worthy of attention. But the proliferation of creative output available online means that users can find resources everywhere, and creators can make their work directly accessible to large audiences without such work being vetted, agented, or otherwise intermediated. Some of that work can still be high quality, possibly casting into doubt the ultimate utility of traditional entities credentializing the materials released.

In many cases, technology is giving rise to a host of online critics, such as bloggers, desktop publishers, popular websites, and others who express their views on a vast array of creative works. When these self-directed, and sometimes self-appointed, voices assume a judgmental position, and eventually gain some measure of recognition among online readers, they begin to usurp the role of earlier-established credentializing middlemen. This may lead to the devaluation of credentializing content, as some audience members choose to read and follow online sources for free, rather than to pay for products such as newsprint and magazines. It also gives rise to fundamental questions regarding the functional value of credentialization itself. Some current commentators argue that its role has been overvalued, and that audiences can discern value for themselves.\textsuperscript{43} Others argue that if its role is undermined, society is more likely allow for the release of sub-par materials that audiences may take time, or may not be able, to vet, and that this may well lead to a disintegration of quality content in the marketplace.\textsuperscript{44} In the fashion world, for

\textsuperscript{43} See generally id.
\textsuperscript{44} See generally Anthony Horowitz, Do We Still Need Publishers?, GUARDIAN (Feb. 27, 2012), http://www.theguardian.com/books/booksblog/2012/feb/27/anthony-horowitz-do-we-still-need-publishers. The publishing industry offers a good example of the challenges to credentializing agents in a mature industry that has been unsettled by technology. Historically, publishing houses and literary agents agreed to sign authors that they felt would produce a body of work over the course of a career. Whether such work was commercially viable, popularly appealing, or critically acclaimed, the publishers and agents agreed the work would represent their brand, and it turn they would represent the author. They vetted manuscripts prior to publication, offered editorial support, marketing and promotional support, and commercial production, and then stood behind their writers in the publishing marketplace. See William Germano, What Do Publishers Do?, U. CHI. PRESS, http://www.press.uchicago.edu/Misc/Chicago/288447.html. Some publishing houses or imprints were so highly regarded that they cast a positive glow
instance, credentializing authorities such as fashion houses, high-end buyers, fashion magazines, and other arbiters of tastes and trends are being challenged by online critics, bloggers, self-styled “street fashion” artists and photographers, and other newly minted taste-makers. While beginning to acknowledge the power of some of these newcomers, many of fashion’s most established authority figures have conceded that they are still learning how to respond to, and perhaps learn from, the challenge that the army of online onlookers presents.

In a not-dissimilar fashion, universities traditionally play an important in the credentialization of education, including but not limited to degrees, grades, affiliation, and the overall preparedness of a student for the job market. But their authority is being challenged as well, particularly by the rising power of for-profit institutions able to produce relatively inexpensive online content and to provide alternate forms of credentialization, such as training, certificate-granting programs, or even degrees. At the same time, the advent of MOOCs and their providers, whether on their creators, who gained prestige by association—indeed, just being “chosen” by a well-regarded publisher might attest to an author’s ability, status, regard and saleability. Id. By contrast, digital technology is now allowing self-publishing to occur on an increasing scale. This makes it possible for budding authors to bypass the middlemen, the publishing agents and houses, and to bring their work directly to their chosen audience. It further gives audiences increasing control over their ability to express their response to works, whatever the means of publication may be (i.e., self-published or via a publishing house). Audiences can, as always, express their acclaim by simply purchasing copies of the book and increasing its commercial success. And they can enter the credentializing process by leaving comments on their own websites, on the “reader reviews” sections of such vendors as amazon.com, barnesandnoble.com, or through a host of critical blogs, online reviews, and other critical outlets. Thus, for instance, in 2001 the hitherto-unknown British author E.L. James self-published her novel, “Fifty Shades of Gray,” by putting it online as an e-book and by selling it on an print-on-demand basis. See Natasha Bertrand, ‘Fifty Shades of Grey’ Started Out as a ‘Twilight’ Fan Fiction Before Becoming an International Phenomenon, BUS. INSIDER (Feb. 17, 2015), http://www.businessinsider.com/fifty-shades-of-grey-started-out-as-twilight-fan-fiction-2015-2. Due to aggressive viral marketing by the author, and by enthusiastic response particularly on the part of e-book purchasers, the book proved an enormous success that topped the best-seller lists and, with its sequels, sold in the hundreds of millions. Id. The book and its sequels were eventually assumed by Vintage Books. Id.

45 See for example the gradual acceptance and incorporation of the young self-made blogger Tavi Gevinson into the fashion establishment. See generally Christopher Borrelli, Teen Fashion Maven Tavi Gevinson is 16 Going on 30, CHI. TRIBUNE (Sept. 18, 2012), http://articles.chicagotribune.com/2012-09-18/entertainment/ct-ent-0919-tavi-gevinson-20120918_1_tavi-gevinson-yearbook-one-required-summer-reading.


for-profit or non-profit, may undermine the credentializing role that academia has long dominated. Such a change could potentially occur with respect to single courses or entire programs. With respect to individual courses, MOOCs have the potential to reach thousands of students at once. This may prove particularly useful in covering basic materials, such as large introductory lecture courses have typically offered. But if MOOCs come to serve as a substitute, rather than a supplement, for those courses, universities may find that the original courses diminish in value. At some institutions, especially elite schools that pride themselves on personalized education, students may still opt for the in-class experience rather than the remote one. But at some institutions, particularly those that emphasize value-based pricing of the educational experience, students may prefer to take MOOCs offered by prestigious purveyors (for example, a Computer Science introductory or 101 course offered by an MIT professor through the auspices of Coursera) instead of the course offered by their home institution. Such institutions may find that their role as a credentializing entity is forfeited and, at the same time, their value proposition is undermined. Still further, with respect to educational degree-bearing programs, in certain areas—particularly, for instance, in skills-based training, such as computer programming, management training, and so on—a MOOC-based certificate program may come to replace an equivalent college-based program. If potential employers come to view them equally, students may flock to the MOOC as the cheaper alternative.48

5. Loss of Traditional Sources of Revenue

Content industries have typically relied on bread-and-butter sales of hard-copy products that are bundled, marketed and sold as production units with baked-in markups (for example, the costs of an album are typically higher than the cost of its individual song sales49) and generally good margins. These products include albums or CDs, as well as other recorded works in the areas of entertainment and culture. Digital technology enables the disaggregation of some of these

48 There is some limited historical precedence for this: for example, the General Motors Institute, now Kettering University, has long been highly regarded for its technical, manufacturing, and management training, and the degrees it confers are widely held in as strong a regard as their equivalent in traditional university-based programs. See Kettering University, WIKIPEDIA, http://en.wikipedia.org/wiki/Kettering_University.
49 See generally supra Chapter 3, Section V.B.
products, such as the sale of individual music tracks rather than of entire albums, which tends to reduce revenues by erasing the added value of bundling. But the greater impact on hard-copy sales is the ability of digital users to gain access to online reproductions of such materials, such as, digital tracks of songs recorded in CDs.\textsuperscript{50} The online version of such works lends itself to easy copying and dissemination: as has been repeatedly evinced in the case of music, downloading digital music tracks has become commonplace practice and, notably when coupled with uploading music for other listeners to share, such practices have had a marked impact on the profit margins across the entire sector.\textsuperscript{51} Thus, the Internet clearly has an impact on both the uniqueness and the value of the original work, as well as helping ensure that readily accessible future copies have much less value than might otherwise be able to retain.\textsuperscript{52}

Many of these industries also see the advertising revenues associated with their content undermined by digital technology.\textsuperscript{53} There are several grounds for advertising-related losses: (i) in general, there may be fewer readers that can be gauged and counted on for advertisers to reach; (ii) much traditional advertising has moved online (real estate, re-sales a la eBay, classifieds, etc.), and has not yet found reliable ways of monetizing online audiences (thus advertisers tend to pay less for online space than for print); (iii) even traditional industries are looking to leverage social media and online-oriented advertising and/or marketing: for example, fashion companies paying independent movie directors to make short feature films that mention their brand (and, it is hoped, lend it credibility by association); however, these efforts have not yet been seen to have any measurable payoff in terms of purchasing consumers.\textsuperscript{54}

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\begin{itemize}
  \item \textsuperscript{50} See Ku, supra note 5, at 272-273.
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} This also works in the case of journal articles drawn from the website of a print magazine: for instance, a user can cut-and-paste an entire article, or can merely place a link to the article on her website, enabling the reader to consume the original article for free and depriving the original writer or copyright holder the right to collect any returns from consumption of the original work.
\end{itemize}
6. Competing with Free

As mentioned, consumers who avail themselves of digital technology are proving increasingly reluctant to pay for content.\textsuperscript{55} Some commentators have argued that this trend began with the initial willingness of some content providers to make their content available for free online.\textsuperscript{56} The precedent for this is arguably Napster, in which it was not a content provider but rather an innovative and enterprising individual who devised a means for digital music tracks to be reproduced, uploaded, and shared among listeners for free.\textsuperscript{57} While Napster was eventually dismantled, its progeny, such as BitTorrent, continue to make music freely available to audiences on the Internet.\textsuperscript{58} This new model of content sharing has spread to various other entertainment and cultural sectors, but it is the digital music sharing that has established the virtual model for free dissemination of both commercial and amateur content.\textsuperscript{59}

In education, it remains to be seen whether free MOOCs for basic or continuing education, particularly when aggregated to provide basic certification, credentialization, or degrees (for instance, a series of MOOCs leading to a certificate of competency, an associate’s or bachelor’s degree, or other equivalent), will be pitted against the tuition-based degree programs of traditional educational institutions. The potential challenge is compounded by the fact that these universities and colleges are essentially subsidizing the emergence of MOOC providers by creating courses in-house, as it were, and by supporting the creation, development, and in some cases ongoing support of MOOC providers through their own financial means, such as secured grants, foundational underwriting, individual gifts, and budgetary allocations. While these initial

\begin{footnotes}
\item See generally supra Chapter 3, Part V.A.
\item See CHRISS ANDERSON, FREE: HOW TODAY’S SMARTEST BUSINESSES PROFIT BY GIVING SOMETHING FOR NOTHING 101-119 (2010).
\item Id.
\item See Russ Juskalian, 10 Years after Napster, Online Pirates Alive and Well, ABC NEWS (June 23, 2009), http://abcnews.go.com/Technology/story?id=7913205.
\item Other industries have also begun with free digital content, often finding to their consternation that later moving to a paid model becomes a formidable challenge. For instance, major newspapers began their early forays onto the Internet by making all of their content freely available. Finding that their newsprint sales and subscriptions were plummeting due to increasing online readerships, these newspapers then tried to impose for-pay mechanisms on consumers who had enjoyed untrammeled access to content. To date, most consumers still seem unwilling to pay for online news, and the decline in sales of print media continues apace. See infra Chapter 6, subsection I.B.4.
\end{footnotes}
expenditures may be amortized over time, and may result eventually in economies of scale in teaching within the institutions, they remain considerable and ongoing. Institutions then face the possibility of losing tuition dollars when online students take the courses and/or get credit, certificates, or degrees. This is potentially a costly gamble: the cost of building up a program, and the challenge of monetizing the program, may be compounded with the additional pressure of competing with online courses, degree programs, and educational offerings provided by rival enterprises. Only adding to the problem may be the nature of these rival ventures, some of which may have vastly different cost structures, such as a for-profit business model, others of which may free ride on the work of earlier innovators (for instance, by copying course and degree formats, sharing in open source materials, platforms, and output, and so on), and others of which may be subsidized to an extent that is not possible in the traditional educational paradigm.60

7. Or Competing with Almost-Free (So Can’t Clear Margins Of Production Costs)

In many cases, the scenario of competing with free can become competing with almost-free.61 Thus, for instance, knock-offs by lower-end fashion houses that come out almost at same time as originals are not free, but are at greatly reduced prices when compared with the originals. Similarly, very inexpensive digital versions of content, such as the single music tracks sold on iTunes, may be offered at such low prices that the original content producers cannot clear the margins of their production costs.62 Even in the case of education, proposed schemes to offer certain online courses, credentials, and/or degrees at highly reduced rates from those charged by traditional schools may yet offer education at a price that does not cover the production costs entailed in creating and supporting MOOCs and their providers. This means that even if consumers are willing to accept very low online rates for creative content, original content

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60 Another example of the provision of free content is classical sheet music, which has been cataloged online and offered for free, and is now competing with sheet music stores to such an extent that the latter are being driven out of competition. The few remaining stores are typically subsidized by a larger institution, such as the music store at The Juilliard School. See, e.g., Laura Gambino, New York City’s Last Classical Sheet Music Shop Closes its Doors after Eight Decades, GUARDIAN (Mar. 6, 2015), http://www.theguardian.com/us-news/2015/mar/06/new-york-last-classical-sheet-music-shop-closes-frank-music.
61 See ANDERSON, supra note 56, at 135-162.
62 This is increasingly proving to be the case with other forms of digital content in fields such as media and entertainment, journalism, publishing, and so on.
providers will still not be incentivized to produce such content if the low rates drive down the returns on their production, and therefore do not cover the original costs incurred in production to an extent that can keep them commercially sustainable.

8. Ability or Inability to Price Discriminate

Where content is easily accessible, virtually limitless, and available for free or at steep discounts (even if supported by advertising, so “free” to consumers in that they do not have to pay fees but rather provide viewership of such advertising), it becomes increasingly challenging to persuade consumers to pay even reasonable rates to support content providers and thereby to keep their businesses commercially viable. In other words, digital technology affords many different outlets for content, making it hard for content originators to charge full rates. The music industry demonstrated one of the earliest instantiations of this phenomenon, which has been increasingly evinced in other creative content industries.63 Moving away from a free model has proven difficult, and only compounds the problem that widespread availability of material already presents. Further, this increases the difficulty of maintaining tiered pricing, or rational price discrimination, a strategy that might otherwise help content producers reap the returns that their generation of original content should earn in the absence of undue competition with freely distributed goods. In music, for instance, the Apple iTunes pricing model, which has come to dominate the market due to lack of significant competition with alternative music distributors, pricing for digital tracks remains relatively flat, offering only two modest price points at which the consumer can obtain musical works.64 There is some variation in the price of entire CDs available on iTunes, but this is a dwindling market that is not likely to afford producers any

63 In journalism, to take one such example, the problem has evolved to such an extent as to be deemed a crisis by many commentators. Thus, for instance, if many sources link to a New York Times article, users or readers can simply click on a link to obtain access to it without having to pay to purchase the article, whether in print or online form. While the New York Times may try to steer readers through its website, by making articles technologically protected, or limiting access via secondary sites to their site, and so on, the newspaper has found it almost impossible to thwart significant amounts of reproduction of its content. Moreover, the Times initially made all its content available for free on its own website, thereby possibly inculcating in its readership the idea that its online content not only was free but also should be free, and even should forever remain free.

64 See supra Chapter 3, subsection II.B.1 and III.A.2.
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financial relief in the long run. The market segmentation of consumers, in other words, is very hard to maintain in a flat online environment, that is, where consumers can all obtain access to content on the same terms, for free. In this scenario, it becomes increasingly hard to target specific niches of consumers and market to them specifically and at varied tiers of pricing.

9. Struggling for First-Mover Advantage and Marketplace Position

Gaining first-mover advantage can be an invaluable business tactic, as it is often the lynchpin to securing a strong and possibly invincible market position vis-a-vis competitors. From the outset, obtaining first-mover advantage allows a company to gain a competitive advantage through control of resources, which can lead to significant profit margins and potentially to secure a near-monopoly status. Further advantages are also conferred to the industry participant that secures first-mover status: (i) it may be able early on to purchase assets at favorable market prices well below those that will prevail when the market matures; (ii) in markets that only accommodate a limited number of profitable firms, it may be able to select the most profitable niches, and may be able to take strategic actions that limit the amount of space available for subsequent entrants; (iii) it may be able to establish a dominant positions in geographic or product space, effectively making it unprofitable for follow-on entrants to explore or occupy the interstices; (iv) it may be able to repel entry by competitors through the threat of price warfare, which tends to be more intense when firms are positioned more closely; (v) it may make initial investments that express its commitment to the market and establish its position as an incumbent, which then expands its capacity allowing greater output to be made following entry into the market. The combined forces of early investment (that is, sunk costs), increased capacity for production, and the threat of price cuts to make follow-on entry unprofitable, can secure the first-mover’s advantage to a virtually unassailable position; (vi) when the first-mover advantage is secured, it may be able to achieve large economies of scale, further enhancing, if not anchoring, its dominant market position; and lastly, (vii) it can place powerful disincentives to consumers

65 This is even more vividly illustrated by the example of newsprint in journalism, which has generally struggled to charge certain rates to subscribers (premium, discount, weekly, weekend only, etc.), other rates to newsstand purchasers, and varied online rates (print plus online access, iPad edition, etc.)
66 See generally supra Chapter 1, subsection III.G.6.
67 See id. Amazon is a good example of first-mover advantage. See Scott Anthony, First Mover or Fast Follower?, HARVARD BUS. REV. (June 14, 2012), https://hbr.org/2012/06/first-mover-or-fast-follower.
that may wish or choose to switch to competitors’ products or services, primarily by imposing additional resource costs associated with switching that many consumers are unwilling to assume.\(^{68}\)

In the case of creative content industries, technological changes can either empower or disrupt companies, or entire industries, from their places in the hierarchy. At times, this may lead to irretrievable losses, or to near-monopolistic gains, that can transform one or more entire sectors. Prior to the digital age, it is arguable that the music industry was characterized by the dominance of the major record labels, music producers that captured the lion’s share of music sales and related profits.\(^{69}\) However, the emergence of digital music left the major record labels that exerted a great measure of control over the industry at a loss for a concerted, strategic response.\(^{70}\) It took a new entrant from the computer industry, Apple, to compel the record labels to join in a negotiated compromise: the licensing and sale of individual digital music tracks over the Internet, via the intermediate mechanism of the Apple iTunes Store, and a very low cost (initially, 99 cents per MP3 download).\(^{71}\) Although eventually followed by such competitors of online music sales as Amazon and Tower.com, the first-mover advantage that Apple realized was enormous and, to date, invincible.\(^{72}\) Apple also chose essentially to subsidize its online music sales by charging very low prices per download, and realizing a loss or barely breaking even for several years of revenue, and relying on the sale of its electronic devices—which enabled users to access and listen to such downloads—to compensate for any such revenue shortfalls. The strategy proved enormously successful, and secured Apple’s top market position in the computer electronics industry.\(^{73}\) At the same time, however, Apple’s success reduced the clout of record labels correspondingly: (i) they were no longer able to retain their strength at the bargaining table, for instance in setting the terms of licensing fees; (ii) they were unable to regain

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\(^{70}\) See generally supra Chapter 3, subsections II.B.1 & III.A.2.

\(^{71}\) See id.

\(^{72}\) See id.

\(^{73}\) See id.
their pre-eminence within the music industry; and (iii) they were effectively unable to realize the large share of returns that they had once seen in pre-digital times.\footnote{In publishing, the example of Google Books similarly raises the possibility of a large, powerful entity, coming from outside the publishing industry, negotiating a similar arrangement that not only garners for itself an all-powerful first-mover advantage and market position, disempowers existing industry participants, and reduces revenues for the industry across the board. Google has undertaken efforts to create “the world’s largest digital library” via a massive book digitization project. See Miguel Helft, \textit{Judge Rejects Google’s Deal to Digitize Books}, N.Y. \textsc{Times} (Mar. 23, 2011), http://www.nytimes.com/2011/03/23/technology/23google.html?_r=0. It claims to have negotiated copyright with respect to the books it digitizes, with the exception of some “orphan works” that are still, in some cases, under dispute. \textit{Id}. Google claims to show on its website only snippets drawn from books in its database, so that books may not be fully accessed and read by its users. \textit{Id}. However, representatives from the publishing industry, such as the Authors Guild, claim that Google is “stealing” from copyright owners, book retailers, and other industry stakeholders. \textit{Id}. They further argue that a neutral party, such as the Library of Congress, would be better suited to such a massive digitization project, as it would not be incentivized to maximize revenue by gaining a virtually monopolistic market share in a single database of digitized books. See Anandashankar Mazumdar, \textit{Copyright Office Report Outlines Issues Surrounding Mass Digitization of Books}, \textsc{Bloomberg BNA} (Nov. 2, 2011), http://www.bna.com/copyright-office-report-n12884904134.}

What may be most noteworthy about the emergence and transformation of the digital music landscape is the ability of Apple, primarily a technology company and not a creative content company, to secure first-mover advantage and effectively to dispossess the major record labels of their hegemony in the music industry as a whole. This example cannot go unremarked among the creative content industries, and as commentators on first-mover advantage have noted, illustrates the common phenomenon that “new entrants can exploit technological discontinuities to displace existing incumbents”\footnote{Lieberman & Montgomery, \textit{supra} note 68, at 48.} and thereby establish a new dominant firm with first-mover advantage.

10. Limitations of Technologically-Driven Strategies (DRM) to Thwart Copying/Piracy/User Behaviors

Content industries may try to fight fire with fire: that is, to ameliorate technologically-induced problems with technology-driven measures. Yet even where content industries try to impose technological anti-theft measures, including digital rights management (“DRM”) and other protection systems, they may be limited in their ability to do damage control.\footnote{See, \textit{e.g.}, \textit{supra} Chapter 3, Section I.E.} DRM, for instance, as one such measure, raises several concerns: (i) it has not proven that effective, even...
when imposed in conjunction with anti-circumvention legislation, such as the controversial DMCA; (ii) it has proven largely unpopular with consumers, resulting in a lack of user buy-in that is crucial to retaining customers in an increasingly competitive marketplace (this has been evinced by the controversy over Apple’s digital protection, FairPlay, which Apple eventually removed from its products due in no small part to customer protests); (iii) it makes interoperability among devices even more complicated, which antagonizes users and increases the likelihood that some entrepreneurs will be locked out of markets if they are not compatible with the most popular devices; (iv) it can give rise to international differences that add to consumer frustration (for instance, CDs or DVDs that are DRM-encoded and therefore cannot be played on foreign devices); (v) it may create problems with Internet content streaming, thereby potentially having a negative effect on innovation in a fast-growing area of content delivery; and (vi) broadly speaking, it changes the balance between protection and freedom without the prior agreement of industry stakeholders, including creative artists, content producers, copyright holders, and end users.

11. Parallel or Analogous Limitations of Anti-Copying Strategies in Other Industries

In fashion, high-end production and sales are predicated on an appeal to exclusivity (and quality): elite designers circulate an ever-changing array of clothes collections that implicitly promise their clientele that the goods they purchase are novel, unique and special. The risk that these original designs will not in fact be unique is a constant threat to designers. To date, appropriation of these exclusive new designs has been curtailed by certain real-world constraints, such as the challenge of rapidly photographing originals, manufacturing knock-offs, getting them to sale, making calculated guesses as to which items will be trendsetters, and so on. But that begs the question of what happens if and when the technology of copying does improve: that is, if copies of the original become as perfectly executed as—and indistinguishable from—the originals, and so quickly issued that time delays become miniscule, to the point of being meaningless to the consumer. A world of frictionless copying is readily imaginable, and seems

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77 See generally supra Chapter 1.
78 Id.
to be encroaching: witness the rapidity with which fashion runway collections appear in excellent quality knock-offs via huge retailers like Zara or H&M.\(^7^9\)

Trademark offers fashion one means of curtailing copying via anti-counterfeiting measures.\(^8^0\) This, however, can lead to a sub-optimal outcome, such as fashion’s current arms race: that is, top fashion firms have very invested heavily in various technological anti-counterfeiting devices, such as brand and/or logo encryption, as well as security measures, heavy patrolling of known or potential counterfeiting venues, aggressive litigation tactics seeking sanctions against copyists, and other enforcement mechanisms. The technologies underlying some of these anti-counterfeiting measures is to a certain extent analogous to the imposition of DRM on CDs that the record industry has tried to use to thwart music piracy. But in both cases, the pirates always seem one step ahead of the creators. And in fashion, as in music, user response is also an important concern: the measures tend to be unpopular with the public, despite some recognition that they may be helpful. Thus, in fashion even more than in music, many consumers at all levels buy products at venues that are well-known to be counterfeiting havens, such as certain vendors in Hong Kong, and in well-known venues such as Canal Street in New York (and at times in private residences of willing, well-connected customers). Many of these consumers are unable or unwilling to appreciate the utility or necessity of anti-theft devices, watermarks, and other anti-counterfeiting measures. Indeed, consumer preferences and practices have shifted to such an extent that among many fashion customers possessing and displaying a high-end knock-off can even be a point of pride. Despite the campaigns of the elite designers, who plead consumers to consider the investment costs and returns of original products, the trend, if any, is toward an increased tolerance, if not embrace, of knock-offs. This is somewhat analogous to the pride that certain music listeners evince in amassing music collections that have been gathered from free music distributors online, despite the pleas of artists, record company representatives, and others who decry the effect of music appropriation and its repercussions throughout the industry. And

\(^7^9\) See id., subsection II.B.1.b. It is also noteworthy that these stores are highly effective tacticians in tracking consumer response to the merchandise, keeping it fresh by cycling through very short shelf-lives of the merchandise, keeping maximum flexibility in their ability to churn out varying sized shipments of goods based on popularity and sales, and other marketing strategies aimed at maximizing returns from popular but short-lived fashion merchandise.

\(^8^0\) Id.
in both the case of music and fashion, it is both analogous and striking that the industry has not been able to muster a persuasive, behavior-changing and/or norm-changing response.

II. WHAT SHOULD THE CONTENT INDUSTRIES BE AFRAID OF, BUT MAYBE AREN'T AWARE OF?

A. Breakdown of Norms of Behavior by Creators, Users, Stakeholders and/or Communities

1. Breakdown of Norms Vis-A-Vis Stealing vs. Sharing

As mentioned earlier, users are not only changing their practices with respect to content but also expressing their preferences through such practical changes. Often the terminology used by various groups to describe these changes can be revealing as to how they are viewed, positively or pejoratively.\(^81\) The differences in terminology are not merely semantic, but speak to profound shifts across creative industries. In music, for instance, many artists and copyright owners (such as record labels) consider peer-to-peer file sharing to be “stealing” or “piracy,” while some users believe they are sharing, extending personal use among friends and/or peers, or making music available to others in ways that resemble earlier efforts, such as making mix tapes or bootlegged recordings of performances that are circulated among friends and/or peers. In fashion, those who imitate original designs may call their work “homage”;\(^82\) and those who appropriate designs may call their work “knock-offs” (which term can have a positive connotation in some circles); while those who feel their works are being detrimentally appropriated call it a “rip-off” economy.\(^83\) The changing lexicon reveals a newfound acceptance of digital practices that are becoming so

\(^82\) See supra Chapter 1, Section III.A.
\(^83\) Analogously, In journalism, blog collectives, RSS readers, and other news and information aggregators argue that they are collecting and disseminating material in various formats that meet the needs and convenience of vast and varied audiences, whereas many of the content creators and providers of their source materials object to such a characterization, arguing that they “cannibalize” the content that they create, invest in and need to monetize in order to sustain their ongoing content production. See infra Chapter 6, subsection III.D.2.
deep-seated as to express normative shifts that are bound to be pervasive, wide-spread ing, and difficult to alter or remove. Moreover, they are almost certain to drive changes in business practices, if not legal policies, as creative content industries are compelled to rethink their approach to content sharing among online users, creators, contributors and consumers. While this set of issues is hard for creative industries to unpack, it is even harder for them to accept and to adjust to, and the verdict remains unknown as to how they will come to terms with the newly emerging norms of the digital age.

2. Breakdown of Norms Involving Reputational Capital, Attribution, and Cultural Recognition

In many creative fields, norms surrounding reputational capital, attribution, and cultural recognition play significant roles. This may be due in no small part to historic factors, such as the development of many creative practices over time, and their rootedness in traditions that were structured around communities relying on small, tightly knit and organized groups, such as artisanal and merchant guilds, in which interactive norms often stood in for more formalized dictates and means of governance. As discussed earlier, some guild-like systems persist to this day, among tightly-knit creative, scientific and innovative communities, which retain guild-like attributes, such as informal exchanges of knowledge, norms-based rules that bind community members, and so on. The educational sector, particularly in areas of scientific research, is typically held to highlight the persistence of guild-like spaces today. What is certain is that the normative precepts that were long established in many creative areas persist to this day. Thus, for example, the tacit yet widely accepted standard of attribution can be found in such disparate fields as fashion, education, and music: a creator of original work is always deemed to merit attribution, and failing to do so may incur communal disapprobation, if not outright sanction. In certain instances, as in the case of education, these norms may be instantiated in actual policies, such as punitive measures taken against plagiarism, which is just one failure of attribution. In

84 See supra Chapter 1, Section II.A; infra Chapter 6, Section IV.B.
85 See infra Chapter 6, Section IV.B. Creative fields share this exchange of knowledge, as well as norms-based self-regulation, such as theater, fine arts, and dance. Other creative fields also retain aspects of guilds, such as the tradition of apprenticeship in high cuisine. And interestingly, some fields outside the creative realms are also constructed along guild-like lines, such as plumbing, dentistry, and construction.
86 Id.
others, social disapproval, mockery, and other communal practices serve to sanction appropriation without attribution, often with very real effect.  

While intangible, and often not readily monetizable, these communal norms serve an important bridge-building communal role, and at the same time help to bolster the reputation, esteem, and self-esteem of creative individuals. In many fields, building reputational capital also contributes to the portfolio of accomplishments an individual can bring to the bargaining table. In fashion, for instance, having a portfolio of one’s works is considered an essential signifier of one’s professional worth, thereby functioning much as a catalog of work in music, a curriculum vitae in education, or a resume in other professional contexts. Reputational norms serve critical signaling roles, highlighting valued contributions and contributors in a given creative field, bringing to employers’ notice the most promising employment prospects, and informing emerging artists of developments at the highest level in their area of enterprise. As in the related case of attribution, well-established reputational norms can give rise to sanctioning mechanisms: that is, they are often accompanied by informal community-based sanctions, allowing creativity to flourish without undue threat of copying and appropriation. These systemic features obviate the need to impose formal copyright mechanisms that may entail industry-wide transaction costs.

Particularly in low-IP systems, norms play a vital role in promoting creative production, whether individually or collectively, by rewarding creators with intangible yet meaningful merits and penalizing imitators with similarly intangible yet costly sanctions. Moreover, reputational norms can confer positive feedback, such as prestige, prizes, and rewards that are both intangible—such as improved standing among peers—and tangible—such as outright awards of medals, prize monies, and even rights in future royalties. Where such rewards are not linked to IP, they may

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87 One example is the loss of popularity that music groups widely agreed to have engaged in blatant copying can experience. See, e.g., Brian Koerber, 10 Copycats Who Stirred Up Treble in Music History, [www.mashable.com/2014/06/05/music-copycats](http://www.mashable.com/2014/06/05/music-copycats)

There is, however, admittedly a fine line in many creative practices between appropriation and creative borrowing. Classical music, jazz, and American roots music are all traditions that attest to deep-seated practices of borrowing and sharing, as well as communal and often unattributed music production. But that has often come at a price, particularly to artists who have neither been recognized nor compensated for their creativity. This, after all, is one of the main purposes of copyright: to forestall such injustice. At the same time, in a well-functioning community involving long-standing members, shared norms and normative practices are likewise aimed at staving off injustice and allowing creative artists to receive their just dues both with respect to reputation and reward.
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represent an efficient way of rewarding creative work without incurring the transaction costs that collecting IP-related returns can often necessitate.

Any potential disruption of a creative ecosystem can challenge these vital reputational benefits, which may be as hard to uphold and protect as they are to recognize and quantify in the first place. Technological change may enhance reputational interactions or it may reconfigure the landscape in which they occur, thereby casting these norms in an entirely new and unheralded light. Overall, these non-legal norms create a strong ecosystem that promotes innovative creators and sanctions copiers. One may query whether these norms developed by necessity to compensate for a lack of IP protection or whether they simply pre-date the lack of protection and can explain why greater protection has rarely been sought. But at any rate, the ecosystem may not stand when propertization creates a wholly different culture, based on ownership rights, legal defense and protection of ownership rights, licensing, and other transaction-based relations. On the one hand, it is arguable that the emergence of stronger rights-based practices are actually to be preferred to norms-based systems: they may be more transparent, less guild-like (that is, less liable to restrict privileges and responsibilities community members), and more readily quantified, and thus more fairly compared among stakeholders (that is, apples-to-apples comparisons may be easier to make in quantifiable rights, versus non-commodifiiable, and thus non-quantifiable, reputational capital). On the other hand, however, norms often step in to offer significant compensation where rights may not be obtained, or where rewards based in rights are likely to be limited, inaccessible, or otherwise unsatisfactory. In the creative context, norms of reputation and attribution may also express certain cultural values that are shared by artists, such as the importance of peer approval, promotion of creative collaboration, and open access to artistic repositories allowing creators to draw upon each others’ works and “stand on the shoulders of giants.”

Education offers one of the strongest examples of a community inscribed at its core with deeply rooted norms of reputation and prestige. Some norms are clear-cut, such as reputational capital built by faculty through publication and scholarship, on the one hand, and teaching in the classroom, on the other. In the traditional educational rewards system, the publication of articles, books, and other evidence of scholarship confer reputational benefits that are of incalculable
value both to nascent and established scholars. These benefits are not directly measurable perhaps, but are still significant in counting toward the attainment of tenure track positions and tenure, grants and fellowships, and other academic emoluments. At the same time, well-regarded teaching confers other reputational benefits, such as peer recognition, curricular import, and the ability to attract the most talented students to one’s courses.

But even in the tradition-bound world of education, technology can disrupt the entire system by which reputation is conferred, secured, and retained. In both scholarship and teaching, reputational standing may translate into the online educational world, bringing into prominence well-regarded teachers who will be invited to offer their courses as MOOCs by online providers. At the same time, however, it remains to be seen whether that reputational standing transfers readily to the online world—that is, whether it is equally recognized, rewarded and pursued. Moreover, it is unclear whether professors teaching massive courses online can maintain high levels of teaching that create or sustain their reputation, let alone pursue scholarship at the same time that further bolsters their academic repute. Secondarily, if popularity among these massive student bodies becomes a short-hand or a substitute for truly deserved teaching accolades, the very meaning and import of a teaching reputation is liable to be altered, whether for better or worse. With respect to scholarship, the reputational benefits are less readily translated into the online space. Scholars may be sought-after MOOC professors by virtue of their publishing record, or to the contrary scholarship may be viewed as unrelated to the teaching emphasis of online education. 88 Equally importantly, MOOCs may come to displace a good deal of fundamental teaching, and thereby may undermine the job security, such as it is, of the lower tiers of academics (i.e., those that are not on tenure track). In this respect, MOOCs may add fuel to the fire of adjunctification, or the increasing reliance on teachers that are hired under contract for short-term, if possibly renewable, periods. But if MOOC providers do not see the immediate value of scholarship to their courses, its actual value, as well as its reputational benefits, are liable to be significantly eroded. And the opposite result may emerge as well: that is, in a world where faculty are increasingly adjuncts, the value of published works may diminish in importance as their currency vis-a-vis reputation diminishes or disappears. Copyright in courses

88 Unlike research universities, for instance, most for-profit schools do not place a particular value on the scholarship of their professoriate.
only compounds this problem. For if faculty are not ceded copyright in their courses, their lack of ownership of their own courses and course materials may impose real limitations on their ability to bring such works to one or more future teaching venues. Thus, both scholarship and teaching, as evinced by courses and course materials which may be subject to copyright, may come to have an attenuated value to faculty in the entire area of MOOC-driven education.

In other creative fields, norms of reputation and attribution are equally freighted, particularly in cases where (i) individuals may not be able to attain ownership in their own creative output; (ii) salaries in the field are not necessarily reflective of individual mastery of a craft (possibly due to low profit margins, under-rated areas of work, understood tradeoffs between salaries and intangibles such as work-life balance, autonomy over one’s work, and so on); and (iii) reputational capital is taken into account in employment prospects, hiring practices, and other aspects of the job market. In fashion, for instance, major artists create original works that secure their reputation, while emerging artists likewise strive to create break-out works that will gain attention and begin to establish their reputation. While not necessarily highly compensated, particularly at the beginning of the arc of their career, many artists consider the regard of peers, as well as audiences, to be a vital part of the rewards they earn from the act of creation. Emerging artists are well aware of reputations, and will often seek to apprentice themselves with master artists, hoping to learn, but also perhaps to improve their own reputations by affiliation. In fashion circles, working at an haute couture design house carries its own imprimatur, and is a well-respected resume booster among young talent. This culture of reputational gains achieved

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89 This may be held to be equally true in such fields as comedy, cuisine, literature, and other creative arts. 90 The lack of compensation may occur even in the case of mature, highly respected and renowned fashion designers. For instance, Isaac Mizrahi, a famous designer of haute couture, has been compelled to declare bankruptcy well into the trajectory of his career. See Constance White, Mizrahi, Designer Most Likely to Succeed, Doesn’t, N.Y. TIMES (Oct. 2, 1998), http://www.nytimes.com/1998/10/02/nyregion/mizrahi-designer-most-likely-to-succeed-doesn-t.html. 91 Similarly, in cuisine, apprenticeship in the kitchen of a master chef has long been seen as an essential stage of culinary training, a rite of passage, as well as a means of beginning to secure a reputation as an emerging chef who has been vetted and approved by the master chef. Thus, in cuisine, chefs describe a “culture of hospitality” that they share among chefs and apprentices in the kitchen. They also share a culture of attribution and acknowledgement of priority: credit is given to innovators who create new recipes, culinary styles, and even methods of cooking (for instance, molecular gastronomy). Secondary chefs may imitate, appropriate, or riff on the works of master chefs, but attribution where at all possible is de rigueur: even in the case of historic dishes, for instance, a chef will often add “in the style of” to acknowledge the precedent source. Due to chefs’ desire for peer approval within culinary community,
by proximity and apprenticeship to established masters is hardly singular to fashion, nor does it necessarily require a low-IP environment in which to flourish. The question, however, is where reputational benefits will fall in a more IP-rich landscape, in which copyright in works may come to stand in as a proxy for training, know-how, and originality of design. Further, as in other creative endeavors, it may be more challenging for high-end designers to offer apprenticeships to young talent if they are concerned with protecting the unique aspects of their work and the sanctity of their copyrights. It is an open question whether the vigilance of defending IP rights will have an impact on the relatively open sharing, knowledge exchange, and even collaboration that can occur between master and apprentice. These are just a few concerns that highlight the potential upheaval that dramatic changes to a creative ecosystem can incur.

3. Breakdown of Norms with Respect to Knowledge Exchange and Collaboration

While many industries value collaborative work, creative fields may be said to have among the most deep-seated affinities for collaboration, sharing, knowledge exchange, and open-sourced generation of new ideas, output and experience. Often creative entities or individuals will agree to share rights in the fruits of their collaboration. Just as often, however, parties will agree in advance not to propertize certain parts of the work, or to reserve rights to to propertize at some future point in time in the creative process. This may entail agreeing to publish research at critical junctures, maintaining open source or open access repositories of data, information, and findings, and other collaborative engagements. These kinds of arrangements can go far in allowing collaboration to proceed untrammeled with concerns that complicated rights allocations or burdensome licensing negotiations will hold up the creative endeavor and thwart productivity from the start.

blame is quickly meted out to known plagiarists within the community, and social sanctions are highly effective. Interestingly, Internet stories and blogs about food are quick to single out and discredit culinary pirates or copyists, which offers one instance of technology actually inhibiting outright copying without attribution.

92 In the case of cuisine, some chefs have indeed expressed concern over appropriation of their recipes, cooking methods, and signature dishes. See generally Michael Goldman, Cooking and Copyright: When Chefs and Restaurateurs Should Receive Copyright Protection for Recipes and Aspects of Their Professional Repertoires, 23 SETON HALL J. SPORTS & ENTER. L. 153 (2013).
The norms surrounding collaborative work vary, but they can stand in for more formal arrangements such as IP rights allocations or rights licensing. While it might seem evident that propertization would establish clear-cut relationships between unequal entities, it may in fact not be necessary to create elaborate property rights, or to add layers of rights, in advance of collaborative creative production. For instance, in fashion, increasing collaboration between retailers (e.g., Zara or Target) and designers (e.g., Kate Moss or Martha Stewart) has proved resoundingly successful, on fairly simple terms: retailer sponsors work, while designers get credit and a cut of proceeds.\textsuperscript{93} No copyright is involved, although usually licensing and trademark terms are contractually agreed upon and explicated. Even when propertization is involved, as often occurs in academic research, property rights may be delineated in advance between corporate funders or foundation sponsors and academic scientists, but the right of scientists to engage freely in some measure of collaboration, even with outside scientists, may be agreed upon in advance.

In the case of copyright in courses, professors have long engaged in collaboration and sharing amongst themselves, for instance, circulating syllabi, mentoring young faculty, co-teaching courses, guest teaching and lecturing, and creating interdisciplinary jointly-led courses. When courses become subject to copyright, however, these practices may be placed at risk by the need to clear rights among faculty, institutions, and stakeholders. The informal norms that facilitate collaborative practices may be replaced by more structured, explicated agreements. The risk in this case is that when propertization becomes the new norm, collaboration can entail new, and possibly onerous, licensing, transaction, and/or clearing costs. This may undermine spontaneity, particularly in fields where collaborating often occurs loosely and freely, such as academic work, but also in other creative fields such as literary writing (theater), entertainment (film), or music. Or propertization may require collaborating parties and related stakeholders to engage in more formalized cost/benefit analyses prior to collaborating. Not only might this have a chilling effect, particularly with respect to small-scale collaborations (where the costs of rights management are likely to be higher than the rewards), but it might change the open and collaborative nature of creative practices altogether, thereby reconfiguring the landscape of entire creative industries.

\textsuperscript{93} See generally supra Chapter 1, subsection III.G.5.
B. Breakdown of Economies of Prestige

In many creative content industries, the commercial exploitation of finished output has not historically been the sole incentive or reward for creative generation or innovative development. Indeed, leading commentators describe “economies of prestige” as areas in which public sector incentives and rewards can not only displace private sector benefits, but also serve as better and more efficient stimuli. In the words of two prominent scholars, Stephen Maurer and Suzanne Scotchmer, “different models of knowledge creation call for different incentive schemes.”94 These schemes work particularly well in the case of creative environments “where the social value of an innovation is not appropriable by private firms or intellectual property rights are insufficient to cover costs.”95 Generally, the mechanisms that prevail in economies of prestige can be found in various public sector settings. As Maurer and Scotchmer note, “mechanisms [other than IPRs] have remained important [particularly in the public sector], . . . . Funding mechanisms used by the public sector routinely include in-house development, procurement through competitive bidding, and research grants to universities and promising scientists. The public sector also uses hybrids that mix sponsorship with intellectual property.”96 In the context of creative content industries, such as the education sector, the receipt of such research grants and sponsorship options have historically been an important source of support that bolster institutional resources earmarked for creation and innovation. Likewise, prestige-based incentives and rewards in the education sector have comprised prizes,97 research contests,98 government grants,99 public sponsors and the direction of research,100 and mixed public/private incentives.101

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95 Id.
96 Id. at 1.
97 Id. at 7-10.
98 Id. at 10-16.
99 Id. at 17-20.
100 Id. at 20-23.
101 Id. at 23-26.
In education, prizes, grants, public sponsorships and funding, and so on have been vital sources of support that stand side-by-side with institutional resources, private funding, and revenues flowing from the commercial exploitation of IP rights in academic output, such as patented innovations, or trademarked properties. Recently, however, these pillars of the economies of prestige have been threatened by widespread public opposition to public funding and support of higher education. Disruptive innovation on the copyright side of the academic funding equation may serve only to heighten opposition to prestige-based awards to academe, particularly if MOOCs offered by educational institutions become a commercially viable and potentially profitable venture. In such a case, public resistance to support of higher education may reflect a widely-held sense that academia can be wholly self-sustaining by profiting from its work product, not only on the patent and trademark side, but also on the copyright side. While there may be some justification for such a perspective, it is also a short-term view that does not fully take into consideration many important factors that are central to the academic world. For one, the long gestation time required for creating viable work may require immediate support in order to lead to long-term gains. Second, it is not at all clear that enough academic work, whether in patentable research and development (“R&D”) or in copyrightable courses, will yield sufficient revenues to clear investment costs, let alone to support the costly ecosystem of academia. Third, requiring institutions to look to their profitable work as a mainstay of support is likely to incentivize academics to pursue work that has the highest commercial potential, rather than work that is important but less viable in the marketplace, thereby undermining the central tenet of academia that is broadly described as the pursuit of knowledge for its own sake. And fourth, institutions that are hard-pressed to earn revenues from the exploitation of academic IP may find themselves compelled to lean on their faculty to pursue commercially viable work. This can put at risk academic freedom, which is a central cultural tenet of higher education.

C. Breakdown of Guild-Like Spaces Governed by Norms and Commonly Agreed-Upon Practices

Norm-rich environments tend to be predicated on highly structured practices and agreements—sometimes but not always informal or unspoken but understood—that bind together tightly-knit
Guilds, or guild-like spaces, represent such controlled environments, that: (a) are restricted by membership, and extend responsibilities and privileges only to members; (b) may offer apprenticeship and training to nascent members, and confer the guild’s imprimatur upon successfully trained members; (c) protect the rights of members in their work, ensuring that rewards are reaped by members; (d) share a system of group norms, as opposed to formal legal enactments, that serve as an enforcement mechanism; (e) promote sanctions that give notice to potential copyists that they will be pursued, and at the same time actually thwart and/or punish actual copyists; and (e) promote both traditional creative work and new original work that meet with members’ approval and regard.\(^{103}\)

Guilds and guild-like spaces tend to be conformist in nature, and due in part to their longstanding practices and internalized agreements, do not generally rely upon an IP-rich regime to achieve effective outcomes that spur both creation and reward. As the foremost commentator on guilds, Robert Merges, notes, guilds create an “appropriability structure” that “makes it profitable for individual entities to both develop new technologies and share them.”\(^{104}\) Moreover, Merges notes, guilds can sustain “a balance of competition and cooperation under which group-generic information is shared, but individual-proprietary information is not.”\(^{105}\) Thus, by engaging in often (but not always) formalized self-governance practices, guilds represent a form of private ordering arrangement that can serve to reduce transaction costs, such as the costs of negotiating, allocating and managing IP rights and rewards.\(^{106}\)


\(^{103}\) Robert Merges enumerates three leading characteristics of guilds: “(1) an ‘appropriability structure’ that makes it profitable for individual entities to both develop new technologies and share them; (2) reliance on group norms, as opposed to formal legal enactments, as an enforcement mechanism; and (3) a balance of competition and cooperation under which group-generic information is shared, but individual-proprietary information is not.” Merges, supra note Error! Bookmark not defined., at 2. I have expanded upon these characteristics to highlight their relevance to various creative content industries.

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) In this respect, guilds can manifest some of the practical arrangements that are entered into by various private actors that are obliged to come to a mutually agreed-upon set of practices in order to prosper and share resources beneficially. See ELINOR OSTRON, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); see also ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).
Guilds were originally created to sustain production and creativity within a trade, by (i) offering a training grounds for young apprentices seeking mastery of the trade; (ii) delineating the traditions, responsibilities, roles, techniques, norms and practices of members of the trade; (iii) metering the rights and rewards flowing to guild members from productive output; (iv) policing outsiders seeking to compete with guild members and ensuring that they would not appropriate guild-specific practices, techniques or products; and (v) sanctioning any appropriation that might arise accordingly. Most guild-like systems today, such as low-IP or IP-free regimes that involve tightly knit communities of creators, may still adhere to some of these practices. Most importantly, these guild-like structures share the ability to exchange information and know-how, to keep vital information flowing among their members yet protected within their parameters, and to allow the appropriation of knowledge to lead to profitability among the group’s members. These present-day “appropriability institutions,” as Merges calls them, include patent pools, industry-wide standard-setting organizations, informal knowledge exchange among academic scientists, and (in a more limited way) open source software development.

When technology challenges guilds or guild-like spaces, driving copying at such levels that the viability of the underlying creative industry is challenged, guild members may look at IP rights with increased interest, seeking to bolster guild-like practices with a more formalized rights-based approach. But IP rights are not necessarily easy, or indeed ultimately desirable, to superimpose upon a guild-like system. First, IP can be skewed in its effects on guild members, benefiting certain more-established members at the expense of less-powerful ones. IP rights, after all, can require significant resources to defend via litigation or other formal mechanisms, such as mediation. Unless the guild or guild-like coalition has actual funds set aside for the protection of its minor members, IP lawsuits will not necessarily be open to all parties, nor likely to result in equitable outcomes across the board. Second, adding layers of IP to an existing

107 Merges, supra note 103, at 13.
108 Id. at 18-19.
109 Id. at 19.
110 Id. at 18.
111 Id. at 19-22.
regime can interfere with longstanding practices that signal certain critical information to outsiders, including competitors, consumers, and market-watchers. And third, enhanced IP may not serve to stimulate creativity in a guild or guild-like system. In such systems, internal mechanisms may already suffice to promote and reward creativity. As mentioned, building strong reputational norms among peers is often already a major motivating force among creators in a given field. The desire to collaborate, and to be deemed worthy of collaboration, may also offer strong positive incentives to maintain high creative activity. The guild’s ability to ensure that rewards are appropriately garnered, and threats to such rewards (such as incursions by potential copyists) are policed, also allows creators to work with knowledge that they will reap profits and will not be undermined by unfair appropriation. In such circumstances, IP rights need not serve as a substitute for guild-based mechanisms. Nor do they clearly protect the creative output. Lastly, by superimposing, or substituting, a formalized set of rules for an internally agreed-upon set of practices and norms, IP rights may interfere with or undo the very foundations of a guild or guild-like system. To some critics of such a system, propertization may seem a positive development. But to the system’s members, awareness that it may be radically altered, and agreement to such changes, are preferably secured up-front, rather than after changes have been made and the guild-like practices and protections are displaced.

The fashion industry features several guild-like practices, comprising a loosely-defined yet distinct membership of designers (both emerging and established) who engage in norms-based practices such as conferring reputation, policing appropriation, establishing the allocation of rewards and privileges, and so on. Indeed, in the early twentieth century fashion actually had a fairly well-established guild system, the Fashion Originators Guild (“FOGA”), which among other operations created a highly effective system of registering apparel, monitoring potential appropriation of registered apparel designs by outsiders, and by attempting to maintain apparel prices that had been threatened by competitors’ copying and cut-rate sales (although these practices primarily affected apparel at the higher price end of the spectrum). According to at least one prominent commentator, these practices that stood in the stead of actual IP rights might

\[\text{(112 Id. at 19.)}\]
“suggest that a higher-IP regime was desired by high-end designers.”

But another equally plausible approach to understanding the Guild’s efforts is to consider that they demonstrate the fashion industry’s interest in establishing its own set of mechanisms to regulate the behavior and norms of the industry, without recourse to the formalized property rights of IP rights systems and the institutionalized remedies of litigation. The Guild’s behavior arguably spurred outside competitors to innovate in the design of less-expensive apparel, rather than to copy high-end designs, when faced with the threat of Guild policing and sanctions. But it is hard to determine to what extent this impetus was caused by the propertization of rights in apparel, via a formal registration system of original apparel designs, versus through the active monitoring and public condemnation that the Guild undertook against its competition.

The Guild itself was eventually challenged and dismantled by the courts on antitrust grounds. This raises valid questions as to whether or not guilds or guild-like practices can exist at all without running afoul of anti-competition laws. But the more pertinent question in IP terms is what the Guild could accomplish with or without propertization of fashion’s original designs. If copyright of apparel were to be legislated into being, and if a registry of original designs were to be made functional, certain critical issues would almost certainly surface. For instance, it is clear in the historic case that copyright in dress design would best serve high-end designers. But these designers already enjoy a significant lead-time advantage in the field, as their works are the first to be issued and then followed. This might increase the market position for high-end designers, thereby concentrating yet more power at the top of the fashion design pyramid. Further, it is unclear whether copyright in design would benefit independent and/or emerging designers, who might be able to register their original works, but might not have the resources to defend any incursions on their properties. In the case of a guild, defense funds might be pooled and set aside to cover members’ litigation costs. But in a competitive marketplace, the smaller stakeholders might not realize the benefits of IP rights that they could not defend. One solution might be to create a clearing house, somewhat analogous to the performing rights organizations that manage music rights, which have the resources and authority to monitor copyrighted works in their

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114 *Id.* at 2-3.
purview and to sanction illicit copying or misuse of their members’ registered works. But this kind of registry seems more suited to fashion trademark, which centers on clear-cut logos, recognizable brands, and signifying markers that convey important information to consumers regarding quality, origin, and authenticity. A registry of trademarks to prevent fashion counterfeiting is highly appropriate to preserve these important industry-wide practices. In the case of copyright, however, the registration of apparel design is a much less well-defined proposition, as originality is hard to define (due in part to the norm of homage qua deliberate appropriation), and as appropriation is not universally condemned. Indeed, one part of the fashion copyright conundrum is the interest that some designers have in allowing copying to occur, and even in engaging in a certain degree of copying, in order to secure trends, bolster reputations, and reach ever-wider audiences. This positive regard for copying likewise permeates large segments of fashion consumers. Many consumers, at all points of the price spectrum, will increasingly concede that they are willing, if not eager, to purchase knock-offs that faithfully replicate the latest high-end trends at a fraction of the original cost. While elite designers have long deprecated these patterns of consumption, they are not immune to its appeal: several such designers have begun to create secondary lines, at reduced price and quality than their luxury lines, that knock-off their own latest trend-setting items as well as items drawn from the trends that they identify in the current season. The market in knock-offs is rapidly expanding, and the buy-in of designers across the spectrum may speak to its likely longevity. But it may also speak to a tacit understanding among designers at all levels that the absence of IP allows creativity and some degree of appropriation to co-exist in a thriving market, and to benefit the market overall.

**D. Possible Undermining of “Negative Space” in Fields Where IP Has Not Traditionally Been Called Upon to Keep Productivity Robust**

As seen in the case of guild-like systems, well-established practices and norms can effectively manage creative output among members, with recourse to propertization only where it may be required to stave off overly predatory copying that cannot be adequately penalized and halted. These private ordering arrangements may to a certain extent obviate the need to impose the transaction costs or administrative costs that are usually prevalent in IP-based regimes, and for this reason are arguably preferable first-order solutions to the copying conundrum. Similarly, in
mature industries that are already non-IP or low-IP based, also known as IP’s “negative spaces,” introducing propertization may require an initial cost-benefit analysis that takes into account likely transaction costs, as well as more intangible costs to the industrial ecosystem.

The fashion industry example outlined in the guild context is a premier example of the functionality of negative spaces. Although structured as a guild at an earlier point in its history, the fashion industry is now so enormous and multidimensional, spanning international production centers and markets, that it can no longer rightfully be deemed guild-like, as its membership cannot now be meaningfully restricted. Nonetheless, efforts have been made to move to a property-based fashion regime, in which some copyright in original design might serve to keep productivity robust. However, as outlined above, there are considerable costs to such proposals. These include the following concerns: (i) copyright in fashion design may need to be protected against infringement (litigation costs); (ii) smaller designers may be hampered by inability to assume such costs, even if it is their work that is disproportionately subject to copying; (iii) administrative costs of “registering” designs, proving originality sufficient to merit copyright protection, and keeping up copyright may be unduly high, especially for new designers; and (iv) there may not be payoffs to copyright, as there is in music, if knock-off designers aren’t subject to “royalty”-like payments (as in the case of music where an artist will pay to cover a song). Thus, even a licensing system in fashion design is established, its costs may not outweigh its benefits. Even in the current environment, in which technological innovations in copying techniques have brought appropriation to new all-time highs, these concerns remain constant, and do not seem clearly to be resolved by the introduction of copyright in original fashion design.115

115 Similarly, the culinary world represents a regime in which productivity currently flourishes without recourse to propertization of creative output. Although cuisine, like fashion, is a sprawling and international industry, it bears closer to resemblance to a guild-like system, insofar as its prominent chefs are still more limited in number, and their reputations are better secured among industry insiders. Other guild-like attributes include a free-wheeling culture of sharing, attributing, paying homage by imitating or making riffs on famous recipes, and a very strong system of apprenticeship that legitimizes and credentializes emerging talent. Yet again some calls have been made for shaping a limited copyright in recipes, as well as unique and/or original cooking styles. But as in the case of the fashion industry, copyright in cuisine may undermine some of the foundational practices, norms, and rewards that contribute to its thriving ecosystem. One aspect of cuisine that illustrates many of these features is its apprenticeship-based system of training and instruction. See generally Debra First, Chefs Take the Stage, BOSTON (June 27, 2012),
E. Loss of Flexibility that Non-IP or Low-IP Spaces May Afford

In some industries, the low-IP equilibrium may allow various kinds of useful flexibility, whether by design or by practice. Demands for greater propertization may emerge in these industries, or may be contested (past or present), but increasing propertization may come at the cost of flexibility, growth, and/or innovation.¹¹⁶ In creative fields such as music, for instance, the ability

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¹¹⁶ Several examples of well-functioning low-IP regimes can be identified. In the case of computer databases, for instance, a split between U.S. and European Union practices is revealing. In the United States, such databases are unprotected; whereas in the E.U. they are protected. Tellingly, it is in the E.U. that the number of computer databases has actually declined steadily since protection was extended, whereas such databases continue to thrive in the U.S. A further example from the computer sector is that of Open Source (“OS”) software. In this instance, the underlying source code is indeed copyrightable. However, participants in OS programming construct, and engage in, a cooperative low-IP regime. According to some prominent commentators, OS projects use the default rules of IP law as a lever to require the code's openness--an end that OS projects pursue for what is described as “a mix of ideological
to work collaboratively on large musical works (such as musicals, operas, performance art, and other large-scale works), high levels of proprietary rights may complicate the negotiation and clearing of rights to the detriment of performance, reproduction, recording and distribution goals. Increasingly, music permeates a variety of entertainment products, such as movies, theatrical releases, television shows, and so on. The cross-licensing of musical rights has been known to spiral to such levels of complexity that some promising works have been thwarted or delayed due to hold-out problems and other rights-related obstacles. The problem is only heightened by the increasing globalization of music and entertainment, in that international rights become even more costly to assess and administrate. In contrast, in less IP-protected fields such as fashion, the general absence of copyright (with the exception of a minor carve-out for some fashion print design) simplifies the negotiations that cross-licensing entities must undertake to clear collaborative designs, shows, and collections. It is of course possible that if copyright were to be imposed on fashion, rights-clearing mechanisms could be established to minimize transaction costs and maximize the potential for collaborative work, cross-licensed output, and other such arrangements. But the flexibility of the current regime should nonetheless be appreciated as one of the features that has allowed fashion to flourish in its exchanges and cross-licensed output.

and economic motivations”. A third example, analogous to the copyright industries, is drawn from technology and technology patents, and involves the microprocessor industry. This industry maintains another "contractual" low-IP equilibrium. The microprocessor industry harbors a "charmed circle" in the industry of a small number of dominant firms. These firms engage in portfolio cross-licensing, thus freeing them to pursue architectural and manufacturing innovations without concern for the large number of overlapping and conflicting patent claims that may otherwise arise. Added benefits from the large microprocessor firms' perspective are increased entry barriers that the portfolio cross-licenses impose upon would-be upstarts that lack similarly comprehensive patent portfolios. See infra Chapter 6, subsection I.F.3.

F. Expansion of Copyright via Propertization of Things We Don’t Normally Consider Copyrightable, Such as Certain Performative Acts

Under current copyright law, performative acts\textsuperscript{118}, whether artistic, educational, commercial, or other purposes, are generally not copyrightable. One of the constraints hindering copyright in performative acts is the statutory requirement that a copyrightable work be “fixed in any tangible medium of expression.”\textsuperscript{119} There are workarounds for certain performative acts, however. For instance, an original choreographed dance may be deemed “fixed” when the choreographer records the steps of the dance on paper.\textsuperscript{120} This expands the contours of copyrightable works, however, and is a debatable proposition when applied to areas that either already have copyright protections or do not appear to be shortchanged by an absence of copyright protections. Expansion of the subject matter and scope of copyright demands a solid rationale that may not be readily discerned. Further, as earlier discussed, copyright protection tends to entail rights-clearing transaction costs that may prove to outweigh the benefits it might yield to putative copyright holders.

In the context of education, while courses are likely historically protected (courses arguably having some copyrightable status when they are “fixed” via course and lecture notes, and related teaching materials), the act of teaching a specific course has not been protected. Some faculty or institutions may seek to have teaching itself protected, in a manner as analogous to the protection extended to some dance choreography of a dance being protected. It is conceivable that such protection could function like a performance right in music, whereby performance of another’s work requires a licensing right to be obtained and royalties to be paid for the performance. This might be effectuated through a rights-clearing organization structured similarly to music’s performing rights organizations. Given the complex nature of education, and the enormous educational industry today, the transaction costs would likely be considerable. Moreover, the emergence of MOOCs only complicates the matter: to whom would copyright in the enactment

\textsuperscript{118} By this I do not mean performance itself; rather, I mean the steps and instructions that set out how to do a performance, as in the case of dance, as described.
\textsuperscript{120} Although even this characterization may be debatable. See, e.g., Julia Haye, So You Think You Can Steal My Dance? Copyright Protections for Choreography, LAW LAW LAND (Sept. 13, 2010), http://www.lawlawlandblog.com/2010/09/so_you_think_you_can_steal_my.html.
of courses be ceded, and whether or not it might be parsed among interested parties, such as the instructor’s home institution, the MOOC provider, and the instructor herself, might prove extremely difficult to negotiate, delineate, and manage.\textsuperscript{121}

\textit{G. Expansion of Copyrightable Subject Matter via Novel Construction of the Useful Articles Doctrine and Predicated upon the Possible Elision and/or Breakdown of the Distinction Between Functionality and Originality}

In certain industries, whether or not output is copyrightable may turn on the distinction between functionality and originality that is elucidated by the useful articles doctrine. In fashion, for instance, apparel design has historically been uncopyrightable, and grounds for that have been offered on functionality grounds, or the utilitarian function of clothes. If apparel becomes

\textsuperscript{121} In the context of the negative space of cuisine, the nature of the performative act revolves around the preparation of a dish. Currently, recipes for dishes are not copyrightable, but the descriptions around them (as often arise in a cookbook, cooking magazine, or televised cooking lesson) may be copyrightable. It is conceivable chefs seeking rights in their original work could plausibly argue that the act of preparing a particular recipe according to instruction may constitute the "performance" of the underlying work. In an increasingly competitive world, asserting copyright over recipes may seem to make good sense: chefs could stake their claim to culinary success on their portfolio of original recipes, instructions, cooking styles, and methods of preparation. Yet establishing rights in performative works in cuisine represents yet another expansion of propertization in hitherto unclaimed space. Allocating these rights might again prove problematic. If copyright were expanded to include recipes, permission to reproduce recipes by cooking in an individual kitchen would have to be granted, either through a carve-out for personal use or through practice (that is, not pursuing licensing rights in each individual use). More challenging would be public preparations of copyrighted recipes, such as meals cooked in a restaurant. A three-course menu might require multiple rights in recipes to be cleared, entailing at least some transaction costs. Itinerant chefs and volatile restaurants (both of which are rife in the industry) would be compelled to delineate their copyrights and to determine where rights would be retained in the case of departure, dissolving, runaway success, or other major events. Collaboration might prove more cumbersome than customary, as the negotiation of rights would likely be required to precede the exchange of recipes, information, secrets, and know-how. And elaborate fine dining events might become still more costly than at present, as licensing thickets would need to be cleared and transaction costs absorbed into the price of the experience. Lastly, it seems unlikely that the status of individual chefs would be much improved were they to receive copyright in their culinary creations. Most chefs would not prosecute their rights if they had them (due to time and money constraints, as well as the distraction that litigation tends to entail). Copyright infringement suits would likely be brought by large publishing houses that own the rights to recipes contained in the cookbooks. And chefs who created the recipes might find it complicated and confusing to navigate their rights to use the recipes in their cookbooks, particularly if rights in the recipe were held by the publishing house and not by the chefs themselves. as they no longer have copyright in them. While licensing schemes could be developed to bypass some of these issues, they would still take considerable effort to delineate, clarify, and refine through practice. Thus, it would seem that cookbook publishers would stand to benefit most from copyright in recipes, although they are not constitutionally protected parties (as of course are authors and the public).
expressive, as in the case of certain fashion design, determinations of originality at this point may be fraught, not to mention highly complicated at this juncture in fashion’s rich and multi-layered history. Nonetheless, it may well be argued that certain aspects of a fashionable work may not be merely, or even primarily, functional. Yet whether or not those elements may be deemed distinguishable, and therefore separable (legally, that is), from the work in which they are embedded remains an open question that would most likely require adjudication to determine.

Authorship is another point of contention, particularly where it may be difficult to differentiate the work of authorship from the instructions about how to perform it. But instructions about how to perform a work are not the same as the work of authorship: for instance, a schematic rendering of choreographed dance steps is not a procedure, and the required instruments and sequence of notes for a symphony do not constitute a process. Along these lines, following the well-settled precedent of *Baker v. Selden*, processes and procedures (techniques) are uncopyrightable, but their expression may be copyrightable: for instance, a treatise on perspective drawing is copyrightable, but the author does not get an exclusive right to practice perspective drawing.

Again, the fashion sector can offer some insight into the debate. As noted, dance choreography may be copyrightable. Arguably, then, the expressive and aesthetic side of original fashion design may offer works of authorship that are copyrightable. For instance patterns and drawings of dresses and/or collections (particularly if annotated), “look books”, and so on could be

122 See supra Chapter 1. Similarly, in cuisine, recipes have been deemed uncopyrightable on functionality grounds. To the contrary, however, there are commentators who argue that some new dishes are innovative and original enough to rise to the copyrightability standard (and some may not even be particularly functional in a traditional sense, for instance, the “molecular cuisine” pioneered by Ferran Adria and refined by his followers at Noma and elsewhere is arguably more designed to experiment with scientific principles behind cooking, as well as to play artistically with one’s ideas of what cooking is). See generally Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDozo ARTS & ENTER. L.J. 1121 (2007).
123 101 U.S. 99 (1880).
124 See id.
125 See supra note 120 and accompanying text.
deemed copyrightable, while instructions or techniques describing how to sew or make an item might be deemed strictly functional and therefore not copyrightable.\footnote{126}{Again, cuisine provides a parallel illustration. In culinary circles, there is already much movement in this direction: for instance original cookbooks, which may be expressive, authored, authentic, and “conceptually separable” from function are copyrightable; whereas recipes, which are instructions and techniques, or means of fixation, but are purely functional, are not.}

The rhetoric of authenticity also plays into determinations of copyrightability. As one prominent commentator on fashion and copyright notes, "the rhetoric of authenticity performs much the same social function as property ownership, placing the claimant group in a position superior to all others with respect to the item in question."\footnote{127}{SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 54 (2005).} A question as to whether authorship and/or originality norms tend to develop in creative endeavors that privilege individual creative composition, such as music, over what is, or was, often collaborative creation in fields such as fashion.\footnote{128}{MARTHA WOODMANSEE & PETER JASZI, THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (POST-CONTEMPORARY INTERVENTIONS) (1994). This is not a perfect distinction to draw, admittedly, as many fashion designers act independently and are famous in their own right, while many musicians play together in bands, compose music together, and engage in collaborative efforts. But the status of authenticity in fashion is often put into question, in part due to fashion’s long history and the general perception that fashion rarely presents truly original works but rather continually offers re-workings of past trends, works and ideas.} It may be possible that making certain works in fashion, and potentially other low-IP fields, copyrightable confers varying degrees of status vis-a-vis authenticity, originality and expressiveness that may hitherto have been recognized by aficionados, but not formalized by being granted the legal status and protections that copyright confers.

\section*{H. Potential Repercussions of Propertization on the Public Domain}

It may seem evident that content-rich companies would welcome propertization. Indeed, many vociferous proponents of property rights have emerged in low-IP regimes such as fashion and cuisine, giving rise to a general sense that propertization is desirable to protect creative content. But over-propertization may be problematic, even for content providers. Some of these problems are administrative, such as increased transaction and/or administrative costs, licensing headaches, increased levels of litigiousness, and so on. Other concerns are more difficult to
quantify, but potentially equally weighty in their consequences, such as a possible erosion of collaborative norms. Another consideration is the effect on the public domain. While some content companies may not seem overly concerned with the public domain, others may be well aware that their creators draw from its wellspring for inspiration, ideas, and source materials. It is impossible to tell how much the growth of the public domain would be affected by granting IP rights in currently non-protected creations. But many creative works that are not extended copyright protection, such as fashion styles, musical practices and methods, and an array of educational and pedagogical content are available for use by anyone who pleases.\(^{129}\) In the case of increased propertization, the public domain would only be meaningfully enlarged if some creators who would otherwise keep their works secret would consent to publishing them in return for copyright protection. The default, however, would alter from a regime that begins with open access to one in which access is granted by a few generous parties. This seems likely to lead to more restrictions being placed on content, which may hinder creators who seek both to contribute to and to draw from the creative marketplace.

**I. Possible Negative Effects of Propertization on the Actual Creative Content Itself**

It has been suggested by two prominent commentators, Oliar and Sprigman, that making creative work copyrightable may in certain cases have an effect on the nature of the content itself.\(^{130}\) While conventional IP wisdom sees protection as mainly affecting how much creative work is produced, they suggest that it also affects the nature and kind of content produced.\(^{131}\) These commentators point to the example of stand-up comedy to illustrate some of the effects that changes in the environment might have on creative material.\(^{132}\) Oliar and Sprigman trace an evolution in the culture and economics of stand-up comedy which track a corresponding evolution in the norms of stand-up comics away from a regime that treated jokes as a commons

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\(^{129}\) This also includes culinary recipes and dishes, comedy routines, and yoga poses.


\(^{131}\) *Id.* at 1793.

\(^{132}\) See generally *id.*
and toward informal property rules that limit appropriation. In the comedy world as it has evolved to the present day, a comedian is lauded by his peers as well as audiences for the unique nature of his creative material, such as jokes and stand-up routines. His reputation is critical to his being hired for various engagements or gigs, and it is therefore his coin of the comedy realm. A comedian’s jokes must be fresh, unique, and topical to retain the interest of audiences and gain the approval of peers. This means that comedians today are incentivized to invest in new, original and personal content. At the same time, while paying to one another’s creative material, comedians are strongly discouraged from borrowing jokes or routines without due attribution. Appropriation is prohibited not by externally-imposed rules, but rather by internally-inculcated norms that render copying an unforgivable transgression against fellow comedians. Those who flout the norms and appropriate creative work are likely to be sanctioned by overt criticism, shunning, and other social penalties that may have a markedly negative impact on a comedian’s employment prospects and standing in the community. Under the current community-based regulation, therefore, comedic creativity, as well as unwarranted appropriation of creativity, are regulated by an informal norms-based system. In this context, the text of the creative work—that is, the jokes, routines, and other elements of a comedian’s stock-in-trade that are uniquely expressive—are protected against encroachment and/or theft. Such protection may not be perfect, but the norms of the community do raise the cost of appropriation of such texts, which may not be deemed rational to assume by a prospective copyist.

By raising the cost of appropriating creative comedic work, the norms-based culture of stand-up comedy incentivizes comedians to invest more in innovation directed at the substance, or text, of their creative output. Thus, comedians today will invest in new, original, and personal content, which tends to be observational in nature and point-of-view driven, rather than generalized. Oliar and Sprigman trace the rise of the personalization of comedy in recent years, and argue that comedians today invest less in developing the performative aspects of their work (such as sight gags, slapstick, and so on), as once occurred in such classic comedic settings as vaudeville, and more in simple stand-up routines in which fresh and original material are delivered (as, for

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133 Id.
134 Id. at 1854-55.
135 Id. at 1831.
136 See id. at 1812-23.
instance, in the simple stand-up delivery of such contemporary comedians as Jerry Seinfeld, C.K. Louis, and Dave Chappelle). Thus, they argue, following the rise of the norms system, comedians did not simply invest in creating more of the same kinds of material as before; rather, they changed the content of their material and diversified the types of comedy on offer.

The example of stand-up comedy, as limned by Oliar and Sprigman, suggests that the benefits from establishing and enforcing an informal, norm-based property system in jokes and routines are greater in terms of ensuring real returns on investment, as notably argued Demsetz. But Oliar and Sprigman also argue that, contra Demsetz, causality is not strictly unidirectional. Demsetz’s theory would suggest that economic change may have contributed to the emergence of norms-based property rights. Further, the norms-based system, accompanied by increasing adherence to the system, emerged contemporaneously with the transformation of comedic product from the generic to the increasingly original and personal. Causality, however, may also run in the other direction: that is, the more original the humor, the easier it may be to patrol originality against appropriation. This may lower the costs associated with detecting appropriation of original jokes and routines, and with enforcing rights in such materials.

Contemporary stand-up comedy therefore stands at a distinct remove from its predecessor. In the earlier post-vaudeville era, many jokes were generic, and were often hard to associate with a specific person. Today, when comedic material is more distinct, it is easier for listeners (whether peers or audiences) to detect appropriation. The costs, social and private, of enforcing rights in jokes are thus lower when humor is original. As the norms-based system of stand-up comedy has become more entrenched, it has come to make more sense for comedians to

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137 Id. at 1850.
138 Id. at 1854.
139 Id. at 1860 (discussing Harold Demsetz’s article Toward a Theory of Property Rights, 57 AM. ECON. REV. 347 (1967).
140 Id.
141 Id.
142 Id.
143 See id. at 1857.
144 Id. at 1857.
145 Id.
produce unique, observational, and point-of-view-driven content; and the more unique the comedians' material is, the easier it is to enforce and maintain a norms-based property system. In other words, with respect to the effect that norms and/or IP rules have on the nature of content, the causal relationship runs in both directions.

The example of stand-up comedy exists in a negative space, in which IP does not formally grant property rights in original comedic output such as jokes and routines. Its norms-based system does, however, ensure that creative comedians will have the right to generate and benefit from their own original work without the threat of free-riding copyists who might otherwise undermine the source of their livelihood and the basis of their reputation among audiences and peers. The advent of technology in this instance may actually help comedians to maintain informal governance over this system by making it easier to detect appropriation of creative material: an Internet search for jokes and routines may unearth potential copyists more swiftly than ever. But the emergence of a particular kind of humor in the stand-up arena—one that relies more on the delivery of personal observations, sharply-honed witticisms, and point-of-view driven patter—may reveal that the nature of an ecosystem can have a profound effect on the creativity it supports, selects, and stimulates. Therefore, the choices that are made regarding which IP rules will govern a particular creative industry are most likely to implicate delicate normative judgments. Indeed, the choice of IP regime governing stand-up comedy may be seen as a factor that helps to shape both the type of material produced and the role of the art form in our society. For this reason, a reconsideration of IP rules may need to be updated, so as better to recognize and take into account various possibilities, such as: (i) they may change the nature of the creative practices they are regulating; (ii) different people are likely to create and consume at different levels of protection (good performers versus original writers); and (iii) different content is likely to be presented under different production processes.

**J. Breakdown of Commons**

Many of the features of guilds, discussed earlier in Section II.C, are also found today in commons, semi-commons, or constructed commons, which are analogous to guilds in their restricted membership, defined borders, practices and norms, and internal management of rights
and rewards. To a greater extent than guilds, however, commons are generally inscribed in the context of proprietary IP-based regimes. The traditional commons that exists in creative fields can be analogous to those that arise in real property contexts, as in the well-known cases of cattle ranchers and fish hatcheries.146

Driving technological change can put pressure on the commons by various means, including accelerating resource exhaustion, changing the balance of powers between stakeholders, overturning long-established norms, and various other seismic shifts that may undermine the agreements, constructs, and understandings that allow a commons to be sustained and to thrive. In the university setting, the constructed commons147 is grounded in a proprietary model with respect to scientific research and scholarship, but is less formalized with respect to teaching of courses. Strong norms of sharing, collaboration, openness, and individual autonomy or “academic freedom” also undergird academia, which contribute to a commons that is, paradoxically, at once exceptionally robust and surprisingly delicate. In the case of academic research, for instance, some entities have greater rights in commons-based IP properties due to being parties in, or privy to, public-private partnerships among academic institutions and corporate allies. But when important fundamental research is concerned, commons may arise to protect basic materials that must be drawn upon to advance the scientific process—as in the case of basic genetic materials that are essential to a broad range of scientific work. Technology has facilitated the operational aspects of sharing of genetic materials in academia by offering massive databases that are readily accessible, user-friendly, sustainable, and broadly available. But technology also accelerates the rate to patenting, which puts pressure upon research scientists to make the most crucial genetic information less widely available, to confer upon the owner a competitive advantage in the race to patentability. This can undermine the norms of academia, and can put pressure on parties who operate within the IP-based system to emphasize property rights at the expense of academic principles, interests, or goals.

146 See supra note 106.
147 See generally GOVERNING KNOWLEDGE COMMONS (Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg, eds., 2014).
Similar tussles are being fought in the academic world over rights in scholarly publications, as in
the case of academic journals. The Internet has revolutionized the production of, and access to,
academic journals, in part by making available the contents of these journals available online, via
services to which academic libraries may subscribe. Databases such as Google Scholar allow
individual articles to be indexed by subject, thus greatly facilitating access to the articles. Certain
smaller, most specialized journals may be prepared in-house, by specific academic departments,
and may published only online; such form of publication has sometimes been in the blog format.
Currently, there is a movement in higher education encouraging open access, either via a process
of “self-archiving,” whereby the author deposits a paper in a disciplinary or institutional
repository where it can be searched for and read, or via publishing it in a free open access
journal, which does not charge for subscriptions, and may be either subsidized or financed by a
publication fee. To date, open access has affected science journals more than humanities
journals. Commercial publishers are now experimenting with open access models, but are trying
to protect their subscription revenues; these goals may not be achievable simultaneously, but the
possibility of a limited access system that provides some revenue and yet leaves some material
open to general use may, with some innovative measures, be within reach.

The open access movement may be seen to accord well with the norms of academia that
emphasize upholding a rich, readily accessible public domain. But scholarship has tended to
follow a more restrictive model of a commons, in which journals and other scholarly
publications are broadly available within the universe of academia (although not necessarily
completely unavailable to the outside world). The scholarship commons has remained semi-
closed due in part to expense, which after all is underwritten by institutions themselves. The
privatization of the commons that is visible in these technological times in fact predates the
advent of the Internet, and its exclusivity has been a matter more of pricing than access. But
technology does serve to make the commons more readily available, which raises an interest in
making it more readily accessible to all interested parties. In this regard, the move is not toward,

148 See, e.g., JOHN WILLINSKY, THE ACCESS PRINCIPLE: THE CASE FOR OPEN ACCESS TO RESEARCH AND
SCHOLARSHIP (2006); Bo-Christer Bjork & David Solomon, Open Access Versus Subscription Journals:
149 See generally infra Chapter 6, subsection IV.E.3.
150 An example of academic open access is the Social Science Research Network. SOC. SCI. RES.
but rather away from, propertization, and toward a fully open model. But the expense that academic journals entail, whether subsidized by an institution or defrayed by levying subscription fees, runs counter to the open access model—or at least begs the question of who will assume the costs of academic journals in the future.

One possibility is that an entity such as Google may express an interest in assuming the costs of effectively subsidizing academic journals in order to corner the market on scholarship online. But while it may solve the expense problem, this option may raise concerns regarding copyright ownership of the articles, as well as access issues overall. If Google takes an ownership position in the journals, it may be assumed that it will have rights over access to the journals with respect to all other parties. Even if it chooses to allow access, the extent to which this is truly open may be in doubt. Metering, limiting access, imposing certain conditions on access, and so on might all be within the company’s prerogative vis-a-vis important scholarly works. Moreover, as a private company, Google may well intend at a future date to seek to monetize access to academic journals, and singlehandedly to do away with the commons-based model. If Google were to have a majority stake in the journals, it might well be able to have control over their future.151

This debate is remarkably parallel to the question currently being raised by the Google Books venture, in which Google is planning to scan and digitize approximately 130 million volumes of books, and to make them available online through its Google Books service within the next decade (to date, approximately 30 million books have been scanned). See Joab Jackson, Google: 129 Million Different Books Have Been Published, PCWORLD (Aug. 6, 2010), http://www.pcworld.com/article/202803/google_129_million_different_books_have_been_published.html. The Google Books project was undertaken in 2004 in partnership with several prominent libraries and universities. See Kevin Bergquist, Google Project Promotes Public Good, UNIV. RECORD ONLINE (Feb. 13, 2006), http://www.ur.umich.edu/0506/Feb13_06/02.shtml. Google Books makes available a “preview” or a “snippet” of the work, and allows a full view of the book if it is in the public domain. See Google Books Library Project—An Enhanced Card Catalog of the World’s Books, GOOGLE. In some important respects, the Google Books project is similar to a commons. It involves a limited number of parties (primarily universities, libraries, and Google); it provides the terms of access to and use of works; and it creates a restricted source for sharing, with the mechanisms that allow sharing to occur. In making the scanned and digitized works available to—and searchable by—the public, the Google Books project perhaps more closely resembles an effort at creating a public domain. However, only the books that are in fact in the public domain are available to the public. Those that are under copyright may be made available for sale to the public via electronic book retailers, such as Amazon, Barnes & Noble, Apple, and a new digital bookstore to be launched by Google that is tentatively to be called Google Editions. See Welcome to Google Editions, GOOGLE, http://static.googleusercontent.com/media/www.google.com/en/us/intl/En/googlebooks/pdf/GoogleEditions-intro-v2.pdf.
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raises concerns within the academic community in particular as to whether such a venture would indeed be constructed and sustained as a “commons.” It is not clear whether the proprietary and indeed for-profit nature of a venture necessarily implies that a closing of the commons space. But the exertion of control by a parent entity would be certain to raise flags in the commons space, particularly among academic circles that insist upon access to resources as a universally agreed-upon tenet and commitment.

III. SOLUTIONS: CHANGING THE BUSINESS MODEL

“Technology can change people’s relationship to content in ways that can make a profit.”152

A. What Can Changing the Business Model Do?

There are significant copyright concerns that arise with respect to the mass digitization of books by Google and its partners. See Jonathan Band, Google Library Project: Both Sides of the Story, 1 PLAGIARY 6 (2006), available at http://quod.lib.umich.edu/cgi/p/pod/dod-idx/google-library-project-both-sides-of-the-story.pdf?c=plag;idno=5240451.0001.002. The question of whether consent is required to digitize books and make them available, whether in excerpt or whole, remains controversial and unsettled to date. But questions also arise regarding the commons-like nature of the Google Books venture. On the one hand, the union of universities, libraries, and the private entity Google seem to make near-universal access to a vast repository of published works a new and wholly unprecedented possibility. The potential democratization of knowledge is more in the nature of a public domain project, but it may be effectuated by a specific group of actors working together toward a common good. At the same time, however, the inclusion of a single entity, and the concentration of power in its control due to its mastery of the technology as well as the repository itself, is a force that may challenge the viability of the coalition in the long-term, and may even threaten to compromise the nature of the project due to the fact that Google is a private enterprise, and therefore is profit-driven by nature and design. Profit-driven companies can, of course, be part of a commons without necessarily compromising its essence and existence. However, conflicting interests within a commons can undermine its cohesion, and can throw into question the guiding principles of commons members that are motivated by other interests or goals. In the case of Google Books, technological innovation is making digitization of entire libraries possible, which is readily aligned with the goals of democratizing education and knowledge that many institutions, such as libraries and universities, share. But inequities among the parties, challenges to underlying copyright of authors, and essential questions of consent and buy-in, still remain at hand to challenge the commons-like nature of the project and the fairness of its outcome.

1. It Promotes Certain Key Behaviors Generally Agreed on as Being Optimal for the Growth and Development of Private Enterprise

As noted, private ordering strategies and solutions—such as contracts, private arrangements, licensing and cross-licensing agreements, commons, and so on—are almost universally viewed as optimal first-choice options for responding to new business challenges in ways that will contribute to industry-wide growth and development. These choices afford the greatest freedom to private enterprises to pick and choose exactly what suits them, without requiring cumbersome governance mechanisms, burdensome administrative and other transaction costs, or onerous government oversight. They allow industries to emerge, to mature, and to adapt to technological and other kinds of disruptive innovation by rewarding positive innovative choices and behavior and weeding out regressive choices and behavior. The marketplace is generally preferred as the corrective mechanism for companies, and industries as a whole, that need to stay flexible and responsive to changing business environments.

Changing business models and strategies redounds to the benefit of industries in myriad ways: (i) it rewards dynamism; (ii) it corrects static, broken, or intractable industries; (iii) it allows industries that don’t need IP to flourish without intervention; (iv) it allows companies to capitalize on first-mover advantage; (v) it can provide convenience to users; (vi) it promotes cross-subsidization, or using one product to subsidize another; (vii) it can foster crowd-sourcing for ideas, funding, or other resources, which may drive innovation faster, as a greater number of participants can generate an overall increase in creativity; (viii) it can capture spillover effects and positive externalities; (ix) it can offer business-driven solutions for certain problems; and (x) it can helpfully draw from the successful business models of no-IP or low-IP regimes. Changing the business model is the first approach that effective industries and firms consider when tackling significant changes in the industry in which they operate. In many creative content industries, technological innovation—such as the advent of the Internet, but also major improvements to devices that enable copying, user appropriation, dissemination and delivery of works to vast

audiences (not just the Internet, but also logistics systems), and so on—are compelling companies to develop new strategies and models that are better suited to the current landscape.

2. Business-Driven Solutions

One of the clearest examples of changing business models that has emerged in recent years is the music industry, which has been forced to reconfigure its entire approach to harnessing creative output in order to generate revenue across the sector. Following are some of the specific business-driven solutions that the music industry has contrived in response to the transformation of the sector by the disruptive innovation of the Internet.

a. Selling Production Units; Responding to Declining Sales of Production Units

The standard unit of sale in music prior to the emergence of online music consumption was the record album, or later the recorded CD. Digital technology first enabled users to disaggregate albums and not only listen to but also, critically, to download (for listening or purchase) single song tracks in an easy-to-use MP3 format. The music industry first resisted disaggregation of song sales, considering, perhaps rightly, that such single-track purchases would likely result in a decline in overall music purchases. Moreover, bundled albums were often sold at a price greater than the sum of each part, and a loss of album sales would also represent a loss of the mark-up the industry had enjoyed. Both of these predictions came true: music sales have declined over time, and albums are bought in far fewer quantities than they once had been. At the same time, however, disaggregation became hugely popular, and consumption of a single digital track is now a well-established practice among music listeners and purchasers.

The most powerful industry representatives in music, the recording labels, did not initially drive the change from album sales to single track sales. While digitization was the technological force that enabled the change, the driver that set the new model in place was a technology company,

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154 See generally supra Chapter 3, Section V.F.
155 Id.
156 Id.
157 Id.
Apple. Recognizing the new market in disaggregated songs, Apple brought the record labels into negotiations and essentially forced their hand, compelling an agreement among the parties to sell music online, via the Apple iTunes Store, thereby locking in the major music purveyors to a single system of music delivery. As discussed earlier, this early lock-up has afforded Apple an enormous first-mover advantage—which the record labels in essence forfeited at the outset by not coming to an agreement amongst themselves—and this advantage generally persists to the present day. Apple has been further able to capitalize on its first-mover advantage in two respects. First, by recognizing its leading market position, it has been able to grow sales of digital music very rapidly, offering individual song sales at very inexpensive prices (at the start, 99 cents per song) and building its market through the immensely popular iTunes Store, which features exceptional availability and pricing. This has allowed Apple initially to realize losses, or merely to break even, for several years running, and only eventually to begin to turn a modest profit. Second, by recognizing that its core competency is in technology, rather than music, Apple has benefited from locking in the record labels to its ecosystem, a universe comprised of devices that are not interoperable with any devices not made or authorized by Apple. Due to this closed ecosystem, Apple can allow the sale of Apple devices that hold and play music, such as the iPod and its progeny, to effectively subsidize the sales of individual digital tracks: that is, users will purchase the devices in order to have access to the Apple iTunes Store, and at prices high enough to subsidize the artificially-low prices of the music tracks. This cross-subsidization runs greatly to the benefit of Apple, but to the detriment of the record labels, which are forced to license their songs at very low, flat per-song rates. This, however, may be seen as the price of losing the essential first-mover advantage, and relinquishing the ability to establish a leading market position in the online music space.

The music industry has also changed its fundamental business model in other respects that likewise respond to the changing environment that has been brought about by technological innovation. It has shifted its focus from recorded music as a primary source of revenue to a more

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158 See generally supra Chapter 3, subsections II.B.1 & III.A.2.
159 Id.
160 See id.
diversified portfolio of revenue-generating properties that supplement and bolster music sales. For example, the relatively recent “360 deal” that is now becoming common practice in the industry involves a contractual agreement between a record label and an artist that grants the label rights and royalties not only in recordings but also in performances, including a percentage of the proceeds from live concert ticket sales and any other income.\footnote{See generally supra Chapter 3, Section III.B.} The record label is also granted rights in ancillary sales of merchandise (such as concert T-shirts). Moreover, industry members are beginning to view technology as a boon, not merely a challenge: for instance, many artists are building strong online support via websites that enable them to reach audiences directly and to create relationships between artists and their listeners. These websites nurture the experiential relationship that audiences have with creators and content, and thereby reinforce fan loyalty by creating a network of “insiders,” or loyal listeners who are privy to special information, early releases, extra music tracks, and so on.\footnote{See id.} This helps foster loyalty, but may also serve to reduce the incentive to resort to music piracy by promoting unique tracks, inside information, and a sense of investment in the artist herself. More recently, some innovative artists are beginning to follow their audiences online, and to track supportive audience clusters in order to determine the most receptive locales for future performances.\footnote{Other industries have followed these innovative business strategies and adapted them to their own purposes. The videogame industry, for instance, now actively builds websites that center upon the experiential interaction between users and content: for instance, the World of Warcraft (“WoW”) offers its users the ability to interact with “real” members of the WoW community. See Mark Lemley, \textit{Is the Sky Falling on the Content Industries}, 9 J. TELECOMM. & HIGH TECH. L. 134 (2011). Again, by creating an insider network of privileged users, the videogame industry hopes to thwart would-be pirates from resorting to ersatz production and thereby siphoning off revenues from the original creative work. \textit{Id}. The publishing industry is also trying to attach online audiences with community-oriented websites that connect creators to audiences. For instance, entrepreneur Chris Anderson created booktour.com, a website designed to connect authors conducting live book tours with their receptive audiences (however, booktour.com closed for business in 2011). See Carolyn Kellogg, \textit{BookTour.com Closing Up Shop}, L.A. TIMES (Aug. 17, 2011), http://latimesblogs.latimes.com/jacketcopy/2011/08/booktou...shop.html.}

One further source of profitability that content companies are wrestling with in the wake of technological change is advertising-related revenues. Many creative industries, including music, have long relied on revenues to support their content delivery models. In the music sector, radio broadcasting has historically been an important part of the industry business model, garnering
audiences for new releases, royalties for sound recordings, occasional live performance rebroadcast rights (as in the case of the long-running Metropolitan Opera radio broadcasts), and other advertising-related revenues.\textsuperscript{165} By contrast, online music streaming has proven less effectively monetized, due in part to limited but increasing audiences, relatively lower advertising rates commanded online, and historically-imposed restrictions in online music royalty payments.\textsuperscript{166} In sum, online advertising has proven extremely limited in appeal and effectiveness, and has not displaced print advertising, although the latter has also been in steady decline. Companies dependent on advertising to sustain their viability are hard-pressed to devise adequate responses to this challenge. Some creative solutions, such as maximizing Google search placements, optimizing product placement in unexpected venues (such as the use of product placement in films by fashion and merchandise enterprises), and more recently data mining and data sales (such as the sale of users’ search preferences, shopping habits, and so on), offer some promising solutions. But the advertising-supported media paradigm has not shifted, and its business model may require retooling to be fully effective in the new technologically-oriented environment.

\textbf{b. User-Generated Content (UGC)}

Digital technology places newfound power in users over already-created content, but it also enables users to create their own content, or UGC, at significantly lowered production costs. Some of this content may be new, such as original compositions recorded online by emerging artists. In these cases, the material will not conflict with already-copyrighted material. But some of this content may draw upon source material that is already in circulation, and may be under copyright. In music, some of the most widely regarded UGC involves young performers reinterpreting, remixing, riffing on, or otherwise recreating artistic compositions from a wide range of sources.\textsuperscript{167} In order to gain exposure to audiences, many of these performers display their work on popular sites, such as YouTube or MySpace.\textsuperscript{168} While creative, some of these works may also be appropriative, and may be in violation of one or more copyrights. However,

\textsuperscript{165} Other such industries include newspapers, journals, television, cable and other media.


\textsuperscript{167} See supra Chapter 3, Section I.G.

\textsuperscript{168} See id.
these performers may be unable, or unwilling to make the effort, to clear licensing rights, and may be initially seeking to gain attention, exposure, and/or acclaim, rather than immediate commercial benefit. Many participants in the music industry are beginning to recognize that these works may offer some value to the industry, rather than merely undermining value by transgressing an established copyright. For instance, music agents now scour sites such as YouTube to identify creative talent, such as new young composers. In the case of UGC that uses popular music, the response of the industry is more mixed. On the one hand, some music representatives will search for works that violate copyright and issue notice that the UGC must be removed at a risk of prosecution. On the other hand, some music representatives argue that the UGC serves to reinforce the popularity of the underlying work, and can bring it to the attention of newer or larger audiences. Particularly in cases where no obvious commercial benefit to the creator of UGC is evinced, the argument that UGC helps to buttress the value of copyrighted material can be persuasive. Many in the music industry are also becoming aware that UGC can be commercialized by the very parties who hold the copyright, namely (in most cases) the record labels. Thus, agents from these labels are now beginning to sign artists who have been discovered via their online releases of UGC. This nascent new business strategy affords the labels access both to new talent pools as well as to new audiences on whom they can capitalize.

c. Clearing Rights
Changing the business model can be an effective method for companies tackling technological innovation and its effects, but it can also involve a reconfiguration of property rights, licensing practices, and other IP-related strategies. Creative content companies and content distributors—or entities that carry and distribute content such as cable and satellite television, radio, and Internet service providers—must manage these rights effectively while minimizing transaction costs. One solution is to create collective rights management organizations that are generally legislatively mandated and externally administered by neutral third-party entities, such as performing rights organizations in the music sector. Where large carriers are involved, as in the case of cable and satellite television, these measures may entail compulsory licenses; or, as in the

169 See id.; supra note 8-9 and accompanying notes.
case of radio, they may entail a government-supervised but privately-organized collective licensing regime, accompanied by an exemption from having to pay sound recording royalties to copyright owners.171

Collective solutions can facilitate industry strength over the long term, but they cannot and will not displace private ordering solutions among companies that contrive negotiated arrangements for rights clearing, IP management, and rewards allocations. In cases where multiple rights are involved, companies that broker and enter into agreements may find that bargaining for cross-licensing agreements and similar arrangements reduce transaction costs ex ante, thereby ensuring that revenues are distributed among copyright owners cost effectively. These agreements can internalize transaction and administrative costs, and can break down such costs among members, defraying the burden on any one party.

d. Facilitating Interoperability
Negotiated agreements can also enable companies to secure their market position in an industry, giving content-rich companies the ability to compete in newly contested marketplaces. When technological innovation brings foundational changes to an industry, companies may have to vie for a foothold. For instance, a new technology may give rise to new venues for content dissemination, and content providers will then be compelled to seek out and secure channels for distribution of their content. In music, for instance, the development of portable music players—beginning with boom-boxes, tape players, the Sony Walkman, and evolving to the iPod and other handheld devices—required music producers to ensure that their product would be carried by each successive new device. In the era of the Internet and new technology companies, however, a new element of exclusivity has been added to the portable music market. That is, contemporary electronics manufacturers are currently able to restrict their software in order to prevent creative content from being carried on competing devices. By curtailing compatibility among devices, these electronics companies can lock consumers into their universe, and can compel content providers to release their product via exclusive, narrowly drawn pipelines. While the digital music may be released in a standard format, such as the MP3, it may not necessarily be able to

171 These regimes will be discussed further below, in Section IV.A.
be released via multiple devices without prior negotiation among the content provider and each specific electronic delivery system. The lack of compatibility, or interoperability, demands a level of negotiation, therefore, that is far more complicated than occurred when simpler, more generic electronics were commonplace. Today, content companies must look to business strategies that optimize the release and delivery of creative products on multiple devices under multiple negotiated agreements. Thus, for instance, in the case of music, the record labels must enter into contracts with a number of handheld electronics manufacturers, such as Apple, Samsung, and Nokia, in order to ensure that their digital music tracks will be released on the widest range of devices to reach the greatest number of listeners.

It is evident that IP-based solutions are required to clear the rights that the dissemination of music on various devices that are incompatible and not interoperable. But by negotiating agreements that set the contractual terms and conditions for such dissemination in advance of rights-clearing, content providers and electronics companies may streamline these processes in more cost-effective ways. An early illustration of the efficacy of such business-oriented solutions is the agreement between Apple and the major record labels that made possible the large-scale sale of digital tracks on the Apple iTunes Music Store. By agreeing in advance to the terms of music sales, the parties broke a logjam vis-a-vis online music distribution that had not been overcome through earlier attempts at online music release on the part of individual labels. When the record labels realized that online music was inevitable, they came to the bargaining table and entered into an agreement with Apple that is still operating to the present day.172 The Apple model provides for a simple, streamlined licensing of music rights, but it is essentially a business plan that enables music to be disseminated online. Had the record labels contrived a solution amongst themselves, the terms of the agreement might have been more in their favor. Nonetheless, all the parties came to realize that a business-driven solution was optimal for online music delivery. This is the model that is likely to offer a basic template for content production and delivery in other industries, particularly as they respond to similar challenges in the online landscape.173 These agreements are still nascent, and have not attained the breadth of the iTunes

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173 Entertainment firms in film, video, television and other media are already beginning to wrestle with online delivery of their product. In television and film, for instance, some major producers are negotiating
delivery system, with respect to either the number of contracting parties or the size of the receiving audience. But the solutions are, and will likely continue to be, driven by the business model of creative content companies. As the online environment changes, these firms will be compelled to anticipate changes in the environment and their consequences, and to work proactively to forge new allegiances that build market share, facilitate creative content exchange, and attain a degree interoperability that best suits their needs and objectives in the marketplace.

While commonly used in a technological context, interoperability concerns can also rise in the broader sense of compatibility between systems or components of a system. In the higher education sector, this has interesting ramifications. Traditionally, higher education has been relatively atomized: students matriculate from a given school (or system, such as the University of California system), receive the vast majority of their credits from that school, and pay tuition to that school in exchange for a diploma upon successful completion of the school’s requirements for graduation. Institutionally, therefore, the student is bound to one main entity; and that entity is rewarded by a full degree’s worth of tuition. There are typically some opportunities for students to pay for and earn credits elsewhere—study abroad, exchange among a handful of schools, and so forth—but the home institution ensures, via its academic policy, that the student is primarily educated, and makes his or her payments, within its purview. This is a closed ecosystem that has remained relatively unmarked and unquestioned prior to the disruptive innovation of online education, extended not only by traditional institutions but also by newcomers such as third-party providers, for-profit entities, educational consortiums, and so on. These entities are beginning to offer an array of courses bound to compete with the course offerings of traditional schools, and to challenge their proprietary model that is predicated on a lack of interoperability. At the moment, universities and colleges have not constructed a plan to negotiate with these entities and to contrive a way of expanding their course offerings to students without entirely forfeiting revenues from the enhancements to their curricula. Instead, these traditional institutions have pursued several key tactics: (i) to create online courses that their own students can take, only some of which may be taken for credit; (ii) to limit course credits to their

the limited release of their product through venues such as Hulu, YouTube, and individual channels such as the online arm of the popular comedy the Daily Show. See infra Chapter 6, subsection I.C.4.

This is, of course, vastly simplified, but the basic point—allegiance to one school, and a single draw of revenue at that school—holds.
own courses, effectively excluding credit from other institutions; (iii) to support accreditation that thus far has prioritized real-space learning, established institutions, and traditional pedagogy; and (iv) in some limited cases, to explore slowly institution-wide interest in developing online education, often as a cost-cutting measure or means of attracting a larger, more diverse student body.

In other words, the business model of higher education has not yet moved away from limiting interoperability, either by changing policies, renegotiating relationships among educational institutions and providers, pursuing revenue-sharing plans for online education, or rethinking accreditation. At the same time, a lack of clarity in determining allocations of copyrights and related rewards in coursework increases the likelihood that educational institutions will find such tactics cumbersome and complicated. But the disruptive innovation of MOOCs has begun to quicken change within the academy, and the spiraling costs of college tuition are spurring wide coalitions of students and parents, not to mention interested educators, to call for change. By promoting interoperability among education providers, traditional schools may be able to reduce the strain of high costs and tuition, thereby contributing to the satisfaction and well-being of their students; and by exerting quality measures via the processes of accreditation, they can ensure that their product retains its standards and standing. By bringing new business models and practices to the table, educational institutions may also confer benefits upon their faculty and staff, extending the scope of their teaching, the strength of their teaching contracts, and the basis of their livelihood. But whether these steps will be taken willingly by educational industry participants or, as in the case of the music industry, be compelled upon them, remains to be seen.

**e. Drawing from the Business Model of Low-IP and/or No-IP Regimes**

A useful blueprint for companies that want to build business plans flexible and resilient enough to adapt to innovation may be offered by industries that are built on low-IP or no-IP frameworks. In many mature creative industries that are structured to promote product and innovation flows without substantial property rights and protections, several features stand out: (i) the ability to protect core competencies; (ii) the use of loss leaders to attract users to the value-bearing product; (iii) the flexibility to capitalize on trends, tastes, and built-in obsolescence; (iv) the ability to capitalize on creative performance, rather than merely on creative product; and (v) the
vision to allow copying to drive creativity, indirectly leading to increased profitability for the original creative individual or entity.

The ability to protect core competencies is exemplified by creative content industries in which innovation remains in the hands of highly skilled, imaginative, and capable designers who create the output that fuel their respective industries. In fashion, for instance, original designers must constantly create new apparel designs that feed consumers’ insatiable appetite for new and trendy clothing, giving rise to an industry churn that is vital and ongoing. But their work is not copyright protected, and indeed need not be to keep profits flowing. Although some profits will be lost due to knock-offs, the originality of haute couture designs are most prized by discerning audiences, and the quality of the highest-level products ensure their exclusivity as well. In education, teaching skills are at a premium and cannot be replicated without a high degree of mastery, training and pedagogical skill. Most educators have not had to assert property rights in their teaching because it remains the exclusive provenance of those who have been trained to teach. Moreover, the “capture” of educators within the echelons of higher education ensure that work cannot be easily poached by competitors until the teachers’ contractual obligations have run their course.

The use of loss leaders to drive product sales allows companies to attract consumers with free or inexpensive content while at the same time protecting more valuable, high margin products. In education, for instance, universities and colleges are experimenting with offering free online MOOCs that attract a wide-ranging audience, and that bring new learners into close contact with high quality instruction. The online interactions may serve as a kind of recruiting material that can attract students to degree-bearing programs, thereby ensuring a steady stream of

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175 This includes industries such as architecture and technological and industrial design—although unlike fashion, but like education, these do have some significant IP protection.
176 In architecture as well, design protection is limited, but the originality of star architects is prized, and their distinctive design is not readily replicated by lesser lights. See supra Chapter 1, subsection III.D.2.
177 Computer software is slightly different: the product may ultimately be IP-protected. But many software designers and programmers value contributions to open source software, which is not subject to IP protection. In part, this is due to the value attributed to creative prowess in the computer design world. Working on open source software enables professionals in the computer field to demonstrate their mastery of software design, while still protecting their own skills, work, and the value of their creative production. See infra Chapter 6, subsection IV.E.3.
matriculating students who will pay tuition to pursue a full-time higher education degree. But universities may eventually create MOOC sequences that themselves lead to a certificate or degree that is either inexpensive or free. These MOOC programs may then serve as loss leaders that are accompanied by ancillary products related to (i) education, such as one-on-one tutorials, intensive research studies, (ii) employment, such as networking opportunities, job fairs, and internships, or (iii) further training, such as programming, hands-on training outside the classroom, and so on. Another possibility is that these ancillary products become the loss leaders, and the universities ultimately come to charge tuition for the MOOCs. In either direction, one product or set of products enhances the value of the core product. In the latter case, however, copyright protection may be considered to capture the full value of the MOOCs if they are offered at a price.

In the case of music, as the value of content remains flat or declines relative to previous years (adjusted for inflation), digital tracks may come to be seen as a loss leader of sorts. Particularly if newer audiences rely primarily on music streaming—that is, listening but not purchasing their preferred musical choices—musical content may be limited in its profitability for some time. Recognizing the potential for such an eventuality, the music industry has increasingly turned to live performance, rather than recorded music, as a source of revenue and growth, particularly with respect to the top of the spectrum of commercial artists.\(^{178}\)

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\(^{178}\) But it is not music alone that can move toward the commodified performance and away from the commodified creative product. In comedy, for instance, the stand-up comedy routine as performed by a talented comedian is far more valued than the jokes, routines, and/or actions (such as sight gags) that make up the act. Analogously, in cuisine, the recipes of famous chefs may only occasionally generate revenues when compiled in cookbooks. More significant are the performances of chefs, such as cooking shows, lessons, demonstrations, and of course the meals that they produce in restaurants (which are not typically copyrighted). Even when famous chefs are not involved, recipes are not generally deemed valuable in the culinary realm. Many recipes are freely shared and circulated, for instance via such websites as epicurious.com, marthastewart.com, and so on. These recipes are viewed as loss leaders, which are intended to drive cooking audiences to purchase products such as the sale of magazine subscriptions (such as Bon Appetit, Gourmet, and Cooks Illustrated), or to follow the many ventures of famous chefs, (such as Martha Stewart, Alton Brown, and Mark Bittman). While culinary enterprises blend performance and product in the wide range of offerings, they like music are seeking to supplement relatively restricted revenues mined from the exploitation of creative content with new revenue streams that may flow from performance, collaboration, user-generated content, and other new forms of creativity.
f. Contracting into Optimal Arrangements

Another approach companies may take in adapting to new environments is to use contracts to set the terms of their relationships, whether within the industry or with respect to end users (or both). Where it is optimal to contract around IP entitlements, or in some cases even to contract them away, companies can find that contractual arrangements are a superior means of striking an optimal balance of ownership and access. This tends to be particularly effective when IP rights have been inefficiently allocated in a given sector, or when judges, legislators, or administrators create systemic inequities that cannot be easily rectified, appealed, or reversed. It also allows both multi-party arrangements and complex licensing schemes to be secured in the case of large, complicated creative endeavors, many of which will span multiple genres, locales, venues for release (domestically and abroad), and long-term payouts. In the case of fashion, for example, it is becoming increasingly commonplace for designers to design several collections per year, releasing them internationally at fashion shows that target exclusive, restricted audiences. At the same time, designers may engage in collections designed for sale at larger retailers and at lower price points. But added to these releases are new ventures that are attracting fashion designers, such as participating in modern dance performances, pop music videos, or performance art. These productions often involve multiple media, and therefore multiple rights, that must be negotiated among a host of interested parties. Contractual arrangements are almost certainly the best course of ascertaining and managing rights when such complexities abound.

B. What Does Changing the Business Model NOT Do?

Creative companies can adapt their business model to meet the demands of a new industrial landscape shaped by disruptive technological innovation. These strategies may include creating new contractual arrangements, rolling out new products, changing the balance between existing products and new revenue sources (such as performance, ancillary activities, or supplemental products), monetizing user activity (such as placing advertisements on websites), or promoting new product placement (such as featuring products in outside content). Business plans can also

involve quasi-property arrangements, such as joining or reinforcing a commons, creating a network of licensing agreements within an industry, creating guild-like organizations that allow the sharing of information, training, and resources among members, or participating in certain open source endeavors to buttress proprietary products. Creative content industries that are able to ascertain the right mix of business strategies and solutions may realize crucial cost savings by reducing transaction costs that can proliferate when the management of IP entitlements is involved. In general, these efficiencies can be enhanced with economies of scale, giving changed business models a distinct edge over changed IP-based allocations as first-order solutions to industry-wide challenges.

Yet while changing the business model can be an effective tactic for the creative industries, it can also be flawed on various counts. These shortcomings are especially problematic when they (i) undermine certain core principles of the given industries; (ii) interfere with interactions among companies, or between companies and end users; (iii) restrict spillovers or positive externalities; (iv) lead to suboptimal outcomes due to imbalances of bargaining power among stakeholders; and/or (iv) more contestably, have a negative effect on non-commodified values, social interests, and democratic goals.

1. Promote Uniformity

When creative companies change their business model, they do so in response to challenges that are posed by innovation within the industry, such as emerging technologies, as well as challenges that are raised by competitors who themselves are reacting to change. In this competition-driven landscape, creative companies will vie with one another to gain a first-mover advantage, to secure as dominant a position in the market as possible, and to wield and leverage their exclusive portfolio of IP rights with the dual aims of maximizing revenues and minimizing competition. These goals, while fully rational from the perspective of corporate self-interest, run counter to the greater goal of promoting uniformity. Lack of uniformity within an industry may be a natural outcome of a competitive environment but, as in the case of individuals, many policymakers that

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180 For example, IBM’s use of some open source software, or Adobe’s open source software that protects some of its work on a proprietary basis.
a level playing field at the outset is more likely to lead to a meritocratic outcome, in which the best industries (or, analogously, individuals) rise to the top of the field. When technological innovation disrupts a field, the equilibrium point may need to be reset. Even in cases where many companies within an industry are incentivized to change their business model, more equitable grounds for starting may be preferred for the industry as a whole, so that rights and responsibilities are distributed more equitably at the outset, and rewards and revenues are gained more fairly in the long run. In the case of the fashion industry, for instance, arguments over the proposed (and currently tabled) legislation that would grant copyright in fashion design have pointed out the disparity in interests and power among industry stakeholders. These advocates of reform argue that enacting copyright protection would level the playing field and enhance parity among designers across the fashion spectrum.

2. Promote Interoperability

Changing the business model, as mentioned above, may be made in service of seeking a supra-competitive advantage, such as one company establishing a dominant position that imposes a closed ecosystem on its users and thereby locks up the entire industry. Typically this closed system by definition precludes interoperability with outside devices, products or systems, as its raison d’être is to keep users dependent on one company’s spectrum of products and services. While this can work greatly to the advantage of a single entity, it tends to be suboptimal for the industry and its community of end users. First, a closed system can lead to monopolistic pricing, as users who are compelled to purchase goods and services within a closed system can neither seek out compatible but less costly products nor engage in comparison price shopping within the product lines that the closed system offers (for instance, searching out competitive prices from various retailers). Second, a tightly controlled ecosystem can force third-party vendors (such as add-on applications, or “apps”) to conform to the dictates of the controlling company. Such dictates may include assurances that the third-party entities will not create products compatible with competitors’ products, thereby reinforcing the monopolistic position of the initial company. Third, closed ecosystems that preclude interoperability within a field can also impede or divert innovation of a range of new devices, systems, or products. That is, if a predominant company

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establishes a powerful position in an industry—one that is at least quasi-monopolistic in its authority—both competitor companies or third-party vendors are constrained to avenues of innovation that either conform to the parameters of the ecosystem or operate on the margins of the ecosystem with limited returns. Competitors that devise entirely new systems, even if such systems are superior in various aspects to the dominant ecosystem, run the risk of being shut out of the market, due to their inability to secure a position at the margins of industry production. Thus, innovation across the industry may be constricted by the inability of an industry to sustain parallel or multiple tracks of development among competitors, particularly in cases where a single company or cluster of companies can establish a prevailing ecosystem that becomes the standard among companies and users alike.

The example that typifies the kind of ecosystem that deters interoperability is the Apple model, which has had a profound impact on the music industry. By creating an interlocking system of devices, including personal computers, handheld devices, online music and media platforms, and operating systems, Apple has created an electronic universe that is, figuratively speaking, hermetically sealed. The Apple universe is closed to outsiders, due to (i) exclusive licensing and sales contracts with third parties, (ii) restrictions it places on content sharing with other competitors’ devices and systems, (iii) limitations placed on users’ ability to use and reuse content (for instance, content may be downloaded and copied onto a limited number of a user’s devices), and (iv) a general lack of interoperability with devices and systems not in the Apple universe. Apple has long established a dominant position in the music sector, initially secured by creating a partnership agreement among the record labels and Apple for the licensing and sale of digital music tracks online. But its singularly powerful position comes at a cost: third-party vendors and competitors alike have struggled to create products that are compatible with Apple devices and that conform to the terms and conditions (relating to copyright and to other rights and revenues) that Apple dictates. Those companies that choose to operate outside the Apple ecosystem still struggle for market share, and are hampered by the unwillingness of many music consumers to range outside the user-friendly ecosystem that Apple has established and for which it is known. On the one hand, it may be argued that this is only a natural outcome for a truly innovative and successful technology company that has come to master the music industry universe as well. However, this dominance comes at a cost. For instance, emerging companies
that were beginning to offer music sharing systems comparable to Napster, yet able to distinguish between licit and illicit sharing and further able to obstruct the latter, were effectively quashed by Apple’s online music store, its exclusive agreements with recording labels, and its subsequent dominance of the market. More recently, the exclusive Apple ecosystem has essentially cornered the online music sales market, and has impeded competitors such as Zune (Microsoft’s now-defunct digital media player) from gaining a foothold in the digital media market. This works to the detriment of consumers, who are generally benefited by greater choice among digital media systems, as in virtually any market.\(^\text{182}\)

In contrast, in the case of higher education, as discussed earlier, changing the business model may promote interoperability. Negotiated arrangements among education providers may expand the curricular choices that students have when they pursue a degree, or they may even expand the very degrees that students choose to pursue. But an opposite course of action could emerge as well: that is, the business model of higher education could be changed to accommodate MOOCs and online courses only within the boundaries of a given institution. For instance, a university may determine that its optimal model allows a student to choose from an array of courses that is has developed, both in real space and online, and that the student can take up to a certain number of courses at other institutions for credit, but only on a limited basis. The only difference from the present system, therefore, would be to expand online courses offered for credit, but such courses would by and large be created, owned and administered by the home institution. The conclusion to be drawn is fairly evident: if a school prioritizes interoperability as a net good, it can pursue business models that prioritize opening education to an array of institutions. If, however, it is more protective of its properties, conservative as to retaining control over the quality of its curriculum, and concerned with retaining students and tuition dollars, a traditional school may choose to limit interoperability and access to online courses that it does not create, control or own.

**3. Promote Collective Solutions, and Other Communally-Worthwhile Outcomes**

Individual companies that change business models are typically acting competitively, which may or may not promote collective solutions. If it is in their rational self-interest to enter collaborative arrangements, companies will leave room for collaborating in their business plans. Thus, for instance, scientific research institutions will make ample provision for retaining access to patent pools that will allow them to draw on fundamental research resources, such as genetic databases that make basic gene sequences available to researchers within the scope of the patent pool. In these cases of rationally-driven collaboration, institutions that may be competitors can agree to share access to data within a closed scientific community in order to promote individual advances in research and discovery.

Collective pooling of resources can also occur in creative fields that involve uncopyrighted materials, such as group runway collections in fashion, in which original designers work together to create a unified style that each will individually express and sell to his or her own market segment. Alternative to collaboration among peers, or horizontal collaboration, is collaboration among designers and retailers, or vertical collaboration. In fashion, this can entail an original designer joining forces with a retailer to create a collection that is exclusively sold by the retailer and leverages the designer’s status within the retailer’s market niche. Thus, for instance, exclusive designers trying to reach more mass-market consumers are increasingly agreeing to make limited edition collections that are sold by a popular retailer at relatively inexpensive prices (for example, the 2013 “Isabelle Marant ‘for’ H&M” collection\textsuperscript{183}). Importantly, this new hybridized sale of high-end designer products marketed for middle-end or low-end retail consumption represents an innovative business model response to the threat of appropriation that would-be fashion copyists are increasingly posing to the industry.

These examples of successful collaboration, however, tend to proliferate in specific circumstances: in low-IP or no-IP based regimes, collaboration is facilitated by the lack of property rights in original design that removes the task of clearing rights from the steps that must

be taken prior to entering into a collaborative arrangement.\textsuperscript{184} In highly propertized regimes, collaboration is indicated when competitors require access to a common pool of data or resources and seek to avoid costly rights-clearing processes in advance of their efforts. In the latter situation, however, the commons that is created offers a collective solution to an potential early-stage road block, but it does not perforce promote collaboration in the research and discovery work itself.\textsuperscript{185}

**4. Promote Cumulative Innovation**

Changing business models may promote cumulative innovation in creative industries, but it must be a goal that is pursued deliberately, as opposed to competitive strategies that may not prioritize collaborative work. Thus, for instance, in the context of industries that rely primarily on patent rights to thrive and grow, cumulation is promoted not only by business models but also by a strategic use of patenting versus publication rights. In the context of cumulative innovation in patent-rich fields, publication may be wielded as a strategy for redividing the bargaining surplus between the original inventor and cumulative improvers.\textsuperscript{186} This strategy, however, relies more on the use of IP entitlements, and the restraint of such rights in order to advance publication as a strategic ploy, as opposed to changing business models. Similarly, employee mobility and knowledge portability are strategies that may serve to advance cumulative innovation within innovative industries.\textsuperscript{187} These strategies may be shaped by changing business models, such as, for instance, crafting employee non-competition agreements, or promoting the exchange of ideas in some open source endeavors, or they may be advanced by changing IP policies, such as extending publication rights to employees. In the case of education, scholarship and research in scientific fields have often sought to promote cumulative innovation through a combination of

\textsuperscript{184} Trademark rights are easier to clear, as in the case of collections made by a designer “for” a retailer: each brand is retained, both the designer and the retailer are able to use their respective brands in the collection, and both gain strength by association with the partner.

\textsuperscript{185} Valuing collaboration is a normative judgment that is subject to discussion. For the purposes of this paper, it is assumed that collaborative, interdisciplinary, or team-driven work helps innovators to reach goals together that may not have been attainable individually. Hence, it is treated as an intrinsically desirable social good.


business-related and IP-related strategies. Increasingly, instruction and coursework in education are becoming potential grounds for cumulative innovation, collaborative efforts, and useful idea exchange. But changing business models in education may not advance such causes, particularly as the increasing adjunctification of education does not particularly incentivize or reward collaborative work. Thus, if valued, cumulative innovation in education is likely to require both changing business models and adaptive IP entitlements to continue to flourish.

5. Protect End-User Rights, the Public Domain, or Less-Powerful Stakeholders

When creative companies or industries are spurred to change their business models, they are acting primarily to protect their revenue-generating properties and processes, as is their mandate. But there are several respects in which these industrial priorities, however valid and rationally self-interested, may run counter to the interests, rights, activities, and values of other parties in the creative fields. First, changing business models may have a varied effect on the end users and/or consumers of products generated by creative industries. On the one hand, they may serve end users well, by creating economies of scale, cost efficiencies, or other positive effects that can get passed down to the consumer, such as through lowered prices. On the other hand, however, they may prove adverse to end users’ interests, either by (i) changing the terms that were previously granted, such as reducing the scope of permissible activity (for instance, imposing new restrictions on “personal use”, or curtailing rights to “fair use”); (ii) charging end users greater fees for their consumption or engagement with products; or (iii) redrawing the lines of access to creative properties that may have served as building blocks for user-generated content or other creative activity on the part of end-users. Second, changing business models may entail efforts to fence in properties and/or activities that were previously considered part of a creative and cultural public domain. Not only end users but also the general public may be implicated in such fencing off, which may be to the detriment of overall creative activity. Third, changing business models may have an adverse effect on the rights and rewards of stakeholders that are involved in creative industries but that do not have a strong bargaining position with respect to their competitors. The broad range of stakeholders that are implicated in creative industries tend to have very different levels of bargaining power, or leverage, and may be effectively forced into suboptimal results when a changing business environment causes companies to pursue new
profit-maximizing strategies that may favor well-positioned entities over emerging, independent, or newer entrants that are not backed by powerful supporters or lobbyists that can ensure they get their due market share.

In music, for example, the cost to end users that changing business models levy may be extensive.\(^{188}\) They may include new restrictions on the use of content, as in the case of music that is purchased online and that can only be downloaded onto a limited number of devices.\(^{189}\) In terms of personal use, the right to reproduce creative works—even those that have been duly purchased by the end user—may be limited or cut off by technological means (that is, anti-copying protections). This can lead to an odd imbalance, such as a user’s ability to enjoy a wide range of personal uses of hard copies of creative works (for instance, the ability to photocopy books) but her inability to extend these same personal uses to digitized versions of creative works (for instance, her inability to re-record films, even those she has purchased and wishes to record for purely personal use). Equally importantly, the access that end users have to creative work, as well as their ability to use it in innovative, creative, or transformational ways, may be impeded or thwarted by changing business models. In music, established practices have historically allowed artists to borrow from one another and thereby to create new and transformative works, and even entirely new genres (for instance, the growth of much modern folk, rock, blues and R&B music is predicated on such creative borrowing). Increasing emphasis on the propertization of music may be one approach that the music industry has taken to disallow creative borrowing without rights clearing and/or royalty payments being assessed.\(^{190}\) This may be primarily an outcome of IP-based solutions that seek compensation for musical borrowing, even in cases where the new artist is not appropriating the original work but rather using it in an innovative and transformative manner. At the same time, however, the music industry seems to have made a concerted business decision to repress creative borrowing that may entail even the slightest of inroads on propertized material. Thus, for instance, in the 1980s the industry brought its force to bear on the practice of music sampling, in which the creative practice called for

\(^{188}\) This is equally true in media and entertainment sectors.

\(^{189}\) Similarly, in the case of film, video and recorded television series, works that were previously available for multiple personal uses are similarly curtailed, such that an end user may only view the works on certain devices. See infra Chapter 6, subsection I.D.2.

mixing short portions or samples of recorded music to create a new, fresh, and original work.\footnote{See Chris Richards, The Court Case That Changed Hip-Hop—From Public Enemy to Kanye—Forever, WASH. POST (July 6, 2012), http://www.washingtonpost.com/opinions/the-court-case-that-changed-hip-hop--from-public-enemy-to-kanye--forever/2012/07/06/gJQAVWr0RW_story.html.} As sampling grew in popularity, the music industry demanded that artists and/or DJs obtain clearance of copyrights of all the short samples used to comprise their works.\footnote{Id.} Clearing the copyright thickets proved challenging for all but the most successful musicians and DJs, which led to a number of musicians encountering legal difficulties with respect to their use of uncredited samples.\footnote{Id.} As a result, the innovative practice of music sampling was largely thwarted, and many of its creative practitioners were forced to abandon their efforts in order to steer clear of the sampling morass.

6. Curtail Monopoly-Seeking Behavior

Companies change their business models in order to establish as large a market share as possible and thereby to maximize their profitability. When innovation throws an industry into disarray, the primary incentive is to adapt business models in ways that are advantageous to a company and garner it a superior position vis-a-vis its competitors. In certain situations, transformative change can leave an opening that can be exploited to garner dominant market share. Companies that are thusly situated are naturally motivated to seek a monopolistic market position, which can lead to supra-competitive monopolistic returns. It is challenging to try to change business models within an industry to curtail or solve for monopoly-seeking behavior. In the case of an industry that becomes dominated by a monopolistic entity, one possible approach might entail a coalition of competitors uniting their forces to garner enough collective market power to challenge and counter-balance the monopolist’s stronghold. (Note that on the one hand, the single dominant firm risks running afoul of antitrust laws aimed at monopolists; but on the other hand, the coalition risks running afoul of antitrust laws aimed at cartels.)
Alternative possibilities are presented by the open source movement. Under the open source philosophy, creative and innovative work is undertaken collaboratively, with rights of attribution and non-commercial rights of reproduction. Part of the point of open source production is to steer creative and innovative industries toward collaborative, shared production that runs counter to the kind of monopolistic tendencies that competitive markets can allow, if not encourage.

Equally fostering such creative openness is the Creative Commons, which has generated the Creative Commons License to allow creators to work without exerting complete control over their output and yet without fearing appropriation of their work for commercial exploitation or without proper attribution. These strategies share features that are drawn as much from changing the IP environment to changing business practices, and effectuate successful development of industries, firms and creative talent without necessitating competitive positioning or attempts to corner a market. Moreover, they can enable creative industry participants to launch challenges to dominant firms without requiring cartel-like behavior, litigation, or other sub-optimal practices and tactics.

7. Maximize Spillover and Network Effects

Spillover and network effects are positive externalities that tend to occur in richly creative areas that are rife with innovative industries (for example, Silicon Valley, or New York City). In these areas, innovation by a firm may leak out to others in its orbit, naturally subsidizing the productivity of other firms without direct governmental intervention. It is well-established that in these conditions the social returns to innovation exceed the private returns to any given entity. In part, this is because the benefits of innovation may spill over to other firms in ways that cannot be fully internalized. The level of these spillovers naturally varies by industry. Further, sector-

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194 The open source movement was spearheaded by the computer software industry, but now spans an array of other fields, as well as a comprehensive philosophy of collaborative and open source production. See Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom (2006); Lawrence Lessig, Free Culture: The Nature and Future of Creativity (2005); see also Andrew Orlowski, Lessig, Stallman on ‘Open Source’ DRM, Register (Apr. 15, 2006), http://www.theregister.co.uk/2006/04/15/lessig_stallman_drm.

195 This has arguably been an effective strategy in the computer industry, as demonstrated by an increasing number of companies that have turned to open source, non-proprietary software development to challenge the hegemony that had been long enjoyed by Microsoft.

196 See About, Creative Commons, http://creativecommons.org/about.
specific productivity is directly and positively related to the level of spillover. In other words, inherent "leakiness," both of practices and propertization within a sector, may have a positive effect on innovation in some but not all industries.

Changing business models when undertaken by a single venture is a strategy intended to maximize market position and its payoff in terms of revenue, and therefore is a competitive strategy that is not intended to enhance spillover and network effects. When undertaken by an entire industry, however, it may have a significant effect on the greater environment, leading to better or worse long-term outcomes.

One illustration of the differing effects that a changed business paradigm can have on the environment with respect to spillover effects arises when the industry-wide change is predicated on protecting core valuable properties and leaving open practices, resources, and know-how that are deemed non-essential. But a changed business paradigm that protects some properties and releases others may not ultimately enhance spillover effects. In the case of education, for instance, protecting core valuable properties appears to necessitate restricting access to degree-bearing programs to matriculating, tuition-paying students, while greater openness is granted to online MOOCs that are available for free to all interested learners. This dichotomy is premised, however, upon the increased propertization of the courses themselves, so that copyright in courses and course materials may protect the value of the teaching and the materials taught. In other words, by copyrighting courses, universities are trying to prevent free-riding by competitor institutions on the labor and output of their faculty. The changed business paradigm therefore necessitates a heightened IP strategy that newly cordons off course instruction and materials by placing them under enforced copyright protection. It can be imagined that such a development

197 In the computer software industry, for instance, companies jealously guard the source code that undergirds their valuable products and services (such as operating systems). At the same time, open source ventures are becoming increasingly common in the computer world, as industry participants come to value the resources, expertise, creativity, and collaborative problem solving that open and unpropertized work can accord the entire industry. In this case, spillovers and network effects arise because entire areas of innovation are left relatively free of property allocations (that is, they may be subject to a Creative Commons license, and therefore are subject to a property regime, but one that is not predicated on an ownership model), while other areas of innovation (such as specific source code, algorithms, business practices built around a proprietary system, and so on) remain appropriately protected. See infra Chapter 6, subsection II.D.2.
might have chilling effects on spillover and network effects, as faculty come to realize that their coursework may not as freely be shared within the community without some sort of rights-clearing occurring ex ante. In this case, then, the relative openness of academia becomes restricted by changing business practices (and their heightened IP corollary), which may have an adverse affect on the greater community as a whole.

C. What Are the Relative Advantages/Disadvantages to Changing Business Model vs. IP Level?

1. Business Model Advantages

The advantages that are inherent to the adaptation of business models, as opposed to other strategies for change (such as seeking enhanced IP protection, as shall be discussed below), are at once numerous and powerful. First, as noted, it is generally agreed that private ordering solutions are market-driven, and are preferable to solutions driven by external mechanisms, such as governmental intervention, legislative fiat, and so on. Second, it typically offers more flexible and industry-specific solutions that are highly granular, in that they can be structured to fit the needs of a company, a class of companies, or a given industry. In other words, the needs of the music industry may not be the same as those of the educational sector, and business model solutions can take those differences into account and be shaped accordingly. Third, business models do not usually involve the "one size fits all" model of IP entitlements, which are usually so broadly written and construed as to span many industries under one paradigm—such as the monolithic grant of copyright—rather than being shaped to fit the contours of any particular industry. Fourth, business model changes tend to be more flexible than alternatives, because such changes can be adjusted and readjusted in accordance with changing factors in the environment. As they do not tend to require external approvals, for instance from legislatures, governing bodies, administrators, and industry stakeholders, but are rather made on a case-by-case basis via the internal governance mechanisms of individual companies, business model decisions can be as adaptable or fluid as the companies involved are willing to allow. Finally, business model changes may be made through private arrangements within or across industries, rather than under the directive of externally imposed policy measures. The basis for industrial private ordering is
generally rational self-interest on the part of industry actors. Therefore, private ordering is a negotiated decision that must obtain the best possible results for each of the interested parties to be agreed upon and established. While policymakers may strive for such a utilitarian outcome, they may be hampered by information asymmetries, a lack of deep understanding of the industry, or the need to strike a compromise with outside stakeholders who may bring their own interests to the table. While these are not always negative considerations, they may impede the most effective response to change from the perspective of business concerns within the industry.

2. IP Advantages

Changing IP entitlements in a creative industry involves across-the-board measures that by definition are not privately ordered, open to negotiation ex post (that is, after IP measures have been put in place), or granular at a company-specific level. When disruptive innovation occurs within an industry, companies often hasten to devise counter-attacks that will secure their profit-making ventures. These efforts, as observed above, have the advantages of speed, customization, and responsiveness to the particular challenge at hand. In contrast, changing IP entitlements can entail a slow, laborious, and painstaking process of negotiating rights among stakeholders, persuading legislators and policymakers, establishing new practices and norms under the newly enacted system, and hammering out the details in the course of daily business.

Yet when disruptive innovation strikes or threatens, and market failure is imminent or indeed present, industries tend to clamor for changing IP entitlement allocations as a sure-fire solution. The equation is fairly straightforward: simplified, it posits that changing IP will increase the returns flowing from the exploitation of content owned by copyright holders. Most industry stakeholders call for more IP protection; some argue that more protection plus technological lock-ups (such as DRM) are required to stave off incursions from Internet-enabled activities that negatively affect revenues, such as widespread copying, dissemination, re-sales, and so forth. Despite the lack of granularity, then, changing IP entitlements as an industrial strategy remains an important tenet in the views of many creative industry participants.
Creative content industries that call for changes in IP policy and practice do have some good reasons for seeking recourse in legal solutions. That is, changing IP entitlements offers several advantages that may be preferable to the creative industries than changing business models. First, while the call to change IP may be wholly based in rational self-interest on the part of certain industry members, it may also appeal to a broader group of stakeholders than changing the business model might, as it is more likely to distribute its benefits and costs more equitably across the industry spectrum. As a policy decision that affects broad swathes of constituents, changing IP is likely to require ex ante negotiations that involve multiple parties, including groups that may otherwise be under-represented, such as creators and/or inventors, start-up or emerging ventures, and end users. Second, broadly implemented IP systems may comprise entire licensing systems, such as rights-clearing organizations, which protect the rights of creators but also allow access to their works on an equitable, and perhaps open, basis. In some cases, this may prove more widely beneficial than a changed business model that puts all creative work behind an impenetrable curtain of copyright. Third, IP systems may be promulgated or reinforced (for instance, by adding new layers of copyright protection to a product that has previously come solely under the purview of patent or trademark) as an alternative to imposing technological protections on creative output. In this case, for instance, stricter rules or enforcement with respect to copyright infringement might displace or reduce the need for enhanced DRM protection on some works. The caveat in this case, however, is that an industry may instead choose to pair heightened IP with strengthened technological safeguards, thereby doubly fencing in products behind two barriers to access. Fourth, changing IP systems is likely to require some allowance for openness of access and use, such as maintaining “fair use” exceptions to protections, or re-affirming the right to “personal use” of copyrighted works. These allowances may be more likely to arise when stakeholders other than copyright holders, such as follow-on creators, consumers, and social and/or political activists are able to represent the rights of end users and other parties that may not always be represented at the bargaining table when legislation is lobbied for, agreed upon, and eventually crafted.

There are four vital areas in which changing IP systems can prove more broadly beneficial than the alternative, changing business models, to a creative industry faced with innovation-driven change. First, the effects on the user and/or consumer are particularly important when the user is
herself actively engaged in creation, such that the lines between a creator and a user/consumer may blur. For instance, musicians have had a long and storied history of borrowing, reworking, remixing, and re-imagining the creations of their predecessors. Music copyright allows for this rich lineage of transformative borrowing by offering musicians the right to cover prior works, subject to a reasonable royalty fee. New technologies have expanded such borrowing, but in music, some of those creative endeavors have been curtailed, such as music “sampling” in rap and hip-hop genres. In fashion, however, creative borrowing by user/consumers remains unprotected, as does the original work itself. Enacting copyright protection of fashion designs could protect both the original work and the “cover,” thereby encouraging creative talent to bring to the fore new works that are inspired by, or that draw from, original works, without fear of appropriating without remunerating the original designer.

Second, changing IP may have major effects on consumers in cases where “secondary” production, such as knock-offs, generics and discounted products, give consumers access to products that they might not otherwise be able to afford. This may vary enormously from field to field, and naturally will be affected by the kind of changes to IP that are effectuated. In the fashion industry, for instance, one possible change might entail strengthening existing trademark protections to fortify anti-counterfeiting activities, while continuing to withhold copyright protection from apparel. These measures would allow original designers protection in their exclusive creative works, while allowing knock-offs to flourish and reach lower tiers of consumers for whom trendy clothes would otherwise be inaccessible. But changing IP levels in fashion and allowing copyright in apparel might yet allow knock-offs to survive, particularly if fashion copyright were formulated to carve out certain kinds of designs from protection—for instance, certain “looks” that have become part of the common currency, and that therefore are not likely to be deemed especially original—and further, if high-end designers were to continue

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198 See supra notes 191-193 and accompanying notes.
199 But technology has also expedited users’ creative borrowing in other fields as well. In online activities, for instance, many users find that access to creative written works gives them a platform from which to launch creative writing of their own: fan fiction, political commentary, blogging, commenting and other activities all attest to the inspiration that online writing can extend to the greater community. Similarly, Open Source activity allows users to share innovative projects, to have access to the works of others, to contribute original work, and to be engaged at once as user and as creator. See infra Chapter 6, Section IV.D.
200 See generally supra Chapter 1.
to knock off their own works with a view to penetrating lower-tier retail markets. There are analogies to be drawn from the realm of patents as well. In the case of education, “secondary” production might entail the creation of MOOCs, which offer full courses to interested learners at little or no cost. Changing IP might entail protecting the courses taught by university faculty, whether online or in the real space classroom, under copyright, in order to prevent wholesale appropriation of the creative work by third parties, such as third-party providers and other competitors in the MOOC space.

Third, changing IP can help to maximize spillover and network effects. As suggested by various studies on spillovers, positive externalities can be created in some industries when innovation by one firm leaks out to other firms, naturally subsidizing their productivity without external intervention. While there is marked variability among industries in the patent context, spillovers in the creative context is arguably more likely to be positive, due to the nature of creativity that almost invariably involves borrowing, sharing, exchanging, and inspiring among generations of creators. In creative industries, as in the patent context, there is also the potential for cumulative innovation, which can contribute to and advance industry-wide productivity as well. Changing IP can have a significant impact on such cumulative innovation, particularly when it addresses employee mobility and knowledge portability. In these regards, changing IP must take into consideration the greater context of the creative industry, as well as the landscape in which they are embedded, to maximize industry-wide returns.

Fourth, changing IP can be effected in ways that contribute to vital societal interests, needs and goals. For instance, encouraging robust online participation, production, and user-based inputs serves to enrich democracy and advance the free speech of public citizens through open and equal exchange in the “marketplace of ideas.” Further, increasing the availability of cultural and

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201 In the case of generic drugs, changing IP might entail reducing the span of protection on patented drugs, so that consumers might have greater access to expensive medication. Another possibility might be to carve out certain markets that cannot afford to pay for expensive medication that is on patent, either by reducing costs, allowing some companies to reverse-engineer the drug and manufacture it in limited quantities, or create cross-licensing opportunities with countries in markets that cannot afford to purchase the drug at its full price.


203 See generally Bar-Gill & Parchomovsky, supra note 186; Bar-Gill & Parchomovsky, supra note 187.
intellectual resources, such as news and information, arts, books, and so on, serve to enrich the public and to fortify the public domain. And finally, improving access to education and knowledge by offering MOOCs, Open Source courses (such as MIT’s OpenCourseWare), as well as enhancing open access scholarship and publication, serves to educate and inform the citizenry. These goals may seem too lofty to be achieved simply through changing IP entitlements. But by shaping IP in the creative industries with measures that protect critical business interests yet at the same time keep in mind the need to advance greater social aims, IP allocations may have a profound affect on the well-being of creative industries, consumers and the public.

IV. SOLUTIONS: CHANGING IP

Several questions arise in the course of reconsidering IPR allocations, which must be addressed in order to determine how creative industries responding to disruptive innovation can optimize the balance between changing IP entitlements, on the one hand, and changing business models, on the other hand. These questions, which will be addressed below, are as follows: (i) What can IP do?; (ii) What can more/enhanced IP do?; (iii) What’s wrong with more IP?; (iv) What about eliminating IP?; (v) Does IP commodify things? (and should we be worried if it does?); and (vi) Are there other, more effective ways to calibrate IP?

A. What Can IP Do?; What Can More/Enhanced IP Do?

1. Create a Market

Changing IP entitlements, such as implementing a copyright protection scheme in a low-IP creative industry, offers a classic solution to market failure brought about by transformative or disruptive technological innovation. In cases where new technologies threaten to diminish the value of industrial output, extending or expanding copyright protection in creative works may create, reinvigorate, or reinforce the market in those works. Basic copyright theory posits that this occurs because creators know they will be compensated for their creations, and thereby have
ongoing incentives to create. In the case of fashion, for instance, it is argued that imposing copyright protection on original design will protect such works against rampant copying, which generates sales of knock-off items that undermine the value of the initial exclusive works.

2. Manage Rights Metering via Licensing Organizations such as Pros

In a changing environment, the enforcement of IP entitlements can ensure that revenue streams, including royalties, licensing fees, and other payments for the use of copyrighted works, continue to support the viability of creative businesses. Rights-clearing organizations such as performing rights organizations (“PROs”) allow the management of licenses, whether individual or collective, to be centrally administered, streamlined, transparent (that is, everyone who uses them can understand and see how they work), and to contribute to parity among disparate participants and users of the system (for instance, individual creative artists versus larger entities, copyright holders versus users, and so on). Compulsory licensing via clearing houses or PROs can regulate the flow of copyright-protected work. On the one hand, it can ensure that royalties get paid to copyright holders whenever a work is accessed or used. On the other hand, it can ensure that work is available to follow-on creators or artists for access or use. In the case of music "covers", for instance, an original artist may have copyright in her work, which gives her the rights to record and perform her work. (Often the representative record label with which she has signed may actually retain the copyright, but the principle and the outcome remain the same.) However, a secondary artist may record or perform her copyrighted work, contingent upon paying royalties to the primary artist for such access and use.

In a digitized economy, the very real possibility of “slippage”—that is, access and/or use of creative works that are not accounted for, metered, or compensated—can challenge an artist’s livelihood or an industry’s vitality. Metering may offer a pragmatic solution enabling copyright holders to register each occurrence of access and use of a work and to levy fees accordingly. Such metering works best when mechanisms, often technological in nature, can be positioned at the point of interaction between user and device, and thereby to count and charge for each

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\(^{205}\) See supra Chapter 1.
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discrete transaction. Metering may be combined with technological protection, such as DRM, to further ensure that access and use of copyrighted works only occur licitly, with due compensation, and in accordance with the directives of the copyright holder. However, the combination of metering and DRM may stifle uses that had historically been permitted, such as personal use on individually-owned devices (as discussed, for example, in the Betamax case\(^\text{206}\)), and may prove so burdensome to users that the lock-up becomes increasingly unpopular with users and ultimately rejected by the greater user base. Further, one distinct advantage that metering enjoys in comparison with protections such as DRM is that metering allows device interoperability, while still ensuring that copyright holders are appropriately remunerated. In a changing business environment, the ability to remain flexible, and the option to adapt one’s products and services to mesh with state-of-the-art advances in the field, may prove invaluable to a copyright holder seeking to disseminate her work to the largest possible paying audience.

Metering may benefit the creative industries, but even to copyright holders and their representatives it may become more convoluted. The case of music in the digital age—when music is increasingly being created, distributed, accessed and consumed online—is illustrative of the complexity that the metering of IP entitlements may occasion. Digital music is disseminated via three main sources: (i) peer-to-peer file sharing networks, such as BitTorrent; (ii) online music stores, such as the Apple iTunes Store and Amazon.com; and (iii) online music streaming services, such as Pandora, Spotify, and Rdio. All three avenues for music sharing follow a basic model of disaggregating digital music tracks (that is, discrete songs rather than compiled albums) and disseminating them singly. There, however, the resemblance ends. In the first case, music is shared directly among users, and disaggregation of the online music files renders metering functionally impossible. Even if certain occurrences of file sharing are licit via this method (as, in a parallel drawn from earlier practices, sharing a mixed tape for personal use among friends might once have constituted licit sharing), they cannot be metered, and therefore this entire system of music file sharing bypasses compensation to the copyright holder altogether. In the third case, music is streamed directly to the listener via an online service that is closely analogous to broadcast radio. Here, metering follows the model of traditional radio, and performance royalties are paid by the broadcaster to compensate the copyright holder. In the

second case, as previously discussed, digital tracks are sold on the music sites, following the model of earlier bricks-and-mortar record stores, and the price of each work comprises the standard per-song royalties to the copyright owner.

In the digital music universe, however, it is not merely the choices for music delivery systems that are changing, but the choices for music distribution to those delivery systems that are changing as well. In other words, creative artists are beginning to use digitization to bring their works directly to these venues, and in some instances to bypass the traditional middlemen, such as record labels and agents. The role of PROs in this regard takes on a newfound significance, but one that is decidedly complex. On the one hand, musicians and composers can take advantage of PROs to ensure that they are duly compensated for their work. The clearing houses do not require the input of record labels or agents to function, and therefore are likely to prove a valuable and cost-effective mechanism to artists seeking remuneration for their creative work. Moreover, the largest music PROs, BMI and ASCAP, are expanding the range of benefits they offer artists, such as informational workshops on copyright, rights management services, and so on, which can contribute to securing artists' rights and royalties. On the other hand, PROs may become less critical with respect to sound recording rights and more important with respect to live performance rights if digitization effectively reduces revenue streams in online music and compels artists to look to live performance for a greater share of royalties. As these kinds of shifts occur, middlemen such as record labels and agents may become newly deputized to manage performance rights, related royalties and licensing fees, and to oversee the metering that PROs offer the individual artist who is increasingly making her living from live concert performances. Thus, rather than rendering the middleman obsolete, the PROs may come to reinforce their centrality to copyright clearing processes and returns. At any rate, digital music is likely to require mechanisms that uphold artists’ rights and returns in the face of swift, widespread, and potentially detrimental copying. To defend artists’ rights and rewards, PROs will be required to continue to offer a consistent, transparent, efficient and relatively straightforward mechanism for the continued clearing of rights. This may prove useful when new sources of revenue open up via newer technologies, such as online music streaming, ringtones, video streaming (with music as a part of the video) and other as-yet unforeseeable uses of music on the Internet and related technologies and devices.
3. Support New Business Solutions, Including Disaggregation, Price Discrimination, and Distinctions Between Valuable Assets

Digital technologies provide both producers and users with the tools to disaggregate creative content, that is, to break it into components that can be accessed uniquely or sequentially. The music industry demonstrates the indelible impact of content disaggregation on an entire industry. IP entitlements serve a critical purpose in the wake of the digitization, and concomitant disaggregation, of creative content, as they ensure that content usages will be metered and compensated. First, this is of course paramount to creators who must be remunerated for the work they have created, and to copyright holders who are owed royalties for their rights. Second, it is essential to reassure creative content companies that they can safely partner with online streaming services, secure in the knowledge that the work they release will be monetized and that royalties will be duly assessed and collected. And third, it helps to assure advertisers that services offering such content are legitimate, attractive to consumers, and viable.

207 Music is only one of the earlier manifestations that can be found among the creative fields. In television, for instance, cable television stations typically offer bundled programming to consumers, and by grouping together a cluster of networks are effectively able to subsidize the costs of less popular networks with the revenues from more popular networks. Similar clustering occurs on a more granular level when multiple television programs are bundled together on a given network, enabling the greater viewership to support the lesser ones. Since its inception, the cable television industry has relied on bundling as a means of marketing packaged networks (and the varied programs they offer) to consumers at a spectrum of price points, ranging from “basic” to “premium” services that vary according to the popularity of shows carried, the quality of broadcasting (historically, at least, high-definition resolution was offered at a premium), and other features. See generally Haley Sweetland Edwards, Cable Industry Frets Over Future of Your Television Bundle, TIME (Apr. 30, 2014), http://time.com/82416/cable-industry-frets-over-future-of-your-television-bundle. The cable industry rationalizes its price discrimination on grounds that consumers can choose between services and pay only for the programming they prefer; and although consumers may be obliged to pay for certain products that they might not choose, they can indirectly support less mainstream or niche markets, thereby helping to ensure that cable television programming remains well diversified. Id. Digitization, however, has proven a disruptive innovation in the cable television context, as the rise of online video and television streaming services, such as Hulu, Netflix, and Amazon, permits end users to disaggregate the offerings that cable television networks, as well as their counterparts in mainstream broadcasting, and to consume them on an individuated basis. Id. Thus, for instance, rather than being compelled to purchase a bundle of network programming, a consumer is able to purchase, access, or view the specific television program, series, or even episode that she selects. And while this content may be re-aggregated, as in the case of subscription services offered by Netflix and others, the ability to choose how much content to access and use is newly placed in the control of the end user.

208 Again, this is equally relevant to cable and television.
business entities. In the absence of IP, these online services would more closely resemble file sharing sites such as Napster, which would potentially signal that at least some amount of the content disseminated might be illicitly disseminated. Advertisers might well be unwilling to place their advertisements and to expend their resources on potentially illicit websites, and thus might shun online streaming services altogether. Advertising, however, is critical to the ongoing viability of such services, particularly those which receive only a limited share of revenues from subscription services, as is the case with the majority of online music streaming services such as Pandora, Rdio, and others.\footnote{In parallel fashion, online streaming services for film, cable and television content also rely on advertising, as in the case of Netflix. See Michael Lindquist, \textit{Ads on Netflix?}, \textsc{Talent Zoo}, http://www.talentzoo.com/beyond-madison-ave/blog_news.php?articleID=13689. Netflix has the rare model in which robust subscription services can somewhat alleviate the pressure to maximize advertising returns. \textit{See id.}} The understanding that IP protects online creative content serves as a guarantee of value allowing advertisements to appear on online streaming websites and thereby to effectively underwrite the online endeavor.

The digitization of education is giving rise to a disaggregation of content that might conceivably revolutionize the sector. As discussed earlier, institutions that break down instruction into discrete online courses, which can be consumed singly or multiply, are engaging in a radical disaggregation of educational content. By establishing copyright in courses, educators can emphasize the importance of propertizing these instructional units and assigning IP entitlements to their copyright holders. Asserting copyright in the courses serves several purposes: (i) it creates a market in individuated courses, rather than in the more traditional unit of educational value, the cumulative degree; (ii) it empowers institutions to be remunerated by collecting royalties flowing from copyrighted courses; (iii) it sets the terms for employee mobility and knowledge portability; and (iv) it differentiates between academic products, the modular online course versus the sequential classroom courses leading to a degree.

Digitization is not only segmenting educational content, but it is also affecting the value accorded by educators (and, consequently, student-consumers) to distinct components of disaggregated content. Pursuant to copyright law, copyright holders in courses are free to exercise their right to charge for performance of the courses, or conversely to offer the courses
free of charge. In the case of online education, the MOOC course unit has been assigned a zero value by institutions entering the online space. Educators may be pursuing various strategies by offering MOOCs for free. First, they may regard MOOCs as loss leaders that attract a host of learners to the educational space. This could serve two purposes: (i) to draw some learners into the pursuit of a degree at the traditional institutions that are acting as MOOC providers; and/or (ii) to draw learners into the MOOC space, and eventually to secure their consumption with a view to monetizing MOOCs and related programs, services or products in the long run. Second, educators may view MOOCs as experimental forays into the online learning environment, and may wish to conduct an array of pedagogical ventures without risking loss of their core products (that is, courses, instruction, and materials) to competitors. Propertization in this case would serve as a kind of insurance policy, ensuring that appropriation of online educational work product could not be made without some right of recourse (although economic harm and damages might be an open question, given the currently cost-free pricing of MOOCs).

The third strategy that educators may be venturing is speculative, but may be aimed at much longer-term payoffs. That is, by copyrighting courses, educators can signal that propertized instructional units, as well as related materials, function as a commodity in the educational marketplace. It is arguable that traditionally courses serving as part of a degree program in a university also served as a kind of commodity, or a component of the commodity of an academic degree (for which a price, tuition, must be paid). But educators can underscore the commodity value of MOOCs by several means: (i) by extracting courses from the traditional university setting and offering them online; (ii) by asserting copyright in online courses, offering them online on a stand-alone basis; (iii) by pricing them as separable units (whether the price is free or not is immaterial); and (iv) by establishing a market in MOOCs that vie with competitors in the online educational arena. Importantly, the commodity value of the MOOC is distinguishable from the value proposition of traditional education. In the case of MOOCs, the value of the course lies in online instruction, training, and the intermediated online learning experience. In the case of traditional education, the commodified package is more broadly limned, and includes an entire curricular course of study leading to a degree, as well as many intangible goods, including face-to-face classroom instruction, live student interaction in the classroom and on campus, and the entirety of the student college experience. The distinction between the online learning
experience and the live learning experience is, roughly speaking, analogous to the difference in 
music between a recorded performance and a live concert experience.210 As in the case of music, 
educators may choose to differentiate between online and real space instruction, to value them 
differently, and to consider them completely separate revenue streams (whether actual or 
potential). Also as in the case of music, educators may view the MOOC as offering limited 
returns, relying instead on the live university experience as the more significant source of 
revenue. In both cases, then, it is paradoxically the intangible elements of the experience—live 
interactions, lived experience—in which the value of the creative content inheres.211

B. What Can More IP Do?

1. Increase Revenues that You Can Extract from Your Copyrighted Material

Copyright holders usually agree that they lose out on some rents—that is, returns that would 
otherwise be reaped from exploitation of their copyrights—when certain unremunerated uses are 
permitted by copyright. Often the case is made that copying material for personal use—for 
example, when an individual copies a music CD to use on multiple devices—has long been

210 Although MOOC interactions are live, and not merely recorded, they are technologically 
intermediated, may be asynchronous, and may not involve direct interaction between instructors and 
learners.
211 It is not in music and education alone that commodification of creative content can paradoxically 
depress the value of work product (if indeed the product has marketable value), particularly when 
disruptive technologies facilitate the process of producing and disseminating the work, but can promote 
the value of the live experience in which the product is embedded. Copyright can contribute to the 
monetization of content and experience, but it is not always a requisite feature. In the case of 
photography, technology has greatly lowered the costs associated with taking, perfecting, copying, and 
disseminating photographs (among other activities), and in most cases has minimized the value of the 
photograph as a commodity per se. At the same time, technology has enhanced many experiences that 
may be associated with photographs, particularly online experiences such as posting, sharing, exchanging, 
and commenting on personal photographs. Many companies are beginning to find ways to monetize the 
experiences associated with photography, including websites such as Pinterest, Instagram, and Shutterfly, 
which allow photographers to display their works, to interact with one another, and to participate in a 
virtual community of photography enthusiasts. While some users of these websites may assert copyright 
in their original photographs in order to protect the creative value of their endeavors, it is more likely that 
copyright functions, if at all, to prevent outright appropriation of images (and perhaps of the users’ 
privacy rights) than to allow monetization of the creative content. Rather, it is the experience in which 
value inheres, and which may prove profitable to the enterprises that are able to facilitate, exploit, and 
support the live experiences enjoyed by the creative community.
deemed permissible by copyright law. In the digital era, however, such copying may be seen by copyright holders as problematic. The argument of copyright holders is twofold. First, they argue that recorded content may be used for potentially illicit purposes, such as widespread dissemination that undermines actual licit sales of the creative content. But second, they argue, even if the copying is licit, the user may make copies for multiple uses to an extent that deprives the copyright holder of significant returns.\footnote{This argument may contravene the first sale doctrine, but attempts have been made to reconcile it with the doctrine among creative content producers and copyright holders. See Jessica Litman, \textit{Lawful Personal Use}, 85 \textit{TEX. L. REV.} 1871 (2007).} Increased copyright, therefore, might entail requiring payment for each and every occasion on which an individual gains access to, uses, or copies a copyrighted creative work.

2. \textbf{Increase Revenues by Allowing Creative Works in Low-IP or No-IP Regimes to Be Copyrighted, and Protect Emerging Creators in Those Fields}

In creative industries that historically have been extended little or no IP protection, the argument for imposing IP entitlements is threefold: (i) in a world of extensive, inexpensive, and increasing copying, the value of original works can be protected, exploited, and sustained; (ii) emerging creators will particularly benefit from copyright protection, as their work is the most likely to be copied, they are the least likely to be able to thwart copying without the legal mainstays that formal IP protection extends copyright holders; and (iii) the administration of a formalized licensing system will allow licit use and re-use, transformative work, and other acts of creative borrowing and interpretation to occur widely but with due remuneration to original creators.

These are among the arguments put forth by proponents of copyright in the fashion industry, who argue that rampant copying is undermining the business models of original designers of haute couture as well as newly emerging independent designers. While trademark protection may inhibit some amount of copying of elite fashion design (not only brands and logos, but also the recognizable “look and feel” of haute couture), the brands and logos of emerging independent designers are not likely to deter potential copyists from knocking off their work. One problem that has been raised, however, is the creation and administration of copyright in a field that has existed for many, many generations, and that has been richly creative in so many aspects that it is daunting to imagine how newly creative works could be identified, registered, administrated, and
otherwise protected. Fashion copyright advocates, however, may point to the successful operation of licensing agencies, such as collective rights organizations in music and other creative sectors, and may argue that such agencies have been well-developed to address and master just such challenges, and are therefore well-able to administer rights efficiently and with minimum transaction costs.

C. What’s Wrong with Just More IP?

1. Changes Balance of IP/Public Domain; Or Changes Balance of Rights Between Copyright Holder and Consumer

Some commentators argue that historically a balance has been struck between IP and non-IP spaces, such as fair use, public domain, and gray areas that were left alone such as “personal use.” They further argue that by increasing IP protections—whether length of time, scope, or other measures—the balance is reneged upon without due consideration and buy-in by all stakeholders, including users, emerging creators, the general public, and others who are usually under-represented by lobbyists and legislators. But such personal use is only one aspect of the important bundle of rights that many legal scholars consider to lie at the heart of copyright and creativity: that is, “users’ rights” as a whole. Advocates of users’ rights argue that expansions in IP in the creative content industries are significantly disruptive of balances of rights between copyright holders and consumers, and further fail to recognize or make allowances for the blurring of lines between these parties.

213 See generally Litman, supra note 212, at 1909.
214 Jessica Litman argues that personal use has been left out of the discourse of copyright law deliberately and perniciously: “We are in danger of obliterating lawful personal use because we’ve been pretending that it isn’t there.” See id. at 1903
215 See, e.g., Glynn S. Lunney, Jr., Fair Use and Market Failure: Sony Revisited, 82 B.U. L. REV. 975, 977 (“With the development and dissemination of digital technology, the importance of private copying and its legal status, whether fair or unfair under copyright law, has only increased.”).
216 It should be noted that not all legal scholars, naturally, are advocates of users’ rights. One prominent opponent is Jane Ginsburg, who argues that “people who read, watch movies, and otherwise use copyrighted materials are merely ‘consumptive users’ and not active or creative participants and thus don’t merit special attention by copyright law or policy.” See Jane C. Ginsburg, Authors and Users in Copyright, 45 J. COPYRIGHT SOC’Y U.S.A. 1, 15 (1997). Ginsburg also argues that users encroach upon authors with their claims to rights, and thereby challenge creative production, observing that “the
First, according to a major advocate of users’ rights, Jessica Litman, users are perforce a broad category of the freedoms that users have in creative works, including “creative and imaginative behaviors such as reading, listening, listening, watching, and playing [which] further copyright’s goals.” These rights inhere in the array of copyrightable works, including those that are more recently emerging, such as digital creativity and production. Moreover, such rights are culturally embedded, necessitating the freedom for users to engage with culture or, as one leading commentator, Julie Cohen, puts it, to be involved in processes of “working through culture” that are “irreducibly contingent,” or ever-changing in response to the relations that the user and the creative material eventuate. Expansions of copyright can occur at the expense of these important user freedoms, and may precipitate even greater incursions on copyright’s balancing act by neglecting to recognize the user altogether.

perspective of user rights, albeit important, should remain secondary. Without authors, there are no works to use.” See Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”: Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM L. REV. 1466, 1468 (1995). This is not, however, the position taken by this paper.


218 As Litman puts it, “[t]he tendency to see music listeners, art viewers, television watchers, or videogame players as less deserving of copyright’s solicitude than book readers, though, strikes me as misguided. We’ve made the choice to give authors of music, art, television and video parity with writers of books in the rights conferred by the copyright system. If we believe that these works merit copyright protection, it should follow that we value opportunities to experience and enjoy those works enough to assure the reasonable freedom to take advantage of them.” *Id.*

219 Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1179 (2007). Julie Cohen describes the relational interplay between users and creative works in the cultural landscape: “[T]he cultural activities of situated users take place within a web of semantic and material entailments. One cannot simply step out of or around the resources, values, and absences within her own culture, but must negotiate one’s way through them, following the pathways or “links” that connect one resource to the next. This process, which I will call “working through culture,” is irreducibly contingent. It moves in patterns that are both (and sometimes simultaneously) recursive and opportunistic, and supports an understanding of creativity as relational at its core.” *Id.*

220 As Cohen describes the condition: “Copyright doctrine, however, is characterized by the absence of the user. . . . [This] absence produces a domino effect that ripples through the structure of copyright law, shaping both its unquestioned rules and its thorniest dilemmas.” Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 347-48 (2005).
Second, Litman and other legal scholars, such as Rebecca Tushnet, Julie Cohen, or Larry Lessig, feel that the expansion of IP in creative content industries can drastically affect the relational interplay between users and creative works, particularly when the user is actively engaged with such works in ways that can themselves contribute to the creativity that lies at the heart of copyright law and policy. In this respect, the “situated user,” as Cohen puts it, “should be left untrammeled by unduly expansive copyright restrictions, which perhaps (or seemingly) paradoxically will serve to further copyright’s goal of encouraging creative production.”

“These user activities include creative remixing,” which is merely one point on a spectrum of uses of creative work that are encroached upon and threatened by expansions in copyright. Other forms of creative interplay between the user and creative materials are also able to thrive when copyright is kept suitably at bay, as Lessig points out, and are able to flourish in a “hybrid economy” that leaves ample room for spontaneous user generation of creative materials that may be inspired by, or draw from, earlier cultural output.

Third, some commentators argue that by the increasing metering of creative works due to expansions of copyright is liable to encroach upon historically established freedoms of users to enjoy such works with broad liberties and without undue payment requirements. For instance, Lawrence Lessig, a powerful advocate of users’ rights, argues that the interplay of creativity and users has always been liberally granted and largely accepted as free and unfettered. On this line of argument, as articulated by legal scholar Joseph Liu, the fundamental nature of copyright law is distorted by overly expansive IP: that is, “[a]fter all, the overall purpose of the Copyright

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221 See, e.g., id.
222 Id. “Users play two important roles within the copyright system: receive copyrighted works, and some users become authors….This essay introduces a new character, the situated user, who engages cultural goods found within the context of her culture through a variety of activities ranging from consumption to creative play, and whose activities are the vehicle through which copyright’s collective project is advanced.” Id. at 348-49.
223 Litman expresses it eloquently: “As digital tools enable audience members to interact with works of authorship in different and interesting ways, any sharp distinction between passive consumption and creative remixing dissolves into a spectrum of different ways of enjoying works.” Litman, supra note 217, at 350.
224 Lessig points out that this is undeniably a trend toward “remix” culture: “it is no surprise that other forms of ‘creating’ [such as remixing] are becoming an increasingly dominant form of ‘writing’.” LESSIG, supra note 24, at 69.
225 As Lessig contends, “[c]reators here and everywhere are always and at all times building upon the creativity that went before and that surrounds them now. . . . No society, free or controlled, has ever demanded that every use be paid for.” LESSIG, supra note 194, at 29.
Chapter 4: Analysis

Act is not to reward authors for authors’ sake, but to reward authors to benefit consumers and society more generally.”226 The strongest claim on this view, as expressed by commentator Glynn Lunney, is that a broad array of uses should be permissible to users so that their rights and liberties can be preserved without intrusive or burdensome expansions of rights in creative works. Lunney goes so far as to argue that only when users undermine creative production that copyright may step in and curtail or meter their activities. Or as Lunney contends, “unauthorized copying, again unlike theft, becomes socially undesirable only when it goes so far as to threaten the public’s interest in an adequate supply of creative works.”227

Fourth, some commentators argue that re-calibrating the balance between creators and users by expanding or tweaking copyright may have an unwarranted and indeed unwanted effect on the very nature of works that are generated in various creative content industries. One leading commentator on users’ rights, Neil Netanel, argues that “an expansive copyright law will tend to diminish the creation and dissemination of additional works and lead to a clustering in already popular genres.”228

Fifth, and lastly, it is arguable that creative content industries have moved from a predominantly sales-based model to a licensing based-model, and that consumers have been moved from ownership to licensing status with respect to the creative goods they consume. This, it may be argued, is itself a critical change that has been made unilaterally and without the informed consent of the customer. Moreover, it has real implications with respect to the consumer’s interaction with, and control over, the creative content she has selected and paid for. The right and ability to copy, share, sell, or repurpose licensed material is significantly different than those attaching to purchased material. And when licensed material is further restricted by technological lock-up, such as DRM protection, the rights of the user may be materially changed. This again changes the balance of rights between the copyright holder and the end user, yet only the rights holder can be seen to have the unilateral power to make such a reconfiguration to occur.

227 Lunney, supra note 215, at 983.
228 NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 135–36 (2010).
In the case of music, for example, electronic device manufacturers singlehandedly issued limits on the number of times a downloaded work might be copied onto a user’s personal devices, curtailing such personal use without notice or user buy-in. Further, record labels imposed DRM protections on music CDs and digital tracks, preventing even licit copying by users who had legitimately purchased musical works. And the industry began to bring copyright infringement actions under the stringent Digital Millennium Copyright Act (“DMCA”),229 thereby challenging users to explore even the boundaries of fair use, personal use, and non-infringing use of musical works. Together, these measures could be seen to change the balance between IP rights and users’ freedoms without securing even a modicum of user consent and approval.230 These are arguably incursions on “lawful personal use,” as Litman calls it, and thereby illustrate one set of challenges that expansive copyright law can pose to users and consumers.

But the example of music also reveals incursions on users’ rights to creative freedoms in the works that they lawfully obtain. For instance, the rights of users to creatively use musical works has been challenged by restrictions on “sampling” music in remixs, mash-ups, and other new forms of musical composition that have been facilitated by digital technology.231 Further, users’ rights to gain access to short snippets of music, and to weave them into their creative works, has been hampered by onerous licensing requirements that whittle away at their ability to use even the shortest of melodies, chord sequences, or musical fragments without being subject to metering mechanisms and royalty requirements. This may prove particularly onerous to smaller, independent creators with limited budgets, thereby creating a market that favors large-scale productions and, as Netanel suggests, may thereby have an impact on the caliber, scope and nature of the original musical work being composed today and in the future.232 Finally, the

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230 In the case of literature, electronic books or “e-books” point to another copyright-related concern. As in the case of digital music, e-books are copyrighted and actually licensed to users, rather than sold (although the term “sold” is often used as short-hand to describe the transaction), pursuant to the terms of a licensing agreement. This represents a dramatic but often overlooked shift in the treatment of such creative works altogether, as the original sale of books and CDs, respectively, were indeed actual sales that conferred ownership rights in the property on the purchasing consumer. The licensing involved in the case of e-books raises important questions with respect to the first sale doctrine (which will not be addressed in this paper).
231 See supra Chapter 3, Section II.A.
232 See supra note 228 and accompanying text.
expansion of music copyright is increasingly challenging new kinds of creativity, such as performance arts and multi-media works, which often rely upon access to a broad swath of creative works in order to build layered, collage-like pieces that offer a kind of cultural tapestry built upon many contributions, inspirations, and artifacts. Again, this can affect the kind of work being produced, as well as the access that creative multi-media artists are afforded to their baseline materials. It is possible that an expansive reading of fair use may protect some of these works. But fair use has historically proven to be a tricky point of repose for creative endeavors, and may not prove adequate in the face of expansive copyright and aggressive defense of IP rights and royalties on the part of empowered copyright holders in creative works.

2. Locks Up Too Much so that Follow-On Innovation May Be Choked Off

Adding or reinforcing IP in creative industries can run the risk of incentivizing companies to create locked, segregated ecosystems that thwart follow-on innovation or interoperability with other products, devices, or entire systems. In a competitive market, this risk can also arise when companies change their business models to respond to a changing environment, with the aim of gaining a competitive advantage that can effectively corner market share and thwart potential encroachments by competition. But changing business models are continually subject to competitive pressure arising from industry innovations; and even in cases where a company seems to enjoy a quasi-monopolistic position, the eventuality remains high that such a position will not remain fixed in the long run.\(^{233}\) In contrast, adding or reinforcing IP can institute a systemic change that (i) is externally imposed (by legislative fiat, for example); (ii) operates across a broad swathe of the sector (for instance, affecting an entire class of creative producers and/or copyright holders within an industry); (iii) may be additionally fortified by technological lock-ups, such as DRM protections; and (iv) is fixed and therefore may be less susceptible to external competitive pressures.\(^{234}\)

\(^{233}\) The computer industry is rife with examples, such as the case of Microsoft, whose operating system dominated the market for several decades (its hegemony has arguably diminished considerably in recent years, but many argue this is due in part to antitrust lawsuits and other exogenous factors).

\(^{234}\) In an innovation-driven industry such as computer software, the effects of propertization on software products are discernible and ongoing. In the United States, software copyrights are used by proprietary software companies, such as Microsoft, Sun Microsystems, and so on, to prevent the unauthorized
3. Can Undermine a Constructed Commons

Increasing IP entitlements can create a propertized system that regulates the flow of creative work as well as the revenues and rights that attach in such work. At the same time, however, it can displace more tacitly agreed-upon arrangements that have been made within the context of a copying of their products. The proprietary nature of software is reinforced by statute, as software is expressly included under the protection of the DMCA (which criminalizes the illicit evasion of copy protection in those properties in its purview). Many software products are also protected by various anti-copying technologies. As in the case of other copyrightable products, copyright for computer programs prohibits not only literal copying, but also copying of "non-literal elements," such as a program's structure, sequence, and organization. See generally Copyright Registration for Computer Programs, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/circs/circ61.pdf. Taken together, this array of protections allows commercial developers of proprietary software to safeguard their products against competitive inroads, as well as against unfair competitive practices such as reverse engineering software in order to reproduce and appropriate its essential source code. At the same time, however, these measures allow software companies to create closed software systems that compete against one another and that may not be interoperable without the operation of expressly designed cross-licensing arrangements. The complexity involved in negotiating such arrangements may not be cost-effective, particularly in markets that are fast-changing, with little certainty as to which operating system or software products will rise to the top. Further, there is little incentive to promote interoperability, as creating a proprietary software system that dominates the market may lead to supra-competitive rewards (that is, rewards flowing from a monopolistic market position), thereby incentivizing competition rather than collaboration. For these reasons, follow-on innovation can be impeded by extending IP protection to computer software, leading to the dominance of a handful of companies at the expense of newer, more emerging companies that may not be able to establish a handhold in the closed ecosystem that is maintained and controlled by the industry giants.

The negative ramifications of proprietary software were recognized early on by innovative software developers, and gave rise to the “free software movement” arising as early as 1983, under whose auspices the GNU General Public License (GNU GPL) was developed. See The History of the GPL, FREE-SOFT, http://www.free-soft.org/gpl_history. In 1998, the open source movement broke off from the free software movement, but at the heart of both movements lies the basic principle that software developed openly, and free of proprietary constraints, promotes innovation, sharing and cooperation, and increases digital and social freedoms. See Richard Stallman, Why Open Source Misses the Point of Free Software, GNU OPERATING SYS., https://www.gnu.org/philosophy/open-source-misses-the-point.html. The myriad goals, directions, and innovations that free and open source software movements embrace are beyond the scope of this paper. But they represent a compelling push back against certain restrictions and conditions that proprietary software has imposed on its products, consumers, and follow-on innovators, including (i) preventing innovators from reverse engineering source code, even with the aim of adding improvements or modifications; (ii) requiring end users to comply with system-wide controls, such as mandatory upgrades; (iii) requiring users to divulge personal data, at a cost to their privacy and/or security; (iv) preventing users from copying software onto multiple devices (even those they may own), from sharing software, or from making copies for any reason (even potentially licit reasons); and (iv) thwarting follow-on innovators from creating additions, applications, and other useful inventions without first entering into licensing agreements with the software copyright holder.
constructed and established commons. In the classic case of commons delineated by Ellickson and Ostrom, for example, negotiated rights are struck among parties who share a common resource, such as a grazing land or a pool of water, and the behaviors and norms of the parties are mutually agreed upon and adhered to without resort to externally-imposed and administered mechanisms. Imposing an IP regime upon a constructed commons may seem at first glance merely an act of reinforcement, a kind of “belt and suspenders” protection that operates as an ancillary support in changing and turbulent times. However, it can be more pernicious, undermining the agreements that have been struck and that sustain the operations of a group of actors or an entire industry.

This challenge may prove especially dramatic in fields that have strong normative parameters, and that rely on an array of non-material incentives, rewards, and indirect emoluments to buttress the compensation accorded to creative individuals or entities. In both education and fashion, for instance, rewards such as reputational benefits, grants and prizes, peer recognition, and so on may serve as either substitutes or supplements to monetary compensation for creative work. If that work becomes propertized, however, reliance on the mechanisms of non-monetary rewards may become attenuated or incidental. In education, this may mean that a scientific researcher chooses to pursue patenting rights in her work, rather than to publish the results in academic journals. Alternatively, she may choose to pursue individual work rather than to seek collaborative work, preferring to keep patentable work proprietary in order to further her own interests and keep potential patent-related revenues to herself. In other words, property rights may dissuade creators from generously sharing the fruits of their labor, rather than incentivizing them to seek to maximize monetary rewards in exchange for such work. It is not, therefore, that

235 See ELINOR OSTRON, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); see also ROBERT ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).
237 This also pertains to disparate creative fields such as comedy or cuisine.
238 In cuisine, for instance, rather than teaching apprentices how to master an individual cooking style and set of recipes, a chef may choose to assert copyright in his instruction and recipes (rather than merely in a cookbook that annotates such recipes), despite the possibility that such a substitution may undermine the system of apprenticeship and homage on which the commons of haute cuisine has been constructed.
reputational benefits, sharing and collaboration, and a rewards-based system cannot exist side-by-side with a propertization-based regime. It is rather that in certain important cases property rights may demand exclusivity, rent-seeking behaviors, and may close off the rights of follow-on creators (such as former apprentices) to share in the creative efforts of those that came before them and instructed them in the creative art in question.

4. Can Change the Balance Between Propertization and Disclosure

As discussed earlier, changing the business model that prevails in a creative content industry may put up roadblocks to collaborative activity. But the ecosystem of a given industry may be so meticulously structured that expanding or reinforcing IP rights can also disturb the balance between propertization and disclosure to an extent that undermines the latter. This is particularly problematic in creative industries that value disclosure as a vital facet of free knowledge flow and enrichment of the public good, such as the education sector. The case of academic patenting versus publication is a useful illustration in this regard. In academic work, publication is considered a critical feature of scientific research, both as a means of sharing scientific research and discovery, enhancing scholarly reputations, and furthering diverse institutional aims such as attracting top students, attracting external funding, and so on. But publishing and scholarship can at times conflict with interests in propertizing scientific R&D, particularly when the outcome can be profitable to institutions and their allies. Some commentators argue that while there is an inherent tension between the goals of patenting and publication, it is still the case that academia has been able to strike a compromise between patenting activity and publishing activity, and that these patenting and fundamental research can even be sustained as complementary activities.

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239 See supra Section III.B.
240 An important caveat to note is that when propertization takes the form of patenting, the process of filing a patent does indeed entail disclosure. However, this is late-stage disclosure, and occurs long after the run-up to patentability. In that period of run-up, the knowledge gained and the advances made may not be available to others. Perhaps the better distinction to draw is between the end-game disclosure of patenting, then, versus the lifetime of disclosure of publication. However, this seems to erase the importance of early-stage and fundamental research disclosure, which is what gives rise to the distinction used here between patenting and publication.
241 Ajay Agrawal and Rebecca Henderson, two leading scholars in the field, have studied patenting and publication activity at the Departments of Mechanical Engineering and Electrical Engineering at the Massachusetts Institute of Technology. There findings are generally positive: “(i) Patenting as a minority
In contrast, other commentators have argued that an increasing reliance on propertization has become increasingly prevalent in academia, placing essential values at risk.\textsuperscript{242} However, in both cases, it is recognized that IP can place basic scholarly aims and publication rights at risk, and that increasing propertization only serves to heighten that risk and threaten the balance that academia now seeks to maintain.

\textit{D. What About Eliminating IP?}

\textbf{1. Why It Is Not Always Feasible to Eliminate IP}

Some proponents of non-proprietary creative work argue that drastically reducing (for instance, only offering one form of IP protection, such as trademark in the fashion industry) or eliminating IP (such as moving to wholly open source production) can contribute to a richer, more innovative creative environment and a more robust public domain, as exemplified by (i) certain low-IP regimes, such as fashion; (ii) no-IP based regimes, such as comedy and cuisine; (iii) various kinds of open source production, such as Wikipedia, some blogs, and some free software; and (iv) open copyright-based systems, such as the Creative Commons (“CC”) and the Creative Commons copyright-license\textsuperscript{243} (including some open source software). Effectively eliminating IP is usually argued to work best in conjunction with changing business models to draw substantial revenue from non-propertized sources, such as (i) live performance (music and teaching or lecturing in front of live audiences, and so on) (ii) advertisements (carried in hard copy sources such as newspapers and magazines, as well as online sources such as websites, portals, search

\footnotesize{activity: a majority of faculty in the sample never patent, and publication rates far outstrip patenting rates; and (ii) Patenting is not representative of the patterns of knowledge generation and transfer from MIT: patent volume does not predict publication volume, and those firms that cite MIT papers are in general not the same firms as those that cite MIT patents. However, patent volume is positively correlated with paper citations, suggesting that patent counts could be reasonable measures of research impact.” Ajay Agrawal & Rebecca Henderson, Putting Patents in Context: Exploring Knowledge Transfer from MIT, 48 MGMT. SCI. 44, 44-46. They conclude that the implications of their findings are likewise positive: “Our results offer some evidence that, at least at these two departments at MIT, patenting is not substituting for more fundamental research, and that it might even be a complementary activity.” Id. at 59.}

\footnotesize{242 See Rebecca S. Eisenberg, Proprietary Rights and the Norms of Science in Biotechnology Research, 97 YALE L.J. 177 (1988); Arti K. Rai & Rebecca S. Eisenberg, Bayh-Dole Reform and the Progress of Biomedicine, 66 L. & CONTEMPORARY PROBLEMS 289 (2003).}

\footnotesize{243 See CREATIVE COMMONS, supra note 196.}
engines, and blogs, and so on); and (iii) the sale of ancillary devices and services (electronic devices, platforms, and support systems, and so on). One might argue it is possible to enact such changes to business models while at the same time continuing to protect revenue from core propertized sources that are carefully distilled to their valuable elements or features (exclusive fashion, music releases, recordings and catalogs, and educational degree-oriented programs).

The objections to reducing or eliminating IP are as diverse as the creative fields to which changes might be made. The greatest objection is based in the underlying rationale for IP, or a concern for the guarantee of earning a livelihood and the incentive structure that necessitate IP entitlements at the outset of creative activity. It is difficult to imagine how creators will be able to make a living from their creative labor without the right to receive revenue flowing from the fruits of such labor; and the recent losses faced by creators in industries whose IP has come under attack due to technological disruptions seems only to confirm the centrality of IP to the profitability calculus that is integral to the professional creator’s life.

Other objections are illustrated by the creative industries themselves. First, as the music industry has shown, disruptive technologies can affect the value of original content, both by making wholesale copying and appropriation possible and by pitting free content against proprietary content, thereby dramatically reducing the value of the latter (for instance, the proliferation of free music on YouTube, SoundCloud, and other sites that carry musical performances can compete with recordings that must be purchased or licensed and paid for by consumers).244

Another concern is that while the overall quantity of music content has likely increased, the quality of content is highly differentiated and in some cases may be compromised.245 Further, reducing or eliminating IP may also serve to reduce or eliminate the role of middlemen, such as agents and talent scouts, record labels, critics, and others, who traditionally served an important role in vetting, reviewing, and authenticating musical acts and their output. Doing away with

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244 See generally supra Chapter 3. Similarly, in journalism and news media, disruptive technologies are reducing the value of news content, in part by allowing rampant copying of original content, such as articles and opinion pieces, and in part by allowing competitors who generate free content to compete with traditional proprietary news media. See infra Chapter 6, subsection IV.E.3.

245 Again, this is relevant to journalism and media, in which online news sources whose provenance and reliability may not be proven are nonetheless able to compete with, and at times draw audiences away from, mainstream news sources.
these intermediaries may compromise the high standards of musical production that were once ensured by the administration of record labels and other industry professionals. In other words, a proprietary media system may serve to vet and verify content, in ways that non-proprietary systems are as yet unable to consistently reproduce.

Second, some proprietary systems are essentially underwritten by advertising. Broadcast radio, for instance, has historically been free to listeners, but audiences pay for consumption by being compelled to listen to periodically broadcast advertisements. Advertising is equally available to online music streaming companies, as well as to other entities that disseminate creative content online. However, music broadcasters pay licensing fees to music copyright holders, thereby enabling the content to be duly compensated for online performances. Advertisers recognize this licensing scheme, and support the music broadcasting system in order to reach audiences that are listening and consuming its content. The absence of a proprietary scheme may not completely drive advertisers away from sites or services that disseminate creative content, for if non-propertized content reaches a critical mass of viewers or listeners, reaching such an audience may still prove attractive enough to warrant advertisers’ investments. But proprietary systems are the sole means of ensuring that creators are remunerated for their production of content. Thus, while advertisers may be somewhat indifferent to the context of delivery, they may largely prefer to support sites that promote proprietary content in order to attract the best creative talent and thereby to attract and capture the most attentive and loyal audiences.

Third, many mature proprietary IP systems, such as the music industry, are predicated upon a longstanding licensing scheme that manages rights, administers compensation and enables the circulation of creative content. Simply removing IP entitlements would strike at the heart of the terms of production and compensation that are integral to the industry and its creators. The efficacy of an entrenched licensing scheme would be replaced with a non-proprietary system that would be required to generate a new set of practices, norms, rights, and means of compensation. While this might prove possible in the long run, it would create a great deal of instability in the

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Yet again, this pertains to the case journalism: by undermining traditional news-gathering institutions, the plethora of online sources that now disseminate journalism, which can vary in quality and veracity, also undermines traditional news-gathering institutions, which were once the well-established means of according credibility and authority to news and its coverage.
short run, which might well prove particularly devastating to an industry already undercut by technological disruption. The licensing system administered by music PROs has served as a model for other creative industries, and to end it without a viable replacement would seem hazardous and unpredictable.

Fourth, some ventures that are maintained on a non-proprietary basis, particularly open source ventures in various fields, may be effectively subsidized by free and/or volunteer labor, or by institutional support that indirectly compensates creative or innovative work. In the context of open source software, for instance, a collaborative community of software program producers and developers contribute their efforts and ideas to improve computing source code and then to share and circulate it within the community. The input of the open source community is made on a wholly voluntary basis, and is generally unremunerated. Open source also does not involve ownership rights at any stage of the process: the source code is made available via a free license to the product’s design or blueprint, and ownership rights in the improved source code may not be made subsequent to modification of its original design. (Although individuals may avail themselves of Creative Commons alternative licenses, or levels of restriction, for their works.) Many volunteers who participate in open source projects are motivated by different ambitions: some are interested in problem-solving for its own sake; some pursue the reputational benefits of prestige and renown that accompany innovative work within a knowledgeable community that highly values innovation; and some are interested in learning as much as in imparting knowledge and know-how. Entrepreneurial businesses or individual software developers may also participate in open source projects in order to solve a particular problem. They may choose to bear the full cost of initial creation, and may bring that initial work under some measure of IP protection. But then they may seek to bring their work to an open source community, seeking to benefit from the insights, improvements, and innovations that the collaborative community efforts may bring to bear on refining the original work.

Thus, by communualizing the process of development and amelioration, the initial creator(s) can distribute costs across more users, and can even make allowance, within reason, for free riders to

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benefit without undermining the creative process or the value of the project to the innovative entrepreneur. However, even in these cases, the work of contributors to the open source part of the effort is effectively subsidized: first, the contributors are most likely to hold remunerated positions of employment, and to be engaged in the open source work as a side project undertaken primarily for interest; and second, the entrepreneur(s) will share the original work, with the understanding that it may contribute to the productivity of members of the open source community, either directly as the basis for some licensed follow-on innovation or indirectly as the source of inspiration for follow-on entrepreneurs. In either event, the open source work does not need to be remunerated in order to compensate the collaborative community members. Their labor is functionally donated, and the content producers may eventually choose to adopt a proprietary license subsequent to participating in the open source exchange.248

But it is in other contexts that labor without propertization may be more problematic. In the case of education, for instance, classroom instruction has historically been considered protected by practice and by institutional support, and therefore has not been subject to many disputes over property rights. Traditionally, education has functioned as a constructed commons249 in which faculty teaching is supported by an infrastructure built around shared norms such as academic freedom and autonomy, valued scholarship and associated reputational benefits, portability of academic work, and collaborative freedom. In exchange for providing instruction in the classroom, as well as broader tutelage and guidance of students (and often administrative duties), academics not only are paid a salary but also are granted the right to conduct research and scholarship. Academics have also generally been allowed to take their work from one place of employment to the next, including the courses they teach, the materials they prepare, and the research and scholarship they generate. Only the latter, historically, has been deemed worthy of copyright, in part because courses and related materials have not been considered to have much monetary value extrinsic to the institutional setting in which they are offered.

248 It should also be noted that some open source developers eventually stake proprietary claims in some portion of their work, creating companies that are based in open source code but that monetize its application in a concrete and profitable way.

249 See generally GOVERNING KNOWLEDGE COMMONS, supra note 147.
The disruptive technology of the Internet, as has been argued earlier, now locates a potential monetary value inhering in the courses offered at institutions and online. Increasingly, copyright is being asserted in courses and related materials, although there is some dispute as to who will be the rightful copyright holder in the academic context. Resolving that dispute will no doubt affect academic IP entitlements and consequently influence the direction of revenues that flow from instruction. But copyright in courses remains important irrespective of the copyright holder that is granted the entitlement. On the one hand, institutions that claim course copyright argue that they must able to protect, and possibly recover, the investment they make in online instruction. Copyright in courses also enables institutions to prevent appropriation, by giving the institutional copyright holder the right to pursue copiers or infringers that are attempting to free ride on the courses that have been underwritten by institutional budgets. Copyright in courses can further proscribe the dissemination of courses by instructors to multiple online educational providers, another form of infringement on institutional course copyright that again undermines the initial investment made in building and supporting online courses.

On the other hand, however, faculty that claim copyright in courses argue that they are increasingly be called upon to teach courses without the institutional backing traditionally afforded by long-term tenure and tenure-track positions. Faculty point to the increasing adjunctification of the academy, and argue that they are likely to be hired primarily to fill short-term positions that are teaching-intensive, without the additional emoluments that an established institutional connection can confer. Thus, the non-monetary and intangible rewards of academic work, such as the right to pursue independent and autonomous scholarship and research, academic freedom, reputational benefits, the freedom to collaborate, and so on, may not continue to be extended to most newly hired faculty members. If these non-monetary and normatively-based rewards are depreciated or extinguished, faculty argue that being paid for academic work, particularly instruction, will take on a proportionately greater value in the compensation package extended to faculty. Copyright in courses, if granted to faculty, can protect and reward new revenue streams that may derive from online instruction, preparation of courses and related materials, tutelage and guidance, and other teaching-related activities.

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250 *Adjunctification (again) and How (Not) to Fix it (Again)*, NEW APPS BLOG (May 2, 2014), http://www.newappsblog.com/2014/05/adjunctification-again-and-how-not-to-fix-it-again.html.

251 *Id.*
Moreover, copyright in courses can compensate faculty for the investment that they make in online instruction, just as it might for an institution. As an analogy, faculty point to copyright in scholarship, which is often retained by the faculty member who generates the work, arguing that copyright may similarly be granted to the productive instructor.

Clearly, therefore, copyright in courses is likely to prove increasingly important in the online educational context, regardless of whether it is claimed by institutions or faculty. Eliminating IP entitlements in this regard becomes vexed due not only to the disruptive technology that online education heralds but also due to the changing structure of the traditional academic realm. Traditionally, overt propertization of academic work may not have seemed as pressing, as the academy functioned as a kind of guild, protecting and constructing its rights and rewards around the shared values of the guild, such as community, shared norms, exchange and collaboration within the community, a tacit tradeoff between instruction and scholarship, respect for institutional stability and rewards for faculty loyalty, and so on. Increasingly, however, the academic world is retreating from its guild-like, or commons-like, foundations, and is systematically embracing a more industrial, or corporatist, approach to self-perpetuation and growth. Online education, adjunctification, the commodification of courses, and consumer-based strategies are but a few aspects of this corporate approach. In this context, propertization becomes paramount, and IP entitlements become the primary mechanism for allocating responsibilities, priorities, and rewards relating to the monetization of online instruction.

V. REFINING THE IP SOLUTION: TAILORING

Disruptive innovation can dismantle the core business model of a creative industry, but at the same time it can give rise to innovative business strategies and solutions that eventually move the industry forward in a healthy and newly productive direction. As discussed, business solutions are often preferred because they allow private actors to bargain amongst themselves and to contrive arrangements that maximize returns and minimize transaction costs. However, when such solutions are undertaken unilaterally or without the support of changes in IP entitlements, they may fall short of responding successfully to the demands of a reconfigured business environment. Often, therefore, creative industry participants confronting disruptive
innovation will call for the enlargement, reinforcement or addition of IP measures on an industry-wide basis. Yet while simply adding layers of IP protection may be an expedient and highly sought-after prescription for curing the ills of a challenged industry, it too offers a solution rife with critical concerns that may impede the industry attaining an optimal solution that, in broadly utilitarian terms, yields benefits for many or all of its constituents.

Additionally, simply expanding IP entitlements is not the sole means available of calibrating IP responses to changes in the innovative landscape. Other options include strengthening one form of IP protection while reducing reliance on other forms of IP protection. In the fashion industry, for example, some commentators have called for bolstering trademark protections of brands, logos, and defining trademarks, while simultaneously calling for restraint in allowing copyright protection to be sought in designs and patterns. Other options include withholding IP protection altogether from certain industries that have historically been outside of IP-based regimes, and concomitantly reinforcing practices, conventions, norms, and a system of rewards that allow creativity to thrive, even in the face of changing technologies, within a healthy and generally self-perpetuating ecosystem.

Striking an optimal balance between changing business models and altering IP entitlements is a key consideration for creative industries that must preserve their strongest elements while protecting and growing their revenue streams even as they are transformed by the forces of innovation. Another key concern, however, is a feature intrinsic to IP itself: namely, standardization, which must be taken into account when potential IP re-allocations are

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252 See Kal Raustiala & Christopher Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design, 92 VA. L. REV. 1687 (2006). In the computer industry, to take another example, some commentators have called for limited copyright protection in certain programming, to be coupled with reductions in patent protection for certain aspects of programming, such as pivotal algorithms and/or business methods. Pamela Samuelson et al., A Manifesto Concerning the Legal Protection of Computer Programs, 94 COLUM. L. REV. 2308 (1994).

253 In the case of comedy, for instance, the individuation of stand-up routines, the culture of attribution, the centrality of performance-based rewards (rather than rewards based upon the licensing of recorded routines or jokes), and other guild-like practices and norms buttress a robust ecosystem. In this case, some changing business practices, such as the expanding use of comedy on television, in films, and in other media (which, though recorded, is typically performed before a live audience, thereby prioritizing the live experience, rather than the recorded material) allows comedians to tap new revenue streams without having to copyright their material and draw revenues from licensing the personal, individualized, and unique routines that make up their stock in trade.
proposed.\textsuperscript{254} Standardization of IP as used herein signifies that the fixed terms of an IP entitlement, such as for example a fixed term of copyright protection, will be applied universally within an industry. Such changes that happen across-the-board are likely to affect a great many stakeholders, yet these various entities and individuals are unlikely to face similar circumstances, and therefore may not experience comparable outcomes or benefits from such sweeping alterations of policy and the resulting changes in common business practices. This is likely to be particularly relevant to time-sensitive creative fields, such as fashion, in which a one-size-fits-all copyright granted to original design would encompass the works of haute couture original designers, emerging independent designers, and knock-off artists alike. Only in some of these cases might the extended term of copyright be useful, protecting highly original, classic designs intended to endure over generations. In other cases, such a long term might stifle the creative turnover, agility, and rapid transformation that many designers require to respond to quickly changing tastes, trends, and markets. The term of copyright cannot be modified, however, to suit any given niche of the fashion design sector. In such circumstances, standardized copyright protection may not present an optimal solution to current change.

The majority of IP parameters, provisions and terms are standardized, but there remain significant deviations from the norm. Copyright law, for instance, has approved certain specific carve-out areas that enjoy narrow protection, such as certain prints and boat hulls.\textsuperscript{255} An even greater example, arguably, is fair use, which permits the use of otherwise copyright-protected materials for certain limited purposes, such as education, parody and satire, and certain other non-commercial uses.\textsuperscript{256} Thus, while most proponents of IP changes tend to call for systemic, wholesale re-allocations of IP rights, standardization need not be embraced at all cost, and the law does allow some leeway for challenging and even diverging from highly standardized and inflexible laws as may be necessary to benefit diverse creative industries and their participants.

\textsuperscript{254} “Standardization” means that one measure will be applied universally, such as a fixed term of copyright that is granted to all copyright holders, irrespective of the industry in which the copyright arises. Mark A. Lemley, The Economics of Improvement in Intellectual Property Law, 75 TEX. L. REV. 989, 1066-67 (1997).
\textsuperscript{255} See generally supra Chapter 1, Sections III.G.1-2.
\textsuperscript{256} 17 U.S.C. § 107 (2012).
A. Standardization

IP standardization (that is, one-size-fits-all IP entitlements) makes IP operational, easy to use, consistent, and transparent in its allocation of entitlements, rewards, and rights. This helps keep standardization at the top of the roster when it comes to making policies that align and allocate innovation-based entitlements. In any well-established copyright industry, such as music, standardized copyright has helped to shape the industry, but has also helped to lend it consistency, streamline its rights, and secure its rewards.

1. Standardization Makes IP Clear and Easy to Use

Standardization of IP facilitates orderly, transparent, and fair operations. Among its features are: (i) clear and fundamentally well-established definitions of parties, stakeholders, rights, and monies; (ii) clear definition of rights, terms of rights, and where rights are adjudicated; and (iii) administrative bodies that are well-established, with mechanisms for gaining, and if necessary defending IP protection, that are clearly delineated (in the case of copyright law, the relevant bodies are the Copyright Office; Federal Courts; and Congress).

2. Standardization of Licensing Rights is Streamlined, Easy to Use, and Fair

Standardization of IP administrative mechanisms are central to facilitating the access and use of copyright (and other IP instruments, such as trademark and in some cases patenting) in the creative industries. One of the most important and well-developed such mechanisms is compulsory licensing, which permits an individual or company seeking to use another's IP to do so without seeking the rights holder's consent, and simply to pay the rights holder a set fee for the license. Compulsory licensing is typically administered in the creative industries under the aegis of a collective rights organization, which streamlines the process, sets licensing terms,

257 Also benefiting from strong and standardized rights are entertainment, media, and publishing.
arranges the remuneration of rights holders, and in some cases manages and arbitrates disputes among license holders and licensees.\textsuperscript{259}

In the case of music, for instance, the Copyright Act provides for a compulsory license in musical compositions,\textsuperscript{260} which allows a person to distribute a new sound recording of a musical work, if the original work has been previously distributed to the public, by or under the authority of the copyright owner.\textsuperscript{261} The new recording is not required to be identical to the previous work, as the compulsory license allows the recording artist to rearrange the original work to conform to the recording artist's interpretation. However, the compulsory license does not permit the artist to change the basic melody or fundamental character of the work.\textsuperscript{262} The compulsory license requires the recording artist to provide notice and pay a royalty. Although the compulsory license allows a recording artist to make and distribute physical copies of an original musical composition for a set royalty, the owner of the copyright in the original composition is still able to control public performance of the work or transmission over the radio.\textsuperscript{263} The original copyright owner may license the work for public performance through PROs such as BMI, ASCAP, or SESAC.

These music licensing provisions, among others, clearly serve a vital purpose: they establish a streamlined and efficient procedure that does not impose an undue burden on the recording artist, while at the same time ensuring due compensation to the original artist. Naturally, there may be valid criticisms of their operations—for instance, music PROs have been criticized for seeking to expand coverage of public performance licensing rights to encompass non-commercial use by non-profits, private entities or individuals, and other minor players\textsuperscript{264}—but they nonetheless serve the essential function of centralizing, operationalizing, and administering music rights with

\textsuperscript{259} Id.
\textsuperscript{261} Id. § 115(a)(1).
\textsuperscript{262} Id. § 115(a)(2).
\textsuperscript{263} Id. § 106(4).
\textsuperscript{264} For example, the largest music PRO, ASCAP, was criticized for seeking royalties from the Girl Scouts of America for the singing or “performance” of protected songs around the campfire. ASCAP retracted its position, but suffered a reputational blow from the debacle. See Elisabeth Bumiller, \textit{Ascap Asks Royalties From Girl Scouts, and Regrets It}, N.Y. TIMES (Dec. 17, 1996), http://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html.
relatively low transaction costs and minimal inefficiencies (particularly as compared with other alternatives, such as purely individualized and de-centralized negotiated licensing among the myriad participants in the music industry).

3. Standardization Offers Leeway for Important Policy Objectives

Standardized IP entitlements are fundamentally a byproduct of policy decisions that are shaped at high levels, predominantly in courts, legislatures, and administrative bodies, and are therefore meant to operate efficiently in many different contexts and industries. Thus, for instance, where the creative industries are concerned, the copyrightability of expressive works “fixed in a tangible medium of expression”\(^{265}\) may apply equally to a musical composition, dramatic or literary work, industrial design, or computer software. Historically there has been some recognition that the one-size-fits-all paradigm is not well-suited to optimizing the balance of incentives and rewards to creators, on the one hand, and rights of access, use and re-use by partakers, on the other hand. Equally importantly, the need to maintain a rich and accessible public domain is generally acknowledged, as recent battles over the scope and length of copyright law attest.

The understanding that IP rights are and need to remain curtailed is also pervasive among those who set IP policy. Thus, for instance, careful consideration is given to the expansion of copyright duration, in part because the Constitution stipulates that IP protection will be granted only for a finite period of time,\(^{266}\) and in part because seemingly chronic expansions seem to extend standardized IP across all the copyright industries, without appreciable regard to whether or not such measures are appropriate or helpful to all the affected fields.\(^{267}\) Similarly, IP policymakers remain vigilant over the scope of IP entitlements, as for instance in the case of patent law, which seeks to place limitations on terms such as patentable subject matter. The debates over the patentability of broadly-drawn business method patents, genetic sequences, algorithms, and so on, attest to the fine line that patent law must draw in rewarding innovation without risking access, follow-on innovation, and progress and growth within a given field. For these reasons,

\(^{265}\) Id. § 102.
\(^{266}\) See U.S. CONST. art. 3, § 8, cl. 8.
standardization of IP continues to be contested territory, and those who advocate for the need to carefully delineate and in some cases restrict or cabin across-the-board entitlements have prevailed in certain aspects of copyright law.

**a. Idea-Expression Dichotomy**

One such restriction is inscribed in the essential parameters set by copyright law: that is, copyright does not encompass ideas and information, but only extends to the form or manner in which they are expressed.\(^{268}\) This idea-expression dichotomy can offer leeway to creators who generate multiple ideas that might otherwise infringe upon the rights of other creators who have arrived at similar points in their creative work. In many creative industries, the idea-expression divide creates an unpropertized space that is crucial to fostering high levels of productive activity among a broad range of creators, without potentially restricting creative output until the works are fixed and thence copyrightable.

**b. Fair Use**

A second carveout to standardized copyright is the fair use doctrine, which seeks to balance the public’s interest in open access with the property interests of copyright holders by creating a limited roster of exceptions to the copyright holder’s exclusive rights in her work.\(^{269}\) This doctrine protects uses that are considered meaningful or enriching to society, such as criticism, parody, instruction, and some scholarship, by allowing these limited uses to be made without prior permission from the copyright holder or royalties paid to the rights holder.\(^{270}\) In the context of education, for instance, teachers may use excerpts from copyrighted texts or other materials for instruction without clearing rights or securing permission to do so.\(^{271}\) Fair use may be critiqued as a complicated affirmative defense to copyright infringement, whose parameters may seem murky, subject to a court’s discretion, and difficult to ascertain prior to use. At the same time, however, it may be the first line of defense for disruptive technologies that may risk

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\(^{268}\) This principle was first clarified in the 1879 case of *Baker v. Selden*, 101 U.S. 99; it has since been codified by the Copyright Act at 17 U.S.C. § 102(b) (2012).


\(^{270}\) See id.

infringing on existing copyrights with their unprecedented and untested practices or devices. In many creative industries, fair use is the front line of battles over new ideas, devices and methods.

In the creative industries, therefore, the fair use doctrine can be paramount for various key purposes. For instance, it may allow uses to occur that cannot be proven to have an effect on not only the copyright owner’s market, but also on the potential market of the original product.\textsuperscript{272} In the case of disruptive technologies in the creative industries, this may prove critical to an entire industry. Illustrative is the early dispositive case of \textit{Sony Corp. v. Universal Studios}, in which the copyright owner, Universal, failed in the court’s estimation to provide adequate empirical evidence that the use of Betamax technology had reduced Universal’s viewership and negatively impacted their business model.\textsuperscript{273} Notably, this leaves open significant room for future innovations in the creative industries to disrupt the field—as indeed the Betamax videotaping technology had previously disrupted entire media sectors (that is, television and film)—and yet to be sheltered from copyright infringement actions pursuant to the fair use doctrine as elucidated in \textit{Sony}.\textsuperscript{274}

But the fair use doctrine is certainly not a panacea for new technologies, and may in fact have an adverse effect on new technologies in the creative industries. In the case of music, for instance, the practice of “sampling” in certain genres of music was accepted practice until the early 1990s, typically occurring without regard for copyright in the snippets of underlying compositions that were used. However, the legal ruling against rap musician Biz Markie, who appropriated parts of a Gilbert O’Sullivan song, changed practices and opinions virtually overnight. The court in \textit{Grand Upright Music Ltd. v. Warner Bros. Records, Inc.}\textsuperscript{275} held that samples must be licensed, as long as they rise "to a level of legally cognizable appropriation." In other words, sampling of

\textsuperscript{272} Notably, the burden of proof here rests on the copyright owner, who must demonstrate the impact of the infringement on commercial use of the work. \textit{Sony Corp. v. Universal Studios}, 464 U.S. 417, 451 (1984).
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} Thus, for instance, such disruptive technologies as TiVo (digital video recorders that allow users to view recorded and time-shifted television programs, and to skip certain advertisements) or Aereo (digital devices that allow subscribers to view live and time-shifted streams of television on Internet-connected devices) may rely upon arguments based in fair use, or in related analyses (such as impact on commercial markets) to successfully prevail against copyright holders who contend that they are substantially and primarily engaged in copyright-infringing practices.
significant portions of underlying works would not be permitted; while de minimis sampling would still be considered fair and free in line with tradition, as "the law does not care about trifles." The recent Sixth Circuit Court decision in the appeal to *Bridgeport Music, Inc. v. Dimension Films* has reversed this standing, eliminating the de minimis defense for samples of recorded music, but stating that the decision did not apply to fair use. These cases, however, have had a marked effect on contemporary rap and hip-hop genres, however, in which sampling has far less prevalence than it once did. This chilling effect may reveal that while fair use can hold promise for creative industries seeking to diverge from the standardization of copyright principles and practices, fair use may also hold pitfalls that do not clarify an area of creativity’s direction, but rather render it ambiguous, risky, or liable to challenge in the courts.

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276 *Id.*


278 As one of the most important disruptive technologies, the Internet stands at the heart of change in many creative industries, and is likewise at the heart of several fair use disputes in creative contexts. As early as 2003, for instance, *Kelly v. Arriba Soft Corporation*, the Fourth Circuit found on appeal that thumbnails, inline linking, and other online copying practices undertaken by the defendant in its image search engine did constitute fair use and would not therefore be found to have violated copyright. 336 F.3d 811 (9th Cir. 2003). The ability to link materials online is pivotal to certain entities in creative sectors, such as online journalists, bloggers, and others that choose to aggregate links to news sites, to comment on links, or to offer ready access to third-party materials or resources. These practices, however, can be highly disruptive to traditional industries which, as in the case of journalism, may find that their most valuable material, such as time-sensitive news, original articles and commentary, and so on, may be appropriated via linking by online entities or individuals who have not contributed to the expenses of generating such original work. Clearly, then, a viable fair use defense for these activities is likely to prove powerful in the hands of those who use thumbnails, links, and other such practices to disrupt the business models of traditional companies yet at the same time to open access to creative materials to a great many users.

Yet another contested ground of the fair use doctrine and copyright holders is the Google Books search engine, a service from Google, Inc. that searches the full text of books, magazines, and other materials, which are then scanned, converted to text using optical character recognition, and then stored in Google’s digital database. While books in the public domain remain fully and freely available via the Google Books service, in-print books may show “snippets” (two or three lines of text) or alternatively, where permission has been granted, a “preview” of viewable pages. See *supra* note 74 & 151, The Google Books project is presently in dispute, stemming from claims brought separately by the Authors Guild and Association of American Publishers accusing Google of engaging in massive copyright infringement. *Id.* Google has countered that the project represents a fair use of the materials and resources involved, comparing Google Books to the digital age version of an indexed card catalogue. *Id.* While the actions are still pending, Google has prevailed to date, with a New York district court holding that Google Books constitutes fair use, and “provides significant benefits ... advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders.” *Author’s Guild v. Google*, 954 F. Supp. 2d 282, 293 (2013). The Google Books digitized search engine offers yet another exemplar of the potential
B. Uniformity Costs

The power and utility of standardization of IP are so compelling that divergence from the norm requires rationalization. Uniformity costs comprise an important rubric of reasons for moving away from standardization and toward a more flexible, industry-specific treatment of IP entitlements and their allocation among stakeholders. In some cases, uniformity costs may grow to be so extensive that they require re-appraisal—that is, weighing such costs against the benefits of standardization to ensure that IP entitlement allocations still remain the optimal way to achieve innovation-oriented goals.

1. Initial IP Entitlement Allocations are Not Readily Aligned

The key concern of creative industries are how to incentivize creative production, invest in valuable goods that are both intangible and inexhaustible, and profit from the commercial exploitation of their output. This is the standard innovation lottery problem that copyright law is meant to address and resolve. The standard economic solution to this public goods or reach that the fair use doctrine may afford new technologies in creative fields. Digitized libraries may be analogized to traditional libraries, which make materials open and accessible to widespread audiences. But in the case of Google Books, the works that are digitized, catalogued, indexed, and archived are held and made available by private actors (Google is working in conjunction with several major libraries and other partners). The digitized repository on an unprecedented scale, coordinated but also controlled by private hands, may well represent a disruptive technology if, as private for-profit entities are wont to do, Google chooses to exercise its authority over the search engine in ways that maximize its profits. For instance, Google may choose to place links to booksellers on its search results, granting rights to “snippets” and previews only to certain pre-selected private partners. Or Google may seek to influence the price of e-books to which it links, thereby exercising quasi-monopoly power over a vast number of written works. Although these commercial uses may not be permitted under the scope of the fair use doctrine, copyright holders may still be compelled to resort to litigation to ascertain the limits of Google’s authority over its digitized library. In the meanwhile, publishers, writers, libraries, and a host of other entities involved in creative written work will likely find the landscape disrupted by Google’s digitization project.

279 In a competitive economy, we should expect underinvestment in creative and inventive endeavors without some form of government assistance. Once an author, inventor, or their respective financial backers has paid for the creation of a valuable creative or innovative work, competitors can reproduce and distribute that work at prices too low for those who invested in the creation to recoup their investments. Michael W. Carroll, One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights, 70 OHIO ST. L.J. 1361, 1367-70 (2009); see also Peter S. Menell & Suzanne Scotchmer, Intellectual
Appropriability problem is government action. This grants creators of original works a bundle of intellectual property rights, which are designed to stimulate investments in the activities that drive progress by excluding direct competition with the rightsholder in the marketplace. The owner of such rights enjoys the reward of monopoly pricing if there is sufficient demand in the market for the underlying innovation. These rights must, however, be limited, due to the significant costs that intellectual property rights incur in the market: while rightsholders are protected and incentivized to produce and profit from their output, they are equipped by law to wield their rights against end users, direct competitors and follow-on innovators who may seek to bring socially beneficial innovations to market. In order to promote progress, therefore, intellectual property law must strike a balance, providing sufficient incentives for innovation without unduly stifling the efforts of follow-on innovators or the liberties of end-users.

The balancing act of intellectual property law is exacerbated by innate uncertainties that underlie the distribution of returns to investments in creation, innovation, research and development. While it is possible that government actors could step in to correct market imbalances, creators

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280 The United States Constitution grants Congress a range of powers from which it may fashion solutions. First and foremost, Congress has power “[t]o promote the progress of science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and discoveries.” U.S. CONST. art. I, § 8, cl. 8.

281 Some commentators argue that the public goods model is not perfectly suited to works of authorship. See Christopher S. Yoo, Copyright and Public Good Economics: A Misunderstood Relation, 155 U. PA. L. REV. 635, 693–703 (2008); Glynn S. Lunney, Jr., Copyright, Private Copying, and Discrete Public Goods, 12 TUL. L. J. TECH. & INTELL. PROP. 1 (2009).


283 While some advocates of intellectual property law take this as a given, it is not necessarily as self-evident as it might seem. See Menell & Scotchmer, supra note 279, at 1477 (“Whereas the earlier economics literature proceeded as if intellectual property protection was the self-evident solution to the incentive problem, a more recent literature . . . has tried to understand when that is true, and when other incentive mechanisms might dominate.”).

284 See F. M. Scherer, Economics of Innovation and Technological Change, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 7530, 7535 (Neil J. Smelser & Paul B. Baltes eds., 2001) (“So skew is the distribution of rewards that it is difficult to make profits converge toward fairly stable averages by supporting feasibly large project portfolios.”). On uncertainty of creativity and innovation, see generally FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT (1921) (explicating the difference between conditions of “risk”—randomness with known probabilities—and “uncertainty”—randomness with unknowable probabilities).
and inventors are more likely, on average, to have marginally better information about their potential for success in their given markets. Thus, it is generally agreed that increasing a creator’s ability to exclude or deter competitors through exclusive rights is a superior approach, due primarily to the superior private information that they enjoy.\textsuperscript{286} It is also the consensus that intellectual property rights are justified as a means of risk-spreading. That is, creators or innovators are required to stake capital and labor in pursuit of success, despite uncertainty that poses risks, which may not readily be quantified, in advance of their venture. Intellectual property rights spread the risk of failure among these potential rightsholders, who may either fail to produce output that merits protection or produce output that the market deems to be worth less than the cost of acquisition.\textsuperscript{287} While the risks to potential investors are therefore substantial, spreading these risks among investors with private information is generally agreed to be marginally more efficient than other possible options (such as allocating the risk to government actors, relying on government grants or rewards, and so on).\textsuperscript{288}

The magnitude of risk-taking in the innovation lottery is also mitigated in part by the ability of intellectual property rights to lend markets the capacity to correct, to some degree, for the misallocation of rights. Further, these markets may potentially spread decisions about which risks should be undertaken and who should bear them. Further still, these markets may discipline creators or innovators who waste assets in pursuit of unworthy creative or innovative goals.\textsuperscript{289} Intellectual property as it presently stands harnesses the superior private information that creators and innovators have about the value of their cultural or technological contributions and spreads the risk that they and their investors or underwriters may be mistaken about the practical feasibility of a creative or innovative idea and about its market valuation if realized. It also spreads the risk that may be incurred if the timing or amount of reward necessary to induce

\textsuperscript{286} See Carroll, supra 279, at 1373-79; Edmund W. Kitch, Elementary and Persistent Errors in the Economic Analysis of Intellectual Property, 53 VAND. L. REV. 1727, 1728 (2000); Lunney, supra note 281, at 3, 5, n.9 (“[T]he principal advantage of a regime of exclusive rights is that such a regime . . . tends to decentralize the decision-making process, assigning decision-making responsibility to those likely to possess the relevant, but otherwise private, information.”); Steven Shavell & Tanguy van Ypersele, Rewards Versus Intellectual Property Rights, 44 J.L. & ECON. 525, 528 (2001).

\textsuperscript{287} See Carroll, supra 279, at 1373-79.

\textsuperscript{288} \textit{Id.}

\textsuperscript{289} \textit{Id.}
desired innovations and creative works is not accurately assessed.\textsuperscript{290} These features have contributed to a longstanding understanding that intellectual property is an optimal approach to promoting creativity and innovation.\textsuperscript{291}

### 2. Economic Costs

Uniformity costs almost always manifest as economic costs that are intrinsic to, and may be inextricable from, an IP system. Several features of economic costs are implicated: (i) IP rights can distort markets away from the competitive norm, therefore creating static inefficiencies in the form of deadweight losses; (ii) IP rights can interfere with the ability of other creators to work, therefore creating dynamic inefficiencies; (iii) the prospect of IP rights can encourage rent-seeking behavior that is socially wasteful; (iv) the enforcement of IP rights can impose systemic administrative costs; and (v) overinvestment in research and development can in itself be distortionary.

The uniformity costs that arise as a result of standardized IP can be divided into two broad categories.\textsuperscript{292} Type I uniformity costs emerge “when creators of the same class of subject matter face different magnitudes or types of the appropriability problem.”\textsuperscript{293} In music, for instance,

\textsuperscript{290} In recent years, however, the efficacy of risk spreading through copyright law has become the subject of much debate. Since the advent of digital networks such as the Internet, the copyright balancing act has been skewed, as interested parties may subvert the copyright bargain, while rightsholders may pursue a host of strategies to fortify their rights and enforcement capacities that may have serious consequences on creative production, dissemination and public welfare. See generally Julie E. Cohen, Pervasively Distributed Copyright Enforcement, 95 GEO. L.J. 1 (2006) (describing actual and potential consequences of digital enforcement initiatives); Mark A. Lemley & R. Anthony Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 STAN. L. REV. 1345 (2004) (proposing cheaper enforcement procedure to limit potential collateral damage from other enforcement initiatives).

\textsuperscript{291} There are of course likely to be costs associated with the intellectual property system. For instance, one significant social cost is that resources are channeled to innovations that are more likely to serve those with an ability to pay, and these innovations are likely to be underutilized by those who are priced out of the market by monopoly prices or by those who are denied licenses because the transaction costs are too high or the rightsholder refuses to license. See, e.g., Brett M. Frischmann & Mark A. Lemley, Spillovers, 107 COLUM. L. REV. 257, 278–79 (2007). The market also is likely to skew toward production of consumption information goods rather than productive information goods because of the problem of valuing positive spillovers. See, e.g., Brett M. Frischmann & Mark A. Lemley, Spillovers, 107 COLUM. L. REV. 257, 278–79 (2007).


\textsuperscript{293} Id. at 856.
some original composers would likely create whether or not their work was protected by copyright, while others would not. In the former case, the lack of incentives needed for creation might render copyright nonessential to spurring creative production. However, music copyright does not distinguish among composers and their motivations, and thus can be somewhat inefficient. Type II uniformity costs when there is variance among industries and technological fields. In the case of patents, for instance, it is striking that patent law grants the same entitlements to such disparate innovative products as pharmaceutical drugs and novelty toys. Similarly, copyright law grants the same entitlements to authors of musical works, novels and computer programs. In both cases, however, the terms of entitlements granted may not be particularly suited the area or subject matter of creativity or innovation. Yet under a one-size-fits-all model, standardized IP allotments must be accorded and some inefficiencies must be borne.

Several scenarios can reveal the emergence of uniformity costs that are caused by the imposition of standardized IP on a creative industry. One such example involves the term length of IP protection, which is determined by statute in both patent and copyright. In both cases, however, the inability to differentiate term lengths of IP protection accorded to various endeavors can lead to protection being extended long past when it is needed to spur production and protect returns. In the case of patent protection, for example, a novelty toy may only be valuable to consumers for a short season of popular appeal. Nonetheless, the toy is accorded a full measure of protection (20 years), stifling the ability of future innovators to create derivative works, generic toys that reproduce its characteristics, or other non-protected works. In the case of copyright, a musical work may generate returns for its author/composer and copyright holder (assuming here, arguendo, that the “author” or composer is in fact the copyright holder of such work) during her entire life, yet will also generate returns for the composer’s estate due to the

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294 Id.
295 Another example is found in the case of computer software, in which open source software and proprietary software are accorded the same level of protection, irrespective of programmers’ motivations, need for IP protection, or monetary objectives.
296 Id. at 857.
297 Id.
298 Id.
299 See generally id. at 852.
generous terms of copyright protection (life plus 70 years). But while the returns that accrue after the composer’s demise cannot be said to be helpful to spur creativity, it is arguable that at the same time the protection, or over-protection, that generous copyright terms grant may stifle follow-on creative works, as well as limiting access to the original work that would otherwise be fully available if it were in the public domain.

Another example of uniformity costs occurs when IP protection is so expansive that the rights holder is able to garner excessive rents from exploitation of an original work. As in the copyright example given above, a composer of a musical work who owns copyright in her work will earn royalties well after her lifespan has run (such royalties going to her estate). In this case, it is hard to argue that the full term of copyright is required to incentivize the composer and to ensure that she receives sufficient remuneration for her creative efforts. Further, again assuming that the copyright holder is the original composer, it is hard to argue that the extensive span of copyright protection incentivizes her to create more or to innovate further than she already has, because she can rely upon the initial copyright for protection and compensation. Indeed, it might be argued that the income stream she has secured from almost-perpetual rights in her original work may even disincentivize her from composing further works, particularly if the original work becomes a successful and profitable source of revenue. In such a case, whether with respect to creative or innovative efforts, the rights holder is rationally equally likely to seek to eke out more revenues from existing IP rather than to innovate in pursuit of new revenue streams. For these reasons, IP protection that is too expansive for a given industry (because it is applied equally to all industries, irrespective of individual differences) may prove anti-innovative and anti-competitive in application and outcome.

Yet another concern with respect to uniformity costs arises when licensing becomes too cumbersome, expensive, or otherwise not possible; in this situation, logjams can occur because propertization gives rise to disparities in protection that are insoluble. In the case of patents, for instance, patent “thickets” can form where variance of IP protections among industries and/or technological fields create high barriers to partnership, licensing, interoperability agreements, or other industrial arrangements. Uniformity costs can be formidable where such thickets are

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300 This is of course applicable to other fields such as literary writing, theatrical works, and so on.
formed, and where research and development, innovation and product development are unable to progress due to cross-licensing costs that outweigh the potential benefits of multi-party ventures. In the case of copyright, similar logjams can form where IP protections give rise to licensing requirements that are not managed via clearing houses or other facilitating administrators. In the case of new technologies in the creative industries, this may lead to barriers to entry for new delivery systems, such as music and content streaming online, and may prevent innovative technologies from disseminating content through new avenues to audiences seeking creative content outside the traditional venues of consumption.

3. Social Costs

There are a variety of costs that follow from the initial challenge of aligning entitlement allocations. The best-recognized ones are economic, and are based in a relatively narrow construction of the Constitution. These economic costs center upon the constitutional mandate that is widely agreed upon: to incentivize innovation and, thereby, to maximize production. But there is a broader range of costs that many scholars discussed, if not as universally embraced. Many of these look past the creator and consider the spectrum of parties affected by the grant of IP rights and rewards. Broader social benefits look to enriching the public domain and promoting the rights of creative consumers and users. Where IP rights are granted, some commentators maintain, even the most powerful of society’s principles are affected, such as personhood (Radin), free speech (Baker), widespread participation in democracy (Benkler and Lessig), as are many of society’s main activities, such as education, health/welfare, news, and so on (Benkler). An important argument driving the debate over tailoring centers on the idea that the optimal alignment of IP rights and rewards will be able to spur innovation while advancing these critical social aims. Of course, when written this broadly, it seems daunting, if not impossible, to shape policy that advances these goals all at once. But calibrating the impact of IPR allocations might, and arguably should, at least take into consideration the potential effects on these concerns not merely on the creative innovator, but on the creative consumer as well.

From a narrower viewpoint, it is at least clear that uniformity costs give rise to social costs. Where IP protections are extended, greater allocative inefficiency is liable to arise, because the
choice is not between granting rights to party A over party B, but between granting a right to A or to the public at large, which is made of an unknown and unknowable proportion of higher and lower-valued users. Thus, where IP rights are granted, the overall social cost is likely to be greater than normal. In the copyright industries, this is generally evinced as rights being granted to a single class of participants that are identifiable, vocal, and likely to be powerful within a given sector. This may come at the expense of the more ineffable public interest, which is comprised of a disparate, unorganized, and possibly unrepresented coalition of interested parties. While some organizations may choose to advocate and lobby for certain causes on behalf of the public interest, the uniformity of IP protection is not constructed to accommodate easily these “outsider” positions. In several cases, as for instance the current debate over net neutrality, the public interest may be shortchanged in the face of strong and uniform IP protections.

4. Costs to Users

Standardized IP is not only monolithic in its treatment of IP entitlements but also monopolistic in its grant of exclusive IP rights. Starting from the initial conferral of rights, therefore, rights holders are placed in an advantageous position vis-a-vis users. When disruptive innovation threatens to erode the favorable position of rights holders, they may advocate the extension and expansion of their IP rights, as well as additional legal and technological enforcement, which if achieved may compound the imbalance between rights holders and end users.

The costs to users standardized IP generates may arise at inception, such as the loss to the public domain that such IP rights necessarily entail (due to their formal fencing-off of property). Technological innovation, however, particularly where coupled with modern expansion of IP rights, can incur greater costs to users. For instance, many of the creative industries have seen a decrease in users’ rights, access, and control over works that they obtain. In the case of some creative content, such as music, digitized content (for example, a digitized music track) is licensed by a user, as opposed to previously recorded content (for example, a vinyl album or CD) that could be purchased and owned by the user. The difference in rights and access is striking: with licensed digitized content, a user is bound by the terms of the licensing agreement, which tends to be more restrictive than the terms of an outright sale. In the case of music, many
digitized tracks may only be copied a certain number of times, may not be widely shared, and may not exist in the user’s cache permanently. In contrast, a music album may be copied an infinite number of times, may be shared, and exists in the user’s permanent collection.\(^{301}\) When technological protections are added, the problems riddling the rights of users may be compounded. For instance, creative content may be protected by DRM and therefore cannot be recorded, copied, disseminated, or permanently cached. Further, due to competition among carriers, media companies, and providers, users may find interoperability to be limited (for instance, Apple iTunes music cannot be played on non-Apple devices unless the music is ripped onto a CD or converted to a compatible MP3 format).\(^{302}\) Further still, due to international discrepancies and competitive policies, users may not be able to access, use or otherwise enjoy many commercial films that are recorded, streamed, or disseminated in different countries (for instance, Apple iTunes offers different music in America and Europe, and music purchased in one locale is not typically compatible with devices purchased in other locales).\(^{303}\) And lastly, users may find that licensed digital content is less clearly governed by the first sale doctrine than owned pre-digital content. Taken together, these restrictions represent real costs to end users that were arguably either minimal or non-existent in the more traditional and pre-digital world in which users simply purchased creative content and then controlled the content they owned.

**C. Tailoring**

The structure of IP entitlements enables creators to produce original work and ensures that they are rewarded for their output, thereby incentivizing future production. Collaterally, however, IP can give rise to uniformity costs that can lead to a variety of negative consequences, which may come at a high price not only to users but also to other industry stakeholders. The results of inappropriate IP allocations are broad and varied, and may include diminishing users’ rights and access, narrowing the public domain, detracting from well-established norms and practices, and

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\(^{301}\) Similarly, in the case of music, e-books are licensed rather than owned; in the case of films, digitized films streamed via services such as Netflix, Amazon Prime, on demand services, and various online services are licensed rather than owned.

\(^{302}\) Similarly, in the case of film, DVDs may not be watched on Blu-Ray and vice versa.

\(^{303}\) Analogously, in the case of film, many DVDs made in the US are not interoperable with European devices, online streaming of films via US providers may not be accessible via European or Asian providers, and vice versa.
potentially exacerbating downward pressures on creative industries already challenged by technological innovation and other major changes. One approach to reducing uniformity costs is to decrease a reliance on IP rights altogether, and to use changing business models, adding revenue sources (such as advertising, data mining and data marketing, ancillary services, and so on), and other non-IP based strategies to create new markets and opportunities for profitability. In the same vein, private ordering solutions, such as strategic partnerships, joint ventures, constructed commons, guild-like structures, and other negotiated arrangements can likewise reduce transaction costs and minimize the uniformity costs that arise from IP-based solutions.

Another approach to reducing uniformity costs is not to do away with IP entitlements, which after all may be requisite to protecting the interests of creators and rights holders in certain creative industries, but rather to change the structure of IP rights by “tailoring” such rights, or granting IP rights are well-calibrated to suit the specific contours of a given industry. There already exist several examples of calibrated IP entitlements that have been inscribed in copyright law and policy, including: (i) the “hot news” doctrine that narrowly protects rights in time-sensitive news and may allow an infringement action to be brought on the basis of “willful misappropriation” of such “hot news;”304 (ii) carveouts that offer copyright protection in limited areas of production, such as fashion design prints, boat hulls, and so on; (iii) specific exceptions created by Congress, the Patent and Trademark Office, and the courts; and (iv) “gray areas” created by the fair use doctrine that allow certain exceptions to the exclusive rights that copyright confers, such as parody, educational use, and certain other non-commercial uses.

The mechanisms for tailoring IP will be discussed in detail below. They include, but are not limited to: (i) varying initial allocations of IP; (ii) calibrating rights in accordance with the optimum durability of copyrighted work; (iii) promoting IP-based regulatory systems or regimes; (iv) redefining terms and standards; and (v) creating and/or reinforcing alternatives to IP, such as rewards, norms, open source, and so on.

1. Varying Initial Allocations of IP

One approach to tailoring IP entails varying initial entitlements across different industries. This has been proposed in several guises. Some advocates of limited copyright argue that copyright protection may and should be granted in accordance with the needs of a specific industry. In the case of fashion, for instance, copyright has not historically been granted to original designs or other original output. Some proponents of copyright have lobbied to bring copyright protection to fashion design, and a recent bill in this regard, the Design Piracy Prohibition Act, has received widespread attention and some favor (although at present it has been tabled). One proposal that has been brought to the fore by the recent bill is to stagger the terms of protection of certain fashion designs to protect them from their inception through their first three years in the market, presumably their most commercially significant period in the life of the work. Other proposals have recommended extending copyright in elements of fashion design, particularly those that rise to a standard of originality and that risk being reproduced at a cost to their creator. These restricted extensions of protection have likewise been recommended by commentators with respect to other creative fields, as well as other forms of protection, such as patent protection.

2. Varying Terms and Standards (Drawn From Arguments in Patent Law); Offering Options

Assessing IP entitlements in various creative fields can require broad-brush measures, such as bringing copyright to an industry like fashion that has previously only received trademark protection. If copyright law is to extend to new fields, however, it may also consider

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305 As discussed, other negative spaces include comedy, cuisine, yoga, and some sports instruction.
306 In other fields, this output includes routines and jokes; recipes and, until recently cooking methods; yoga poses, methods and techniques; football plays or strategies; and so on.
309 For instance, it has been suggested that some practitioners might seek a limited protection in certain yoga practices and poses.
somewhat more fine-grained approaches to granting IP upon certain outputs and activities. At first this may seem challenging, as copyright can appear monolithic by nature. But copyright law can look to patent law for guidance in shaping and tailoring its application to creative endeavors. By establishing rules, principles and practices that are at once nuanced and flexible, tailored copyright can help creative industries that are being transformed by innovation, and leave room for adjustment or reassessment when further innovation makes inroads on existing businesses.

A useful taxonomy of tailoring in patent law proposes two types of tailoring: terms and standards. In a reasonable Type I approach to varying rights among creators, flexibility with respect to patenting is conferred by a close and careful analysis of the person having ordinary skill in the art (“PHOSITA”). Copyright does not have a precisely analogous term of art to describe a reasonable (hypothetical) person having knowledge of a particular field (and thus, loosely speaking, able to assess if the work is patent-worthy). However, in the case of newly-minted copyright, as in fashion, a similar reasonable person with knowledge of the field might be invoked to help determine what works rise to the standard of originality that fashion deems original and the law deems copyrightable. Such an equivalent to the PHOSITA could also be useful with respect to determinations of “substantial similarity” and misappropriation in copyright infringement claims.

With respect to standards in the patent context, a “technology-specific” approach has been proposed arising from the Federal Circuit’s application of the ordinary skill in the art analysis to biotechnological inventions. This approach arguably results in relatively stringent disclosure standards, especially under the written description requirement, and relatively less stringent obviousness requirements. This results in biotechnological patents that are arguably likely to be more "narrow and numerous" than would be the case absent the exceptionalist approach. Copyright similarly has some potential to focus specifically on variations among creative industries and to bring those differences to bear on considerations of copyrightability. In some instances, this can be said already to have occurred in copyright’s history. Entire creative

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312 Wagner, supra note 311.
industries have been affected by determinations of originality that specify the extent of copyrightability. In the case of fashion, for instance, copyright has historically not been granted to fashion design and apparel, due to the determination by courts that such works do not separate functionality from design.\textsuperscript{314} Those determinations, however, may be open to challenge.\textsuperscript{315} Moreover, in many other the creative industries, narrow copyrights may be imagined that are broadly similar to those found in patent, and at least similar with respect to the ability of courts to take into their deliberations the shape, nature, and effect on copyrightability of the creative industry in question.

The ability of creative industries to seek copyright will by definition, and by necessity, vary over time. In the event of disruptive innovation, businesses may choose to seek IP entitlements immediately, or may prefer to bide their time and wait to determine what is best when a new and workable environment emerges. One proposed approach to affording creative businesses greater flexibility is to offer real options that regulate who acquires, keeps, and exercises IP entitlements.\textsuperscript{316} While possibly challenging to implement, such real options hold the promise of allowing businesses to feel secure that they will be able to avail themselves of IP rights should the need arise, but also reduces the incentive for businesses to seek such rights prematurely. In the landscape of many creative industries that are still ascertaining how best to respond to the changes that disruptive innovation has wrought on their business models and plans, real options may represent a measured and time-sensitive recourse for those considering rights-based strategies and solutions.

3. Calibrating Rights in Accordance with Optimum Durability of Work

The justification for granting IP entitlements, broadly, is to incentivize creation by ensuring rewards in productive output. But in many industries the value that inheres in a work, and the degree to which profits can be yielded by exploiting a work, can vary considerably over time. In

\textsuperscript{314} In the case of cuisine, it may be argued that certain limitations have been placed on copyright grants as well: that is, copyright may be granted to cookbooks, or to annotations of recipes, but not to the recipes themselves.

\textsuperscript{315} This would not be dissimilar to other “technology-specific” approaches to copyright, which have been mixed and ever-evolving, as in the case of computer programming.

\textsuperscript{316} Carroll, supra note 292, at 849.
the case of fast-moving industries, for instance, such as fashion (copyright) or pharmaceutical drugs (patents), it is arguable that the greatest value of the creation or innovation will be consolidated in the early period of its release and exploitation. In fashion, this is because the “freshness” of a garment or accessory, or its peak popularity among consumers, tends to be short-lived, remaining desirable for only an initial season at an haute couture level and then a subsequent season at middle- and mass-market levels. This is comparable to sectors that experience rapid changes in the utility and value of patentable works to consumers, such as computer technologies (both software and hardware), in which innovation, turnover, and changing preferences, markets, and product rollouts are likely to curtail the longevity of even the most innovative products released. The time-sensitivity of creative work, therefore, may yield important clues that help policymakers determine the appropriate levels and measures of IP protection that will protect a work when it is valuable and at peak profitability.

Another important factor in determining the optimum durability of a creative work arises when the makeup of the creators or innovators themselves are more closely scrutinized. In the case of fashion, for instance, the creators who stand to be protected by copyright (as has been proposed) are original designers who lie at the high end of the spectrum, such as haute couture houses of design, and those who are emerging, such as independent designers who are seeking a toehold in the established ranks (they may be at the high or low end of the spectrum, depending on the market(s) they choose to target). These designers are doing the creative work that reasonably merits protection, as it is their collections that establish trends, drive sales, and build the ongoing churn on which the industry depends. While their work may merit protection, however, it is valuable only for the short period of time in which it is desired among consumers, or “hot.” This is also the period, however, in which high-end designers have a significant lead-time advantage in the market. Even without copyright, therefore, they are likely to enjoy the favorable returns that accompany being first-to-market with exclusive, desirable goods. At the same time, however, high-end designers may assume risks that are associated with being first-to-market, and IP protection can help to reduce the costs that such risk-taking may incur, and thereby to promote risk-taking behavior on the part of future designers. Subsequent to the lead-time period, knock-off designers can create similar garments that mimic the look and feel of these trend-setting pieces which further contribute to the industry churn and also extend product sales to lower
market consumers who could not otherwise afford to invest in fashion’s first exclusive offerings. As the initial risk-takers, the fashion designers under copyright would be appropriately protecting their right to returns in successful original works. But after these garments have proven profitable, which is again most likely to occur in their earliest appearances on the runways and shelves, the rationale for protecting long-term returns diminishes in tandem with the decreasing profitability of the creative work.317

At the initial stages of commercial exploitation, creators in fields such as fashion and innovators need protection to reap maximum rewards and thereby to recoup their investment and/or start-up costs. But at a later juncture, when they need less protection because they have already taken full advantage of the initial monopoly rents, the innovators or creators can relinquish their hold on the product’s exclusivity at relatively low cost. Equally importantly, their cost is counterbalanced by a social gain, in that consumers are benefited by getting eventual access to lower cost knock-offs or generics, and thus wider social gains may be realized that counterbalance the later, and possibly more minor, losses that may be incurred when exclusivity and its IP-based rewards have run their course.

But an important caveat distinguishes fashion from some other creative content industries, and may undermine its case for protection as a consequence. The fashion industry as it is currently constructed does not require IP protection at the beginning of a fashion cycle to safeguard creators’ productivity and profitability: key industry features, such as the high pace of churn, and

317 Parallel examples can be found in industries that rely on patent protection. In the case of pharmaceutical drugs, for instance, patents protect innovators and rights holders who are investing significant resources and funds in R&D, the costs of obtaining FDA approval (such as clinical trials, application fees, and so forth), marketing, and other expenses that are incurred in the course of bringing a new drug to market. Again, it is the protection of innovation at its most valuable stages that is paramount to incentivizing innovators and ensuring their due rewards. However, when the protection period runs, generic manufacturers are permitted to produce knock-off drugs (possibly by reverse engineering the original product), and thereby to contribute to the vitality of the overall pharmaceutical drug market. However, an important distinction must be made: in the case of patents, the period of time in which protection is extended is relatively short, although it remains uniform across industries. In the case of pharmaceuticals, the full span of patent protection may be needed to protect the original product at its peak profitability, since drugs may prove desirable, indeed at times necessary, for a matter of years. In this case, therefore, the span of patent protection may be suited to some drug releases, while other products will not require the full term to run before they begin to lose the market value that is based in the requisite exclusivity.
the short window of exclusivity, ensure that original designers are able to reap the earliest rents by being ahead of the curve and having exclusive rights to sale in their latest, most popular, and most profitable designs. It is only in the event that technology actually transforms the industry, rendering copying of designs virtually instantaneous, indistinguishable from the originals in all meaningful respects, and therefore substitutable for the originals, that the elite designers’ initial returns will be undermined. Although innovation is beginning to disrupt the fashion industry, the extent of such copying and its effects on high-end profitability are still subject to dispute. Moreover, elite designers have created highly effective strategies for competing with knock-offs, including increasing their efforts to design works for non-elite markets, in other words, creating original designs that compete at various levels. Thus, if the creators are scrutinized, as suggested above, their viability and competitiveness in the fashion market speaks not to their need for fashion copyright, but rather of their ability to flourish without it.

There are cases in which calibrating the optimal durability of protection may lead to the conclusion that protection is in fact limited in overall value and, if granted, may require being allocated on a case-by-case basis. There are, of course, significant cost concerns associated with such fine-grained protection; and many questions arise as to the overall fairness, viability, and manageability of such a course. The reasoning behind considering fine-grained protection remains defensible, however, and can lead those considering whether or not to seek or extend protection to a more profound consideration of benefits and costs associated with their efforts. In the case of publication and employees in knowledge-based economies such as the education sector, for instance, patent protection may be sought rather than publication (although of course patent applications must make the claims that define the invention), in order to protect an innovation’s profitability. By contrast, publication discloses a work to the public, and hence its value does not lie in secrecy (which confers a competitive advantage in many industry sectors), but rather in disclosure. Disclosure and publication, however, may have strategic uses, such as serving as a strategy for re-dividing the bargaining surplus between the original inventor and cumulative improvers in the context of cumulative innovation.\footnote{Gideon Parchomovsky & Peter Siegelman, Towards an Integrated Theory of Intellectual Property, 88 U. VA. L. REV. 1455 (2002).} There are other useful purposes of disclosure and publication, such as enhancing employee mobility and knowledge.
portability,\textsuperscript{319} reputation, or the strength of an innovator’s portfolio. These features may lead the innovator to conclude that her invention, and the knowledge it comprises, may be actually more valuable with limited protection, particularly such that allows publication to have its rightful importance and worth, rather than with full IP protection. As a practical matter, it is highly likely that these kinds of considerations will have to occur on an individual basis, rather than as a larger policy decision with respect to tailoring IP entitlements. However, the case of publication rights reveals that inventors and creators must take into account the costs and benefits of disclosure versus protection in a nuanced assessment that recognizes the value of both sides of the equation, and that seeks protection only when it optimizes as many facets of productivity as possible.

4. Promoting IP-Based Regulatory Systems or Regimes

Creative industries that are challenged by disruptive innovation and seek not only new business models but also new or expanded IP protection must consider the administrative and transaction costs that actualizing IP measures is likely to necessitate. Particularly when systemic change is sought, the efficient management of IP rights will almost certainly involve strategic, collective, and administratively-streamlined procedures that strike the balance between creators’ rewards and users’ access. Implementing IP-based regimes can call for the creation of collective rights management organizations, which organize and manage the licensing of copyright on behalf of rights holders. These regulatory bodies are especially effective when disruptive innovation displaces the role of middlemen, who (among other important functions) have largely been responsible for managing rights and rewards in longstanding creative industries.

There are also other measures that can effectively regulate and manage IP rights in creative work. In the case of mature industries, such as education, extending and expanding copyright in online courses and related materials may present challenges to administrators, who must work to ensure that rights are equitably allocated and rewards, either actual or future, are dispensed fairly and in rough proportion to expenses and risks undertaken by the various participants. There are various initial allocations that can be imagined: in the case of the University of Pennsylvania, for instance, a traditional university offering MOOCs via Coursera, the interested parties have

\textsuperscript{319} Id.
agreed to a specific contract governing online instruction. The UPenn-Coursera contract provides that the university retains copyright in the courses, while the faculty are entitled to per-course remuneration and/or certain non-monetary benefits (administrative and technical support, lightened teaching load to assist with preparation time, and so on), and any royalties that accrue are paid to the university with a possible eventual payout to faculty. Coursera reserves the right to stake claims in other royalties as they may arise in the future.

These allocations may make good sense given an intra-university context, in which faculty members remain stable, attached to their home institution, and a single online educational provider is involved. Multiplied across the educational spectrum, in a scenario that brings many shifting parties and allegiances to an ever-expanding world of online courses, as well as ancillary activities (tutoring, networking, professional employment and career prospects, data mining, pedagogical research, and so on), the management of rights and rewards can easily become far more complex and daunting. Further, derivative rights, secondary rights (in teaching materials, notes, online bulletin board postings, and so on), and transmission rights (in video, radio, and possibly other media) may add more layers of rights management to the picture. And as in the case of other mature industries, such as music, academic stakeholders may wish to preserve an array of future rights, such as performance rights analogous to the right to perform a copyrighted musical work (that is, the right for one professor to teach another’s course). These various interests have been efficiently managed by collective rights organizations in the music sector, and a similar IP-based regulatory regime may map well onto education and other creative industries that are complex, changing, and moving toward a rights-based system of rewards.

D. When Tailoring Does Not Work So Well

IP tailoring seeks to help industries adapt to change with rights that benefit creation and facilitate market transactions without stifling the emergence of new entities, the rights of users, and vital public interests. This is of course the ideal balance that is sought, but its pursuit has real and
possibly insuperable limitations. For one, changing business strategies may limit the utility of IP and, even when combined with IP, may not fully rescue an industry from wider changes. It may be that new business models, technologies, or even industries are tasked with revitalizing industries that have already been challenged to the point where they cannot recover from their newly destabilized state. Alternately, the combination of new IP entitlements and business models may come at such a high cost to greater interests, such as the public good, privacy rights, openness, or other social goods, that stakeholders in a creative industry must reconsider the path they are traveling. Changing the course of an entire industry may seem quixotic or virtually impossible to effectuate, but it cannot be disregarded if social goods are to be prioritized and upheld. Even thinking about the costs of tailoring itself is worthwhile, as it can serve as a reminder to creative industries that the change they lobby for may not be laden with costs, unintended consequences, or other adverse effects, and that such change should be made knowingly, carefully, and with a view to minimizing these costs, if it to be taken at all.

1. Pricing and Revenues

Inevitably, disruptive innovation forces the hand of creative industries and causes them to reassess and adjust their business models in order to survive, regroup, and eventually, it is hoped, to thrive. But even in cases where business models change, and IP rights are well-suited to industry needs and demands, a transformed market may continue to experience sclerotic growth, decline, or actual failure. While the worst-case failure may be irreparable market failure, a slightly less-worse case of prolonged decline may be nearly as painful to endure. Then only another wave of disruptive innovation may be required to save the industry, or to transform it anew into a healthier, functioning environment.

The music industry may illustrate the challenges and struggles that an industry racked with disruptive innovation can face, although it is far from clear what its ultimate fate might be. In the music sector, sales of individual units of creative work (songs or digital tracks), which disaggregated earlier larger units (record albums), has led to a precipitous decline in net sales and net revues in the industry (even factoring out unpaid downloading and copying). The industry has stayed somewhat healthy through the "360 contracts" that make revenues from sales related
to musicians' work, such as concert tickets/tours, merchandise, promotional materials, and so on. However, extremely well-established and well-administered IP rights, even when wielded with some major enforcement efforts (RIAA and other suits) and coupled with technological protections such as DRM, have not enabled the industry to return to pre-digital levels of profitability. In music, then, songs have become cheaper, but they are just as protected as ever, if not more so (a user may only make a restricted number copies of digital tracks on electronic devices; users can only access digital tracks in certain markets, and on certain devices that may not be interoperable; the use of “snippets” has been restricted by case law even when they are used for new genres such as sampling, and so forth). For users, this may be a net positive effect, in that more music can be consumed at more reasonable prices, and only music that a user desires need be purchased (as opposed to being compelled to buy an entire album). At the same time, however, it may not be an unmitigated boon: users who license online music may discover that their rights are restricted in comparison to the rights they held in music that they purchased in physical hard copy form.

Equally importantly, the effect of this new business model on the music industry has been adverse if not, as some have argued, calamitous. While reports of declining sales can differ in demonstrating the impact (due in part to differences in baselines and factors considered), they are generally unanimous in showing a significant divide between pre-digital and post-digital sales and revenues. In the last fifteen years or so, individual digital tracks have sold at relatively flat rates, and it is only recently that the largest seller, Apple, has realized enough of a profit that it does not need to subsidize losses realized from music sales with gains realized from electronic device sales. It is difficult to imagine how to change the business model to correct for soft or declining sales of digital tracks: while the per-track cost to consumers has been raised across the board (in the case of Apple iTunes, many tracks have gone from 99 cents to $1.29 per downloaded song), it is not clear that prices are wholly inelastic. Further, it is equally difficult to imagine how to re-calibrate IP entitlements to improve the state of the industry. One suggested approach is to reduce reliance on copyright in recorded music, and essentially to treat some recordings as a loss leader—that is, giving them away for free, while charging users for live performances, compilations, access to artists, limited new releases, and so on—and thereby effectively tailoring IP while not actually changing entitlements, but rather by the strategic
decisions of rights’ holders. Another suggested approach is to rely on online music streaming services for a greater share of revenues, creating subscription-based packages, allowing music streaming to be underwritten by advertising, charging additional prices for live streaming, and so on. This option would require IP rights to address online streaming licenses and to craft regulations and fees that would put streaming services on a competitive foothold with traditional broadcast media (such as radio). In sum, while it is hard to surmise how tailoring will solve for the legions of challenges that face the music industry, such a solution must be pursued, and indeed one possible approach will be outlined later in this paper.

2. Price Signals

Assigning new IP entitlements to a creative industry is often argued to be a means of ensuring that price signaling on the part of producers directed at consumers, who seek to differentiate between tiers of products, can be effectuated in a clear and effective manner. The argument is premised on the value of IP as a kind of groundwork that gives creative producers an assurance that their work is protected, and therefore not vulnerable to copying without consequence, which producers can then pass on to consumers in the form of credible separation of products and differentiated pricing, or price discrimination. The argument for tailored IP is that it promotes an enhanced environment for price signals, in that it protects higher tier products at their point of greatest value, and protects high-end creative producers at their peak vulnerability. One shortcoming of this argument, however, is the underlying assumption that a market in which some copying exists is necessarily a market that cannot effectively operationalize price signals. This remains an open question, particularly in the case of well-functioning negative space creative industries that permit some copying but that still remain robust due to turnover, behavioral norms, customer preferences and customer segmentation, and other factors.

In the context of the fashion industry, Randall Picker, a critic of the conceptualization of negative space, argues that “in a world without fashion copyright, high-end designers lose one

323 From a broader perspective, these issues are similarly roiling other media, such as television and video, as well as publishing, journalism, and other content-rich fields. See generally supra Chapter 6.
Chapter 4: Analysis

means to commit to their customers that the masses won't catch up with them." On his view, if apparel is centered on separation, the value of the good is completely dependent on the technology of copying. In such a situation, if instantaneous copying co-exists with low or nonexistent IP, high-end designers will not be able to sell products to their most exclusive customers. But, the more that they can promise to their customers, the higher the price that they should be able to charge for that promise. Picker argues that “[l]egislation creating a fashion copyright would give high-end designers the means to make credible commitments about separation and to raise their prices.” While this may not translate quickly into legislation, Picker argues that fashion copyright would create a preferable regime. Further, Picker suggests that most fashion copying is vertical and not horizontal. Horizontal copying connotes copying at the same level of the fashion pyramid: for instance, a couture house such as Fendi would likely copy its peer Louis Vuitton, while a mass market store such as Target would likely copy its peer Wal-Mart. Vertical copying connotes copying at different ends of the fashion pyramid: for instance, lower-end designers for Target copying higher end designers such as Vuitton. Picker argues that vertical copying virtually always flows in this upward direction: that is, Fendi never expects to copy fashion design from Target, but Target may decide to copy Fendi.

In brief, then, Picker’s argument runs as follows: (i) copyright is likely to be one-sided: that is, low-end firms copy from high-end firms; (ii) rapid imitation limits the value that high-end designers can promise to their customers; and therefore (iii) with a fashion copyright, high-end firms could commit to their customers that they would not face quick matching by low-end copyists. In further defense of fashion copyright, Picker adds: (iv) fashion copyright can compel would-be copyists into abandoning copyright (fearing that copyright holders would bring

324 Picker, supra note 113, at 4.
325 Id. at 5.
326 Id.
327 Id.
328 Id.
329 Id.
330 See id.
331 See id.
332 Id.
333 See generally id.
infringement actions) and instead pursue creative design.\textsuperscript{334} If tailoring were to be added to Picker’s argument, a copyright crafted to protect original fashion garments at their inception, at which original designers enjoy a lead time advantage and can therefore attain peak profits, would contribute to the accuracy of price signaling, as elite designers would be able to make credible commitments about the exclusivity of their works in their first appearance in the fashion market.

While internally consistent, however, Picker’s argument for fashion copyright, even when supplemented by IP tailoring, paradoxically reveals the shortcoming of tailored IP in a creative negative space. As Raustiala and Sprigman convincingly argue, fashion can best be described as a “stable regime of free appropriation,” plausibly flowing from the fact that as a designer, “one is more likely, over time, to be a copyist than to be copied.”\textsuperscript{335} Further, appropriation in its current state in the industry occurs both horizontally and vertically, but also vertically in both directions. For instance, elite designers such as Stella McCartney or Rei Kawakubo have shown that they are as likely to appropriate ideas and designs from Japanese street fashion (the trend to re-create the trend-setting attire of “Harajuku girls” is an example) as they are to appropriate one another’s work. Elite designers are equally likely to appropriate ideas and designs from one another, though, as collections that either openly imitate each other, or pay homage to another designer, are rife in fashion’s ever-changing seasons. Most recently, high end designers have adopted a strategy of appropriating from their own collections: for instance, creating works that are aimed at lower-tier retailers, but that still bear the look and feel of their exclusive apparel. For instance, Missoni, Phillip Lim, and others have created lines for Target that bear their distinctive signature look, while compromising certain elements (such as quality of fabric, and so on) to make these garments affordable for lower tier consumers.\textsuperscript{336} This last example of appropriation would not, of course, be affected by IP entitlements, as copyright holders can always imitate or copy their own work in any number of ways or occasions. It merely serves to underscore the pervasive and vibrant practice of appropriation that is an accepted industry standard, and that allows the industry to churn creative products at all levels of the fashion spectrum. Indeed, it is arguable that appropriation has been a foundation in the emergence of popular mass-market retailers, both in the U.S. and abroad (not only Target, but also H&M and Zara), which has helped to expand

\textsuperscript{334} Id.
\textsuperscript{335} Raustiala & Sprigman, supra note 31, at 1727-28.
\textsuperscript{336} See generally supra Chapter 1.
the fashion market exponentially as it reaches mid- and lower-tier consumers. In this environment, therefore, fashion copyright, even if properly tailored, may be more of a hindrance to growth than an aid.

3. Pre-Existing Norms

In cases where strong norms and established practices prevail, tailoring and price discrimination need to be used very judiciously. For instance, traditionally reputational capital in academia has been an important overarching norm, effectively displacing the use of ownership rights in academic materials per se to confer value on academic scholarship and production or value on an institutional affiliation or degree. A good example of this is the balance of propertization vs. publication in scientific research. Generally, scientific research has created an internal balancing act that rests on two distinct and opposing goals: on the one hand, the propertization (usually via patent) of downstream scientific discovery and innovation, and on the other hand, the publication of upstream scientific research and disclosure of scientific findings (while patenting also involves disclosure and publication, its timing is different, and its disclosure of what is patentable may be narrower than scholarship would otherwise divulge). This arises in both academic and industry contexts, which should be considered separately.

In the academic context, scientific research and scholarship are intended to lead to publication. The publication of scholarly works is crucial to advancing an academic’s reputation and career prospects. They are also part of an academic’s portfolio, contributing directly to her employee mobility and knowledge portability. At the same time, however, academic institutions are increasingly looking to public-private partnerships, or corporate sponsorships, to underwrite their often-costly scientific research. In search of returns on their investment, corporate partners look to the prospect of patentable discovery and the revenues that can flow from exploitation of patented output. The pursuit of patents may exert pressure, directly or implicitly, on academic scientists seeking to share, discuss, or publish their findings at earlier stages (i.e., prior to patentability or to a patent application actually being filed).
In academia, scientists have no prospect of owning patent rights in their work: almost all university technology transfer offices have long followed the model established by MIT, in which institutions immediately garner all patenting rights. But academic scientists do retain valuable publication rights. Indeed, academics have long argued that publication yields reputational capital that is an intangible but real asset in their portfolio, particularly with respect to their long-term employment prospects, for instance, securing a tenured position. However, the increasing “adjunctification” of academia raises questions as to the ongoing importance of publication, and gives rise to a key question: if an academic cannot get on tenure track, how useful is publication to her career? Some institutions argue that adjuncts do not need publication to further their careers (that is, publishing is not helpful to advancement in short-term and contractual adjunct positions). But in contrast some academics argue that adjuncts need publication even more than tenure-track professors to stand out from the field and win even lower level jobs in an increasingly competitive marketplace. Academics further argue that scholarship is a key part of their rights and responsibilities as academics. Just as the precepts of academic freedom confer upon them the right to choose research topics, engage in scholarly debates, and perform autonomous and self-directed scholarship, so does academic freedom grant them rights in and over the results of their work, including determinations regarding disclosure, publication and dissemination of the fruits of their labor.337

In the corporate context, a similar debate arises, but one that tends to lack some of the normative drive of the academic one. Here, scientific research is driven primarily by a profit motive, although industry scientists are also often in pursuit of reputational rewards, quite possibly for career- enhancing purposes as well. Corporations, like universities, retain patent rights in their employees’ scientific research and discoveries, usually pursuant to standard “work for hire” principles. But some firms allow scientists to retain certain publication rights, subject to corporate approval. Equally importantly, the firms themselves retain publication rights, which they may deploy strategically. For instance, in a cumulative innovation context, an originating firm will use publication as a strategy for differentiating and dividing rewards between itself and other improving or innovating firms. Therefore, the strategic value of publication tends to be paramount in industry, but to the originating firm as much as to the original individual(s) who

337 Similar debates are now arising with respect to copyright in courses, as discussed earlier.
innovate within the firm. Any change in IP treatment of innovation will likely affect the firm, and therefore may have stronger safeguards than has historically occurred in the academic context. An increase in publication rights to employees, therefore, might be countered by heightened industry protection, for example, an increase in restrictive non-compete covenants in employment contracts, for fear of idea theft to competitors when an employee leaves the company. In industries that have a particularly fast pace of innovation change, publication would likely have an even greater strategic value, due to the time sensitivity and early-stage value of disclosure. Therefore, any changes to IP protection would most likely be viewed through the magnifying lens of industry impact prior to change.

4. Openness, UGC, Open Source, Users’ Rights, and the Public Domain

Tailoring IP can work with unprotected spaces that are considered worth keeping open; indeed, tailoring can work to establish the divide between protected spaces and open ones. Limited copyright, for instance, can leave room for creative borrowing by follow-on creators, especially when these later works are non-commercial in nature and therefore unlikely to impinge on the business model of the copyright holder. One example of this is the Creative Commons License, a public copyright license that makes possible the distribution of otherwise copyrighted work. The Creative Commons License is governed by copyright law, and enables a creator to give others the right to use, share, and build upon a work that she has created. The License also affords the creator flexibility and the discretion to choose to permit only certain uses, such as non-commercial uses, of her work to be made; conversely, it protects users or follow-on creators who use, redistribute, or rework an original work, subject to their abiding by the terms and conditions that are specified in the original creator’s license for distribution.

Similarly, in the case of user-generated content (UGC), creative media content which may be produced through open collaboration, tailored IP can create space for rich creative production, including news, research, resource and information generation, problem processing, and artistic output, through a variety of media, such as digital video, blogging, podcasting, forums, social

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338 Creative Commons, supra note 196.
networking, social media, mobile phone photography, and wikis. UGC may draw upon a combination of open source, free software, and content-based sharing sites to further shared goals of collaboration, skill-building, and discovery. Tailored IP, including the use of limited licenses (such as the Creative Commons License discussed above), can enable UGC to flourish. In non-commercial cases, tailored IP can create space for UGC to proliferate and disseminate under the fair use doctrine; however, when copyrighted material is used in the production of UGC, fair use may not suffice to exempt the work from copyright infringement claims.

But it is when UGC has commercial implications that the benefits of tailored IP become more complicated and fraught. On the one hand, many commercial websites rely on UGC, and are able to monetize its production. 340

Likewise, sites such as YouTube, Facebook, MySpace, and FanFiction.net, encourage the production of UGC, which forms a significant portion of their online content and appeal to viewers, subscribers and, by extension, advertisers. The ability of these websites to monetize UGC (even if, at present, limited to the draw that advertisers consider site page views to hold) renders them eager to host UGC and reluctant to curtail UGC production based on possible copyright infringement in the underlying material that goes into making it. But in this case, UGC may be made by creating derivative works that borrow from, copy, or allude too directly to other original copyrighted work. The producers of this underlying content tend not to be so sanguine about the use of their material in UGC that is contributing to the commercial benefit of host websites at the producers’ purported expense. These original content producers argue that not only may infringement occur explicitly and intentionally, it occurs in a way that does harm to their commercial interests: for, had the UGC creators respected the copyright of underlying

340 For instance, Amazon and Trip Advisor actively seek user feedback, and rely on user input to rate, respectively, products and hotels and restaurants. These reviews are instrumental to the websites’ content and appeal and, therefore, do not trigger IP concerns (unless the reviews themselves contain infringing matter, in which case the websites reserve the right to remove the offending material or reviews). A parallel development can be found in the video game industry, in which games such as World of Warcraft, The Sims, and Second Life allow players large latitude to participate not only in playing virtual games but also in building essential parts of the games. UGC thus contributes to the business models of both websites and video games, and allows these media companies at once to satisfy users’ urges for creativity, to reap new creative output at no cost, and to monetize the output without having to negotiate IP in the creative works.
work, they would have sought permission and, where appropriate, paid royalties for the licensing rights in such works.

Each of these factors, however, is problematic. First, some use of original works in UGC may be unintentional, as in the case of the use of snippets of background music or video clips. While this may fall under the scope of the fair use doctrine, such a determination may not be evident at the work’s inception. Second, it is not clear that commercial interests are materially harmed, as there is some dispute as to how much work must be used to rise to a level that constitutes harm. Third, by hosting a broad range of UGC, the websites may be expressing a tacit approval of possibly-infringing UGC that is deceptive to the ordinary user who is interested in creating and disseminating her own creative, if possibly derivative, work. Fourth, and finally, it is unclear how tailored copyright could contribute a clear and straightforward solution to the murky waters of UGC that draws upon some copyrighted underlying creative content. In this regard, the potential conflict of interests between UGC-hosting websites, on the one hand, and original creative content producers, on the other hand, is not readily resolved by a solomonic division of IP entitlements. And the costs to creation, innovation, and new business models is real. As in the case of music sampling, an overly strict insistence on requiring licensing of snippets may shut down an entire emerging genre, to the detriment of creative production. In the case of UGC-hosting websites, however, the day may come when UGC-generating users demand rights in their creative work or a share of the proceeds that their creative work may yield. It is possible that eventually the majority of participants in the ever-growing UGC space will determine that maintaining the use of open source, open collaboration, and creative licensing will offer greater benefits in the long run than adhering to strict copyright protections, onerous licensing provisions, and restrictive usage rules that together inhibit user creativity. The alternative would be to turn to a high copyright regime, as has been historically the case in the music industry (among others), with the understanding that disruptive innovation may again reveal the shortcomings of such a copyright-intensive regime, as it has in the recent past.

**E. Other Concerns**
1. Dividing Up The Fields; Assessing IP Entitlements; Gaming The System

By definition, tailoring IP entails making judgments and adjustments that are industry-specific. But the first dilemma that may be integral to tailoring arises when dividing the creative fields is at issue. In some endeavors, such as music, the definition of each field seems relatively easy to delineate, based in the creative output, the history of the field, and so on. But new technologies, new forms of creativity, and new user practices can blur the lines and cause policymakers to deliberate over the categorization of works and the appropriate protection that should be extended. In the case of UGC, for instance, creative content can be musical or theatrical, a performance or a recorded work, infringing or fair use (or original), and so forth. The nature of the content may be disputable, but so often may the nature of industry practices by contestable. Online music streaming may be considered broadcasting, or it may be considered distinctly different, a content delivery system or network that is sui generis.\(^\text{341}\) In other words, creative production and dissemination may defy easy categorization, and that may therefore challenge determinations of how much to propertize, how best to protect, and how finely to parse and parcel out the rights that attach to creative work and how to untangle the complications that ensue by the dissemination of such work in new and burgeoning delivery systems and vehicles.

Another concern that arises in this regard is that creative producers are bound to try to game the system for their own advantage. In other words, a foreseeable consequence of tailoring IP is the likelihood that creative producers will respond to any tailoring of IP rights and rewards on a per-industry basis by (i) seeking to be categorized under the type of production that they feel best suit their needs and give them the best competitive advantage in the market; (ii) lobbying to be given extra protection based on their own particular strategic interests and demands; or (iii) seeking to be exempt from regulations that they consider unfavorable, by arguing that they do not fit into a category that they perceive to be unduly burdensome to their own operations and competitive game plan. Such attempts at favorable self-positioning are understandable, but can be onerous to entire industries, not to mention courts, adjudicators, and administrators, as determinations of the nature of creative industries and the technologies in which they are

\(^{341}\) Further, non-streamed materials, such as e-books, podcasts, pre-recorded programs, and so on that are disseminated through online content delivery systems, such as electronic devices or online radio services, may either be analogized to streaming media, treated as traditional media that is simply disseminated via newer technologies, or cordoned off and treated as a separate area of creative work.
embedded become increasingly complex in nature, and their outcomes become increasingly high-stakes and momentous in their repercussions across multiple industry sectors.

2. Institutionalism and Uncertainty

Tailoring IP, if formally effected and not simply adopted as a matter of practice within an industry (for instance, an agreement among fashion industry participants to emphasize trademark and not to pursue copyright), must occur through legislative and judicial change. Courts, however, are often not the venue to resolve these matters; and legislatures may require costly lobbying efforts, suitable timing, and may be subject to pressure from different stakeholders with different budgets, connections, and other potentially distortionary means. It is far more likely that administrative bodies such as the Register of Copyrights and the Patent and Trademark Office (“PTO”) have a superior competency to evaluate rapidly changing technologies and their environments. Those entities, however, may be overwhelmed with their ordinary tasks and functions, and may not have the capacity to promulgate sweeping change. Moreover, the high transaction costs that such change will no doubt entail may not readily be borne by these administrative agencies. Tailoring, therefore, is a challenging proposition to ask of these entities, and demanding that they assume the role permanently may not be a tenable goal.

The issue of uncertainty also plagues IP tailoring. Legislation is glacial; whereas technological change can occur at light-speed. Further, it is virtually impossible to predict ex ante which areas of innovation will take off, and which areas will be benefited by redrawing of the rules with respect to the balance of IP entitlements, business strategies and plans, and market forces. This may be one of the reasons that administrators such as the Register of Copyrights and the PTO are reluctant to embrace swift and sweeping changes to IP allocations and their systemic implementation in various industries.

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342 One need only consider the rise and fall of technology companies, software developers, content giants such as television broadcasters, publishing houses, newspapers, record labels, fashion houses, and so on, to recognize that creative industries are a moving target, and calibrating their IP entitlements is an equally transient prospect.

343 In some cases, this conservative approach may seem justified, particularly in retrospect: for instance, it has been argued that the antitrust lawsuits against Microsoft regarding their bundling of browsers with persona computers were rendered less effective, if not obsolete, by the rapid decline of Microsoft’s
3. Is There a Constitutional Construction Argument That Tailoring Is the Best Way to Protect the Public Domain?

It is significant that the Copyright Clause of the Constitution does not enumerate the specific creative endeavors that are to be granted IP entitlements, but rather refers broadly to the goal of promoting “Science and useful Arts.” In this regard, of course, it resembles other areas of the Constitution, such as the First Amendment, which only delineates the contours of rights, privileges, and proscriptions of government actions. It has been argued in the context of the First Amendment that these broad provisions were deliberately not explicated in order to leave room for successive generations to interpret them in accordance with the exigencies of their time. Thus, for instance, the First Amendment has been interpreted over time to encompass myriad contemporary concerns that may not have been imaginable at the time of its writing (political donations as protected speech; personhood rights in corporations; rights in contraception; and so on). It is also arguable that, in either the case of the Copyright Clause or other such directives, explication can have a signaling effect: that which is enumerated is protected, but that which is not enumerated has been deliberately left out and is not to be protected. This can contribute to a system that is clear, transparent, accessible, and practical. There is, however, a counterargument to this vein of thought: by leaving rights, privileges, protections and proscriptions deliberately open-ended, one may leave space for future rights or adjustments to rights, especially as disruptive changes and shifting environments may require flexibility, fluidity and openness.

In terms of tailoring IP, both the open-ended approach and the explicative approach have their virtues and appeal. Insofar as legislative change is mandated, a more carefully crafted set of entitlements is likely to come closest to representing the agreed-upon positions of the various stakeholders who have participated in the legislative process. But insofar as creative industries take it upon themselves to tailor their own IP to suit their most pressing needs, leaving room for reconsideration and re-calibration may be more conducive to sustaining healthy competition

market share and the rise of its technological competitors, which together eroded its previously quasi-monopolistic position to a level at which it could no longer truly affect the personal computer market.

344 U.S. CONST. art. I, § 8, cl 8.
while retaining the ability to respond optimally to disruptive innovation and the changing landscape it so often leaves in its wake.
CHAPTER 5: INDUSTRY PRESCRIPTIONS

1. FASHION

A. Business

1. The Nature of the Copying They Care About (By Market Segment)

The fashion market can be segmented into tiers of designers, which is useful to identify and disambiguate the different kinds of copying that are liable to occur. These variations in the nature of copying should be addressed specifically, as their concerns are not interchangeable and their solutions offer distinct sets of tradeoffs.

The tiers of designers are as follows\(^1\): (i) high-end designers (“high-end”) who are renowned for originality, quality, and exclusivity. Their works are first released in runway collections, then sold privately (by the designer’s house) at high cost at to a limited, elite set of customers. Eventually, their works may be released for sale to a limited number of prestigious retailers. These works establish or anchor fashion trends for one or many seasons; (ii) mid-tier (“mid-tier”) designers and labels, whose works are intended to adapt the trendiest works for mid-market customers. Their works are aimed at large retailers, and are not intended to outlast seasonality (sometimes called “fast fashion” in the trade, although this term can also encompass low-end design); (iii) low-end designers and retailers (“low-end”, who are aimed at selling works to mass markets and (iv) independent designers (“indies”) who are emerging talent, seeking to establish themselves as original yet commercially viable creators. Some of these indies seek funding to continue their work independently, while others seek an alliance with a more established partner to produce and market their designs. Also considered briefly are (v) “street” fashion creators (“street”), who are often enthusiastic, talented amateurs interested in adapting fashion to their own interests, tastes, and inspiration. The increasing respect accorded to street fashion is well-documented, and shows that creativity is valued across the fashion spectrum.

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\(^1\) This list, as well as the list that follows of “kinds of copying”, is not meant to be comprehensive; more, it is intended to be illustrative of the tiered nature of the industry. Also, it can help isolate the various kinds of copying faced by the industry across the board.
There are many kinds of copying that occur across fashion’s various tiers. Some of the most striking examples are as follows: (i) High-Indie: a high-end designer, in search of appealing original work, can copy an indie designer, who may not have the means, clout, or ability to contest such copying successfully. Ex.: Diane von Furstenburg’s settlement paid to a pair of lesser-known Toronto designs after “appropriating the design” of a floral print jacket.\(^2\) (ii) High-high: a high-end designer can follow the successful model of a rival, and hew so closely to the original that infringement is alleged. Ex.: in a recently resolved case, Louboutin, a high-end designer whose red-soled shoes proved a runaway commercial success, brought suit against Yves Saint Laurent, a rival high-end designer who produced an all-red shoe with red soles.\(^3\) (iii) Mid-High: possibly most common, mid-tier designers and retailers follow cutting-edge designs and emerging trends with a view to adapting them for mid-level consumer tastes and wallets. These adaptations are intended to invoke the original designs and concepts exhibited by their precedents on the runways; thus, it is not surprising that some mid-tier versions will be hard to distinguish from the originals. This may be especially likely in the case of original works that are so successful as to become standards that are considered part of the fashion “canon” (but that may be seen as losing some of their claim to enduring originality when becoming part of the canon, much as an overly familiar good runs the risk of losing its claim to trademark when it becomes so famous as to be deemed generic). Ex.: Certain mid-tier retailers have hired designers that recreate affordable versions of “classic” designs, such as Diane Von Furstenburg’s iconic “wrap” dress, or Mizzoni’s iconic striped wool-and-silk patterns.\(^4\) (iv) Mid-Indie: similarly, mid-tier designers can adapt popular works by independent designers and thereby bring them to the mass market. This can be especially injurious when independent designers do not have the means to defend themselves against outright appropriation, or when it detracts from their originality in ways that prevent them from gaining recognition, funding, or alliance with essential partners.


\(^3\) The YSL shoe was not found to infringe, but the case was long, disputatious and incited a great deal of contention within the trade. Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc., 696 F.3d 206, 227 (2d Cir. 2012).

Ex.: the Cody Foster & Co.’s alleged appropriation of woks by independent artists and designer 5
(v) High-Street: increasingly, “street” fashion has gained credibility and widespread appeal among all tiers of the fashion marketplace, due in great part to its participants’ originality in creatively adapting, reshaping, mixing, and modeling apparel and accessories 6; at the same time, high-end designers, well-aware of the originality that street fashion can offer, have taken to incorporating some of its designs in their own work. Ex.: Alexander McQueen, to take one such designer, was known to be inspired by street fashion, and to bring some of its features to bear in his own haute couture collections 7,8

The nature of fashion copying, varying across the different segments of industry participants, mandates a range of responses crafted to address the costs incurred by designers whose work has been appropriated, to eliminate or reduce the unfair benefits reaped by designers who cross the permissible boundaries of creative borrowing, and to disincentivize or thwart copying -- more specifically, the kinds of copying that discourage creativity, pass the boundaries of reasonable creative borrowing, and in the long run diminish rather than enrich both the commercial marketplace and the public domain.

2. Business Solutions

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6 Technology has also contributed to the spread of street fashion by allowing fashion followers, bloggers, and photographers to circulate photos and videos testifying to street fashion’s creativity as exhibited in the real-lie streets of worldwide fashion capitals
8 Two other kinds of copying across tiers can occur, but will not be discussed in this paper: (vi)Indie-High or Indie-Mid: this doesn’t occur as often, as indie designers are trying to make a name for themselves, and the best way to do that is to show originality and thereby stand out; and (vii)Street-High: this also doesn’t occur often, for while street fashion might mimic some of the details of high fashion, it usually wants to be seen as free of such elitist restraints. One exception to this might involve street fashion enthusiasts carrying a frank knock-off, like a fake Birkin bag, but that’ll likely involve fake/counterfeited goods and a bit of tongue-in-cheek attitude.
a. Business Pushback (What They Should Do Commercially)
It is the high-end designers who generate original fashion that claim they are most susceptible to economically damaging copying. Many of their leading advocates recognize that independent designers are similarly situated -- that is, originate designs that are prone to being copied and mass marketed by copyists -- and therefore they argue that high-end designers and independent designers are most in need of anti-copying protective measures. Some commentators have argued that the nature of commercial enterprise in fashion reduces such potential losses by creating an ongoing churn or turnover in product demand, ensuring that designers’ original works will be continually in demand. Others, however, have countered that original designers are still hurt economically when they issue new works that are copied almost instantaneously, a trend that is only likely to be exacerbated by improvements in technology that enable ever more rapid, accurate and widespread reproduction of original works. These opposing arguments divide fashion industry experts on the need for anti-copying solutions. However, they share a focus on the parties whose works are most susceptible to appropriation -- that is, high-end designers and independent designers -- and on the time in which such copying is most potentially harmful -- that is, at the initial stage in which the original work is introduced to consumers who are avid for exposure and access to fashion’s latest, most trend-setting offerings.

Commentators and designers alike differ on the nature and degree of potential harm that may result from design appropriation. They also differ as to whether or not copyright protection is

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the optimal solution to stave off such appropriation. But many commentators do not carefully consider the business strategies that can actively counter copying, undermine its economic depredations, or creatively steal its thunder by incorporating its practices into intra-firm practices that bring the gains from copying into the profits of the fashion house that originated the work in the first place. Some of these practices have already begun to take root among industry participants. Often they have grown organically, as ways for firms to expand their reach across the spectrum of consumers in the marketplace. But as often these have not necessarily been recognized as measures that help firms successfully contend with rampant appropriation and its attendant economic losses. It is vital, however, to recognize their contribution to the bottom line of original and independent designers’ fashion houses, as business solutions are an integral part of solving the appropriation conundrum that is an integral part of creative commerce.

While possibly facing some similar concerns, high-end designers should take measures that are in some respects different from those taken by their independent counterparts. The first two of these measures entails a high-end designer bringing appropriation under its own roof and capitalizing upon the interest in its original works across the consumer ranks. One strategy involves collaboration between a high-end designer and a mid-level marketer or mass marketer, the latter of which might otherwise be tempted to appropriate designs without benefiting the original creator. Instances of such collaboration have increasingly emerged in the fashion marketplace: for instance, “name” designers such as Isaac Mizrahi, Martin Margiela, Missoni, and Miuccia Prada have partnered strategically to sell collections in association with mid-level marketers such as Target, H&M, and Zara. In these instances, high-end designers can either recreate their earlier haute couture works, or re-imagine them in more accessible and affordable designs, thereby creating their own version of knock-offs that are sold after the original works have enjoyed their first currency at the top of the fashion curve.

Another option is for high-end designers to diversify their own lines of work, offering not only a single, exclusive haute couture collection over a single season but rather multiple collections, possibly over multiple seasons, that parlay the original works into different lines appealing to

different market segments. Here, high-end designers can either borrow from their earlier exclusive works and create new versions adapted to the tastes of mid-level audiences, or they can create new works based on a similar “look and feel” that continue their appeal to mid-level audiences without drawing from the exclusivity of their top lines. High-end designers such as Ralph Lauren have capitalized highly successfully on these strategies, creating several product lines that range from the original Ralph Lauren Collection to the slightly less cutting edge luxury line Black Label, then to the mid-level Lauren, and to the mass market RL.  

Some of the features that appear in Ralph Lauren’s runway collection may appear throughout the fashion house’s diverse lines of apparel and accessories, but the original works are liable to retain their unique blend of design, quality and originality, such that they remain differentiated from their various instantiations. But in all cases, the original designer Ralph Lauren is able to garner the considerable profits that flow from the issuance of his designs through their dissemination in the fashion marketplace, thereby minimizing the risk of loss at the hands of knock-off artists and other appropriators.

A third business strategy expands upon the theme of bringing appropriation within a designer’s own house. As noted, high-end designers can capitalize upon their ability to create a “look and feel” that is enormously appealing to customers across the fashion spectrum. These designers can create, and in many respects have begun to create, a broad range of lower- or mid-priced “entry level” items, such as accessories, perfumes, jewelry, and so on, that offer the designer’s instantly recognizable look to a spectrum of consumers and aficionados eager for access to his or her works. These works can be produced at low prices and offered at high margins. While they may be easily copied, the premium that comes with purchasing a real brand label item can be enough to keep consumers from purchasing the street version or the knock-off of the original good. This strategy has proved very successful for high-end designers such as Burberry (signature plaid scarf and belts), Chanel (branded buckles, bracelets, etc.), and Tiffany’s (branded charm bracelets, baby gifts, etc.).

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14 The Ralph Lauren retail site, for example, offers dresses costing thousands under the “Collection” heading and others for under $100 under the Polo Ralph Lauren tab. See www.ralphlauren.com.

15 See, e.g., Lisa Wang, Luxury Sales to Exceed $318 Billion, Driven by Emerging Markets and ‘Affordable Luxury’, BUS. OF FASHION (Oct. 8, 2013, 5:00 AM),
These various business strategies are targeted at the devaluation of content that follow in the wake of disruptive innovation, to the consternation of content-rich industries. First, high-end designers can use sophisticated pricing strategies when creating their different product lines. Discriminating customers will learn to read these price signals, and to recognize that the haute couture collections -- which are priced at stratospheric levels that indicate originality, quality and exclusivity -- are meant to be separated from the lower tiers of apparel and accessories issued by a designer house or label. But these same consumers will also find that increases in sales of variegated goods will increase the name recognition of high-end designers across the market spectrum. The recognizability of designers, and their increasingly widespread cultural cachet, can then contribute to making their secondary or bridge lines still more desirable and commercially successful. Thus, differentiated designer lines, coupled with sophisticated and distinct price signals, can effectively counter the devaluation of content in the industry. Internalizing knock-offs thus becomes a plausible defense against rampant copying and its economic costs, and helps bolster traditional sources of revenue while introducing new sources that will strengthen the industry’s long-term prospects for commercial success.

For independent designers, the business strategies may be harder, as they can have fewer resources to stave off or fight against copying, but there are still plausible solutions. Indie firms should partner with high-end firms to seek protection from copying by alliances with deep-pocketed allies. High-end firms should encourage such alliances, rather than seeking to engage in such appropriation themselves, thereby enriching their own stock of original works while building up allegiances within the creative ranks of fashion originators. This is a more viable solution than merely expressing concern for independents, or trying to come up with solutions that may not fit their particular needs (for e.g., the independents are often unrepresented and powerless to litigate against copying, so calling for them to litigate will not serve their needs or


16 See supra Chapter 4, subsection I.A.2.
17 See supra Chapter 4, subsection I.A.2.
Independents should also co-brand with high-end designers, especially with complementary products like accessories, perfumes, etc., and/or in cases where there is no risk of products competing against each other or cannibalizing each other’s markets. And where possible, independent designers should follow the lead of high-end designers in creating differentiated lines that reach across market segments and broaden their name recognition, appeal, and eventual loyalty across as wide a range of consumers as can be secured.

Finally, high-end designers, who often claim that independent designers are the lifeblood of fashion, have a responsibility to the emerging talent pool that they should exercise by wielding their substantial industry clout. Therefore, they should boost the livelihoods and prospects of independents by offering more attribution, name recognition, conferring of approval (rewards, grants from Fashion Council), and sponsorship (helping young designers to incorporate with equivalent of small business admin. grants). For instance, Diane Von Furstenberg has proposed a joint fund, established and funded by high-end designers, to help defray costs of protecting independent works. This is a norms-based approach that requires an understanding and appreciation of the role that recognition can play in bringing independent designers the kind of success that will enable them to counter appropriation and its associated economic costs. The use of rewards, prizes, and reputational boosts result in tangible gains for young designers and in intangible but real advancements in standing among peers, visibility and desirability among consumers, and long-term commercial viability.

**B. Technological**

1. Online Changes

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18 This could still be the case even if there were fashion copyright -- after all, they’d still be unable to afford litigation. See Legal Solutions, infra section I.C.
19 Diane Von Furtenberg, *Von Furstenberg: Fashion deserves copyright protection*, LA TIMES (Aug. 24, 2007), http://www.latimes.com/opinion/la-oev-furstenberg24aug24-story.html. Von Furstenberg wants this to be in tandem with copyright, but perhaps it doesn’t need to be (it may be hard to figure out how to administrate, but it could be done).
Chapter 5: Industry Prescriptions

It is virtually impossible to prevent copying of designs wholesale, especially as technology advances: new mobile devices with photocopying capabilities (not just iPhones, but also smart watches, Google Glass, etc.) can be introduced sub rosa into almost any setting, and attempts at thwarting and/or banning them almost never proves successful in the long run. This is just part of the culture of appropriation that has increasingly become part of present day reality. (see Cultural, below)

2. Possible Responses

There are, however, a few possible responses to technological incursions in the fashion market. First, educating consumers as to the value and worth of highly original works is essential, in order to persuade consumers to support their creation by keeping their production economically viable for high-end designers and independent designers creating high-end goods. Exclusive works require skillful production, high quality values, and an irreproducible quality that comprise no small part of their price tag. Consumers should be taught that the highest-end merchandise is worth paying for, and cannot be copied in a way that reproduces its inherent value. In other words, education of consumers can reinforce the principle of exclusivity that is one of the pivot points of fashion’s cyclicality. Consumer understanding of the economic losses that original designers incur from counterfeiting may be limited, misconceived, or outright erroneous. As mentioned, this lack of perspective may, in some cases, lead consumers to consider owning a knock-off either harmless or, worse still, a point of pride. As in the case of music, the industry has made attempts to raise awareness among consumers, but for the most part these attempts have not been concerted, large-scale, and sufficiently well-funded to counteract both counterfeiting and its acceptance among buyers of fashion merchandise.

21 Note that this is as much cultural as technological.
22 See discussion supra Chapter 4, subsection II.A.1.
23 Some designers and trade representatives have been involved in efforts at such education, and there may be some evidence that they are succeeding. For examples or recent industry efforts, see the Council of Fashion Designers of America’s “Protecting Design” site, available at http://cfda.com/programs/protecting-intellectual-property. However, there is also evidence that purchasing of knock-offs has not abated, and that educational campaigns have not had the widespread effect needed to offset industry-wide economic losses due to counterfeiting.
Second, original designers should sell design patterns and how-to-make manuals online, akin to the old sewing patterns (for instance, Butterick’s and Sears’ patterns, and more recently Vogue dress patterns) and try to preempt the copyists’ market in such patterns. By doing so, designers can fix their designs in a tangible form, thereby possibly laying the groundwork for copyright claims in patterns that are arguably analogous to choreographed and recorded (that is, in a written recording) dance steps or architectural blueprints. Further, designers who sell patterns to their works can also implicitly suggest that they welcome copying of their clothing by the average purchaser of patterns, in part because they are well aware that the craftsmanship, quality, and expertise that goes into making the original works render those works irreproducible, if not unique. Finally, designers selling patterns can convey that they are interested in disseminating the patterns for consumers’ benefit, knowing that consumers will see how original and striking the patterns are and will have their understanding of the irreproducible nature of the works reinforced by seeing the patterns for themselves.

Third, anti-technological measures should be pursued, even though fashion does not have recourse to the equivalent of DRM protection and therefore must rely primarily on watermarks, symbols and other devices that are intended to thwart, identify, or criminalize counterfeiting.  

The fourth and final response entails making an essential choice as to whether to create a fashion copyright and registry, or to strengthen fashion’s negative space, including its existing practices and norms, and allow its operations to continue to safeguard fashion’s viability and values.

a. Trademark and Trademark-Related DRM
It is incontestable that trademark violations have had a hugely negative effect on the fashion industry. This has only accelerated with technological improvements that make both copying and dissemination of copies easier, faster, more untraceable, and most costly than ever. For this reason, industry participants should push harder for the support and vigilant pursuit of a range of anti-counterfeiting measures (domestic and international), including brand and/or logo

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24 See discussion infra section B.2.a.
25 Discussion in infra section I.C.
26 Discussed in infra section I.D.
27 See discussion in supra Chapter 4, subsection I.A.11.
encryption, security measures, heavy patrolling of known or potential counterfeiting venues, aggressive litigation tactics seeking sanctions against copyists, and other enforcement mechanisms. Also, the industry should: increase trademark vigilance; seek out more legislation and enforcement of existing legislation; apply political tactics such as lobbying, political pressure on rampant trademark violators; and ensure that consumers are educated as to the true nature of the economic losses that trademark violations wreak across the industry, both domestically and abroad.

C. Legal

1. The Biggest Possible Change Is to Establish Fashion Copyright

Some commentators, designers, and members of the fashion industry have called for the establishment of a copyright in fashion. Advocates of fashion copyright argue that the industry can increase revenues across the board, and protect the original works created by high-end and emerging designers. As noted earlier, legislation has been proposed and, while tabled at present, is still a topic of heated contention in fashion industry circles. Clearly, creating a fashion copyright would entail enormous changes across the board, and would involve several essential measures. If fashion copyright is indeed to be established, the following steps would most certainly be required. First, the industry should agree to establishing a compulsory licensing scheme, similar to the well-established system that regulates the music industry. The initial step in that process is to establish a centralized, neutral collective rights management organization (“CRO”) that has open membership at reasonable fees. Second, the industry should ensure that the CRO is well-funded, so that it can engage in a variety of helpful activities, including: (i) supporting new independent designers/artists (like the music PROs BMI/ASCAP); (ii) creating a slush fund to support independent designers that need to protect their rights, through litigation, mediation, or other means; (iii) managing existing and emerging fashion designers’ rights and royalties, offering them a host of resources, information, advice, and outreach (in other words, offering the fashion world’s analogs to all the activities that the music PROs do); and (iv)

29 See *supra* Chapter 4, subsection IV.B.2.
30 See *supra* Chapter subsection V.A.2.
possibly supporting technology start-ups whose products are designed to work in the fashion space (for e.g., fashion-oriented apps, blogs, websites). Third, the industry should empower the CRO to establish, administer, and regulate the creation of a registry of original fashion works (apparel, accessories, designs and patterns, other creative output). These works will be protected by fashion copyright, and the registry will ensure that their protections are managed properly by the governing entity, the CRO (analogous to the work undertaken by the music PROs). Fourth, the industry should determine that fashion copyright will be limited in protection by timespan, and should establish a short window of time for protection that recognizes the limited time value of exclusive apparel. Fifth, the industry should establish liberal policies with respect to its “compulsory licensing”: for instance, anyone can make a “cover” of an original composition (that is, her own version/interpretation) if she pays appropriate royalties (again, this is analogous to the right in music to make a “cover” of an original work). Sixth, the industry should consider empowering the CRO to have administrative mechanisms for dispute resolution (this could be some sort of arbitration panel or oversight body), so that most contested copyrights can get settled out of court. This would likely prove cheaper, more efficient, and easier for most designers to afford, and would encourage a degree of self-policing among designers.

One advantage to fashion copyright, touted by commentators who consider the industry to have lost critical economic rents due to copying, is that designers will be able to refine price signals that indicate the relative market value of their goods. Price discrimination allows separation of product lines and affords designers the ability to make credible commitments about differentiated product lines. Price signals then give designers the means to indicate how they value product lines and to direct consumers to the products that they prefer and can afford. Fashion copyright should create the foundation for clear price signals, as it protects works from copying and therefore preserves their value which is reflected in the price they are ascribed. Further advocacy

31 Id.
32 See supra Chapter subsection V.C.3.
33 This limitation is analogous to the “hot news” exception in journalism.
34 See supra Chapter 4, subsection IV.A.2. It is less clear whether or not there should be a right to make a transformative work, but on the whole, leaning in the direction of liberality is likely to keep the process more manageable, open, and positive for industry creativity.
35 See supra Chapter 4, subsection V.A.2.
36 See supra Chapter 4 subsection V.D.2. See also Picker, supra note 11.
37 Id.
of fashion copyright contends that the challenges it poses to would-be copiers (such as the threat of litigation) can also serve to compel these follow-on designers to pursue creative, original work, rather than to run the risk of being caught copying. But while these arguments are generally valid for creative content industries, they fail to take into account the functioning of the creative negative space industries, which have a broad array of norms and practices that stave off harmful copying and encourage creative borrowing that actually bolsters the returns of the industry and its designers. In an industry that experiences copying at all levels, in all directions, and in which the ranks of designers and consumers alike enjoy the benefits of creative borrowing and re-imagining, price signals work somewhat differently than the norm. Top tier prices indicate that a designer’s work is valuable at its origin, when it is first issued in an exclusive collection and available for ownership to a limited number of private customers and exclusive retailers. After that initial window, price may not function so rigorously in the industry; and indeed the byzantine tiers of fashion pricing, discounting, and so on indicate that pricing does not function so much as a single signal but rather as a set of signals that are subject to designer or retailer discretion and consumer interpretation. This is in part due to the fact that the industry does not know in advance which items will become coveted trend-setting pieces that anchor a season and affix its returns in a handful of sought-after goods. Flexibility in prices, therefore, is at least as important to the fashion industry as clarity in price signals. While fashion copyright may not interfere with price discrimination and price signaling practices, it may not further the industry’s marketing and sales strategies. Indeed, some commentators argue that, to the contrary, it will impede the stable but fluid nature of the fashion market, in which creative borrowing is a cornerstone of profitability and the movement of goods. For these reasons, the industry should consider fashion copyright to be a means to ensure protection of revenues, particularly when goods are initially issued, but not as compelling a means to determine and indicate precisely what those goods are worth in the market.

2. How To Make Fashion Copyright Efficacious

38 See Picker, supra note 11.
39 See supra Chapter 4, subsection V.A.2. See also Raustiala & Sprigman, supra note 10.
Clearly, the establishment of a fashion copyright has been under consideration by the fashion industry for some time now. Two proposed bills collectively referred to as the Design Piracy Prohibition Act, are currently inactive, but still offer some indication of the seriousness with which the industry and commentators regards the fashion copyright option. Curiously, the proposed legislation makes no mention of a collective rights mechanism that would administer and manage copyrighted materials, but rather only requires originators to seek copyright directly with the Copyright Office. This is a grave oversight, as the introduction of industry-wide copyright will necessarily entail considerable changes and new challenges that individual designers will likely be inadequately equipped to confront and overcome. Rights-clearing organizations such as CROs are one of the most useful tools for managing rights, maintaining users’ and follow-on creators’ rights, and metering product usage and its related revenue streams. For the creative processes of fashion to flourish, and at the same time for the commercial cycle to thrive, fashion copyright needs to be carefully crafted and just as carefully administered and regulated. As in the case of music, which offers a useful precedent of successful administration of copyright, any fashion copyright should therefore involve liberal compulsory licensing, made to function effectively and universally by a centralized CRO. The fashion CRO should be particularly attentive to the needs of independent and emerging designers, just as arguably the music PROs have been increasing their supportive efforts for emerging musical artists.

Fashion copyright only makes sense if the industry decides it wants to establish such rights in a very tight, limited, time-and-budget constrained/restricted manner. The industry should recognize that a short, limited copyright will allow rights to be calibrated in order to optimize exploitation of the work at the height of its commercial value, and when it is most susceptible to


41 See supra Chapter 4, subsection V.C.4.
copying that could otherwise undermine its returns. Peak desirability and profitability tend to be at the beginning of the fashion cycle, upon issuance of an original work or line of work, and therefore copyright protection should be concentrated upon supporting the creator at that initial stage. At the same time, the industry should mandate that designers seeking protection must present specific, clear parameters of the copyrightable subject matter at issue. Specific copyrights sought should include illustration, such as a blueprint, pattern, specs, and possibly a prototype. It would also be helpful to require the designer to explicitly state the reasons/basis establishing that the work is unique and merits protection. Keeping fashion copyright curtailed is most reasonable because the nature of commercial value in the vast majority of fashion designs lies in the early stages of its dissemination and sale. Moreover, the long, rich history of fashion ensures that many designs will already have been issued, and designers will likely be restricted to seeking protection in a limited number of original works, designs, stylistic flourishes, or creative details.

Concomitantly, the industry must leave ample room for creative adaption, variation, and embellishment of some existing design. Even the most ardent supporters of fashion copyright agree that fashion’s historical trove has been built upon creative sharing and cross-pollination. Indeed, some of fashion copyright’s most vocal advocates, such as Diane von Furstenberg, have themselves been held accountable for appropriation from other designers, genres, ethnicities or cultures, or individual fashion mavens or celebrities. At the same time, while creative adaptation at the lower end of the fashion spectrum may not directly enrich fashion’s creative legacy, it does give access to fashion’s ever-changing works to a great range of consumers who would otherwise be locked out of the market. For these reasons, limiting copyright to the period of greatest commercial vitality is a reasonable compromise that the industry should explore thoroughly.

42 See supra Chapter 4, subsection V.C.3.
But there is another reason that the industry should strategically curtail fashion copyright. As in the case of scientific research, the pursuit of IP protection is frequently balanced against an interest in strategic disclosure that achieves goals other than ownership, such as heightening one’s reputation, securing a strong scholarly portfolio, increasing one’s mobility and employability, expanding one’s reach to a knowledgeable audience, and so on. Analogously, eschewing copyright in fashion can strategically serve an original designer in various respects. First, it can allow a designer to issue new work without having to seek and secure copyright, which may not be an instantaneous process. By competing with other original designers at the height of a new season, and by issuing a series of unique works that defy instant appropriation, a truly creative designer can show that she is at the top of her game, and impervious to the threat of copying. Second, the reputational benefits can be enhanced by her creating a portfolio that is unique but also marketable to various potential partners, rather than wholly proprietary (for instance, owned by the fashion house with which she is affiliated, rather than by the designer herself). This can contribute to a designer’s mobility and commercial flexibility. Third, a designer may actually wish to be copied, such that her work is at once recognizable (for instance, a “signature” work) and universally followed (for instance, through knock-offs that spread the work to lower tier markets). One example is particularly fitting yet somewhat ironic, as it is taken from one of the strongest advocates of fashion copyright, Diane von Furstenberg: her iconic “wrap dress”, which she issued in the late 1960s and has continued to issue with variations to the present day, is simultaneously famous, deeply associated with the designer, yet has been knocked off innumerable times, at virtually every level of the fashion spectrum. Ms. von Furstenberg has benefited from the many appropriations that have followed in her wake, primarily due to having secured a reputation for creating an “iconic” work, but also for having renewed interest in her work emerge as a result of follow-on copying that has occurred in several fashion cycles. It is hard to see how copyright in the wrap dress would have resulted in greater economic gains than the uncopyrighted status quo has allowed. This example, then, as well as countless others, should compel the industry to realize that fashion copyright is a tool to be wielded judiciously, strategically, and in carefully limited measure. In the case of fashion, as in other industries, a solution based in copyright must be paired with changes in business strategies.

46 See supra Chapter 4, subsection V.D.3.
and models, changes in norms of attribution, and a recognition of the varying interests that must be supported throughout the spectrum of industry participants.

3. Obstacles/Concerns

An important objection to fashion copyright is that fashion may not necessarily need copyright protection even at the beginning of the cycle: the high pace of churn, and the short window of exclusivity, means that original designers can still reap the early rents by being ahead of the curve. Only if copying becomes almost instantaneous, and indistinguishable from the originals, is there a threat to the elite designers’ early returns. At that point, they have a stronger argument for some copyright-based protection (other than trademark). Even then, however, original designers need to demonstrate that knock-offs significantly undercut their market. But, on the one hand, high-end designers are quick to assert that their articles are by nature original, unique, and therefore non-fungible. Their sales are to exclusive audiences, and while elite consumers may purchase some lower-tier items, they are not necessarily likely to substitute knock-offs for the haute couture that they pursue and consume. At lower tiers, copying may negatively affect high-end designer sales of slightly more affordable items; or it may dilute the cachet of the original work, such as an original garment or accessory. But market segmentation may still work against claims that knock-offs cast a pall on original sales and the diffusion of works into the market. These claims need to be substantiated, and the losses need to be demonstrably greater than the gains made, even by high-end designers, by capitalizing on industry churn and the appetites for consumption that such churn whets and replenishes regularly.

But even if it is granted that there are some losses realized by copying, the imposition of a new copyright-based scheme seems a radical measure to adopt in order to prevent losses incurred primarily by a limited set of designers who realize gains at one end of the fashion spectrum. There are, naturally, concerns that a new fashion copyright will involve very significant transaction costs: establishing a CRO, setting up a registry, determining administrative, adjudicative, and other responsibilities, and other procedural steps seem almost overwhelming in their enormity, complexity, and expense. But there are other important concerns. Will the cycles that are inherent to fashion, the churn of product turnover, the anchoring of trends, and the ever-
changing interest in new designs and goods be sharply curtailed by fashion copyright? If works are copyright protected, it will likely be daunting to follow-on designers to attempt to adapt, creatively borrow, or find inspiration in their features. Will this lead follow-on designers to be ever more creative in their knock-offs, or will it increase their motivation to create wholly new works, as at least one commentator has argued?47 Another question addresses the impact on end users: will this prove disadvantageous to consumers who strive to have the latest trends and designs delivered to them via secondary designers that create knock-off versions at reasonable, affordable costs? The potential disadvantage to a large market of consumers is not unlikely, and must be considered even at some expense to the originators of the creative works. Other concerns involve practices and norms that have long tradition in the fashion sector, such as “homage”, or works explicitly inspired by prior creations and meant to reflect the respect and admiration -- often with due attribution -- that the designer feels for the precedent creator. Will the practice of homage be chilled by copyright? Will norms of attribution be displaced if copyright clearly designates the originating designer and thereby eliminates the need for attribution? Will designers simply wait until a work is totally off-copyright even to approach it as a source of inspiration, for fear that copyright infringement claims lurk around the corner? While open-ended, these concerns most importantly raise some of the challenges that fashion will face if it asserts the right to a new copyright protection. They also call into question assertions that fashion copyright is an obvious and necessary measure. And they point to the delicate balance that the industry has established to date, which should not be disrupted without weighing the costs and benefits of change.

4. Trademark

It is incontestable that trademark violations have had a hugely negative effect on the fashion industry.48 This has only accelerated with technological improvements that make both copying and dissemination of copies easier, faster, more untraceable, and most costly than ever. For this reason, industry participants should push harder for the support and vigilant pursuit of a range of anti-counterfeiting measures (domestic and international). Also the industry should increase

47 See Picker, supra note 11.
48 See discussion in supra Chapter 4, subsection I.A.7.
trademark vigilance, seek out more legislation and enforcement of existing legislation, should apply political tactics such as lobbying, political pressure on rampant trademark violators, and should ensure that consumers are educated as to the true nature of the economic losses that trademark violations wreak across the industry, both domestically and abroad.

**D. Cultural**

Cost to fashion if it tailors by establishing copyright: loss of fashion’s “negative space”:

Fashion is a well-established “negative space” industry.⁴⁹ Here, price functions as a signal in various ways that are well-understood by customers and retailers alike.⁵⁰ A certain amount of creative borrowing has always been permitted, indeed encouraged, by fashion’s norms. But this does come at a potential cost: unprotected designers, particularly independent original designers, run the risk of being copied or knocked off. Establishing fashion copyright might lessen this risk by putting into place corrective measures and sanctions against copying. However, it will require formalized processes that will doubtless cause designers to incur costs, such as costs of real or potential litigation, registering copyrights, and so on. Further, having formalized procedures is likely to have a chilling effect on freer practices such as informal collaboration, sharing of ideas, cross-pollination, and so on. It may also make established designers think twice about collaborating with younger designers, as they will be compelled to weigh transaction costs in formalizing such arrangements. There are almost always real costs to formality, and those costs may be disproportionately heavy for younger designers who are not necessarily well-equipped to bear them, including (a) having a war chest for litigation; (b) having to forego informal collaborations; (c) not being able to copy or be copied (some young designers may want to be copied so that their work gets exposure and is seen/admired/recognized in the field (loss leader); and (d) having to worry in advance about creative borrowing from works that appear to be in the public domain but that may be contested or claimed by copyright owners.

Another cost of fashion copyright that will take a toll across the industry is the displacement of deeply established norms and practices by formalized procedures. Fashion shares many norms

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⁴⁹ See discussion in *supra* Chapter 4, Section II.D.
⁵⁰ See discussion in *supra* Chapter 4, Sections I-IV.
with other “negative space” creative industries that are also limited in their formalized rights and protections.\textsuperscript{51} Fashion, like cuisine, comedy, and other fields, has been historically configured to encourage sharing and appropriation, which often takes the form of homage. Sharing and borrowing, however, are strongly linked to norms that mandate attribution and recognition of the original creator; without proper attribution, the appropriator runs the risk of being called out and shamed by colleagues, critics, observers and even consumers. The norms of fashion ensure originators that their reputation is enhanced by creative borrowing, and reinforce traditions of apprenticeship that are long-established in the trade and continuing to the present day. As in other low-IP fields, such as education, these reputational norms can boost an originator’s employment prospects and mobility by strengthening her recognizability and credibility among peers. While a similar outcome could be achieved by amassing a copyrighted design portfolio, an original designer may find that having her work readily visible, openly imitated, copied or borrowed from, and accessible without fear of crossing copyright boundaries is in fact preferable to having a formalized portfolio to which she may not have rights, access, or ownership status when she chooses to change jobs. Reputational benefits can also afford designers greater leeway when they themselves choose to borrow creatively, as the work of a creative designer is likely to be scrutinized and praised for its original variations on a theme rather than derided for its reliance on pre-existing work.

The operation of reputational and attributive norms, as well as a culture that encourages responsible sharing, borrowing and imitation, are part of a normative set of practices that have traditionally existed in guild-like settings, such as the guilds that once dominated creative fields such as fashion, music and education.\textsuperscript{52} The formalized, structured, and typically restricted guild no longer prevails, and indeed in some cases has been exchanged for a formalized and layered system of IP rights. But private ordering arrangements are still found in many settings, as evinced by the agreements among Western ranchers famously delineated by Ostrom, as well as formal and informal agreements among artists in many creative endeavors.\textsuperscript{53} Ordinarily, these

\textsuperscript{51} See discussion in supra Chapter 4, Section II.D and subsection V.D.2.
\textsuperscript{52} See discussion in supra Chapter 4, Section II.A.2.
\textsuperscript{53} \textsc{elinor ostrom}, \textsc{governing the commons: the evolution of institutions for collective action} (1990); Robert P. Merges, \textit{individual creators in the cultural commons}, 95 \textit{cornell l. rev.} 793, 794 (2010).
arrangements will emerge among a group of actors who share certain pressing concerns and needs, and who find that operating collectively, but without recourse to the strictures of IP, offer the most cost-effective and manageable way of producing mutually desired outcomes. On a broader scale, however, entire communities often tacitly agree to adhere to certain shared norms, similarly seeking to achieve mutually beneficial results. This behavior can be described as guild-like, as it comprises a set of agreed-upon directives for practice, rewards for approved behavior, and sanctions for offenders. In the case of fashion, blatant copying without attribution is generally frowned upon, and may be called out by peers and critics.\textsuperscript{54} High-end designers tend to attribute scrupulously, as they are well aware that they cannot afford to risk their reputations for originality and fairness. Knock-off designers and retailers may not attribute as carefully, but they may indicate in various subtle ways that their work follows a trend and recreates it for the average customer.\textsuperscript{55} There are many more norms that pervade the fashion community, and that together create a rich network that supports both originators and follow-on designers in their marketability and longevity. The negative space fields are built on these norms, and the vitality of their industries speaks to their success.

Fashion, like comedy and cuisine, have had norms that stand in for formalized practices (see norms-based approaches, below). These norms can co-exist with fashion copyright (at least to a certain extent). But if a no-copyright system functions robustly with these foundational norms, and if a copyright-based system imposes the transaction costs that are attendant to formalization on some of the most vulnerable original creators -- i.e., emerging designers -- then the case for fashion copyright is less than crystal clear. For this reason, bypassing the IP universe, or at least limiting it to trademark protection, minimizes the real costs that come with imposing copyright on a long-established and relatively well-balanced field, while maximizing practices that are


\textsuperscript{55} For instance, placement of an outfit in “Lucky” magazine may juxtapose a high-end designer outfit with a suggestion to the customer that she can “recreate the look” with a knock-off copy. While not a direct attribution, this does recognize the original work, and associates it with desirability in the consumer’s mind, thereby bolstering the reputation and increasing the reach of the original creator.
giving rise to a multi-billion dollar industry. In this case, even disruptive innovation need not, and at present does not, mandate turning to an entirely new set of solutions that are not likely to solve problems at the top of the spectrum while also likely to impose new problems at all other points on the fashion industry curve.

1. Other Norms-Based Approaches

As mentioned earlier, designers should educate each other on certain accepted cultural norms, and should encourage adoption of those norms on a greater scale, and with a greater degree of agreement and opt-in, than has been the case thus far. High-end designers are well-equipped to lead the charge on this front, and have the resources to invest in outreach and other efforts. At the same time, they stand to benefit from strong industry norms, both because they can gain access to new original works by allying with independent and emerging designers, and because they can bring industry pressure to bear on rampant copyists if their message is heard, appreciated and embraced. Designers should reinforce the longstanding idea that homage is an accepted tradition in fashion, and that inspiration among peers is valued. But they should draw the line at outright stealing and appropriation, particularly when done concomitantly with the issuance of the original work. There is a marked difference between copying an established work and copying a new original work, and the difference lies not only in the nature of imitation but also, and more significantly, in the economic loss incurred by the original creator. High-end designers are best situated to illustrate the difference, and to deliver the message throughout their community. They are also ideally placed to defend independent designers, and to call out copying of independent designers as one of the worst offenses possible, due to their vulnerable nature and lack of resources to stave off appropriation. High-end designers should reinforce the understanding that original talent is essential to the industry’s vitality, and that copying at the level of independent and emerging talent therefore comes at an especially high cost. By educating and inculcating these norms in the industry, designers can create a baseline for a range of norms-based approaches to thwarting copying, such as shaming, calling out, and censuring. These norms-based approaches occur in many other creative industries, particularly in “negative spaces” such as comedy and cuisine that rely less on IP and more on community practices to keep appropriation at bay.
2. The Fashion Industry Should Offer More Hybrid or Non-IP Based Rewards

Stronger rewards that give due accord to design originality are culturally-based approaches that will serve to motivate emerging designers, highlight talent that may be potentially interesting to established designers for potential strategic alliances, and reinforce the anti-copying message. Prizes, rewards, and recognition are all valuable incentives, and help confer credit that can be monetized by emerging designers in various ways. For instance, independent designers that have made a concrete impression will be visible to high-end designers and mid-market labels or retailers, and will be possible targets for collaboration with these established entities. This can be mutually beneficial, as independent designers can infuse new energy into more staid, traditional brands and stores. In this regard, disruptive innovation can actually be useful, as technology brings the independent designers increased recognition among customers as well -- for instance, fashion bloggers are now quick to identify and eager to follow emerging talent -- and this can serve to expand existing entities’ customer base when they partner with the independents. Original independent designers should also be sponsored for shows that highlight and recognize their work: their visibility, coupled with a strong recognition factor, may make knock-offs more identifiable and apparent, and may make it easier for the independents to stake successful claims in their work when copying is alleged. Even in the absence of fashion copyright, this can prove useful to independents who are trying to establish a portfolio of work that demonstrates their originality and viability in the fashion marketplace.

3. The Fashion Industry Should Incorporate Outsiders Into Its Ranks

Credentializing authorities are being challenged in the fashion world by outside figures such as online critics and bloggers, self-designated street artists who appropriate and knock-off fashionable items and trends, and others. These outsiders are able to harness the

\[56\text{ See Maurer & Scotchmer, supra note 20.}\]
\[58\text{ See discussion in supra Chapter 4, subsection I.A.3.}\]
communicative reach of the Internet to gain authority over fashion followers and consumers to an unprecedented degree. The fashion industry has been slow to react to these changes, and for the most part has viewed outsider forays into credentialization as threatening, irrelevant, or inconsequential. This is precisely the wrong approach, based in a lack of understanding of the potentially positive effects that outsider authority can have on the industry’s prospects. The industry should recognize that in today’s world credentialization is equally effective when conferred by experts as when conferred by enthusiasts, whether amateur, professional, or somewhere in-between (for example, a blogger with fashion training or expertise who discusses fashion without remuneration or commercial ties). By incorporating outsiders into its ranks, the industry can expand the reach of its designers, particularly those who are trying to diversify their appeal and attain a wider measure of visibility and appeal than the tightly-knit circles of haute couture generally allows. In terms of expanding commercial viability, both high-end designers and independent designers can capitalize on the reach of online fashion critics to build their audiences. Further, many online critics are as astute as vetted and credentialized experts, and may have even greater exposure to designs across the fashion spectrum. They are, therefore, ideally poised to detect copying and appropriation in a wide range of settings, not just locally but also globally. They can be equipped to detect knock-off that infringe on trademark, as in the case of outright counterfeits. But they can also be equipped to detect appropriation that would infringe on fashion copyright, if it were to be established in the industry. By detecting illicit appropriations and bringing them to the notice of fashion’s ever-expanding audience, online observers could play an invaluable role in thwarting rampant copying.

While slow to recognize the possible upside of outsiders, the fashion industry has recently shown some signs of acceptance, sometimes even conferring the equivalent of credentialization on gifted online critics who have captured an audience interest and positioned themselves as market leaders with whom to be reckoned. For instance, the industry has come to accept outsiders such as Tavi Gevinson, an online blogger whose has become a recognized pace-setter in fashion trends and whose critiques have proven consistently appealing to the commercially desirable
international youth market.\textsuperscript{59} Certain fashion houses have also agreed to provide some influential fashion bloggers with a range of products that they wear, discuss, or exhibit on their websites, thereby effectively advertising the products to young, fashion-savvy followers and consumers.\textsuperscript{60} These outreach efforts demonstrate the growing industry recognition that outreach to consumers, particularly those most likely to consume both in stores and via e-commerce, can and should match acceptance by standard, credentialized authorities with placement in newer venues and appeals to more entrepreneurial outsiders, critics, and enthusiasts. This positioning will only be more important in the future, whether or not fashion copyright is established, as it is a cultural movement that has major commercial ramifications for the industry.

II. EDUCATION

A. Business

1. Problems with Current State of Industry

The costs associated with education are spiraling; it seems a constant refrain in the news, and a constant anxiety-producing preoccupation of educators.\textsuperscript{61} Some commentators see online courses, MOOCs, content providers (whether for-profit or not-for-profit), and other related services as holding the potential for a corrective effect or offering new solutions that can revitalize the economy of the entire sector.\textsuperscript{62} This is far from universally acknowledged, however, as other commentators consider MOOCs unlikely to deliver substantial value even over

\textsuperscript{60} See, e.g., Rachel Strugatz and Karen Robinovitz, \textit{To Pay or Not to Pay: A Closer Look at the Business of Blogging}, WOMEN’S WEAR DAILY (June 6, 2012) (exploring the increasingly close relationship between fashion houses and bloggers, which has evolved from simply sending products to paying for coverage of the brand).
time. At present, the issue is still speculative, as MOOCs have only recently emerged, and only for-profit institutions have insisted that they can be readily monetized. Moreover, traditional education has never been able to monetize stand-alone courses effectively or on a large scale. Therefore, not much precedent exists in terms determining how to prepare effective stand-alone courses, how to allocate copyright in such courses, and how to monetize them. Disruptive innovation has begun to help answer the first part of the equation by enabling institutions, faculty and independent providers to create effective stand-alone courses online, which appeal to enormous audiences with the potential, theoretically at least, to be turned into paying customers. But as discussed earlier, the future of MOOCs and their place in the educational landscape remains far from clear, and solving the copyright part of the puzzle is one important part of situating MOOCs in an optimal position for bringing education online and out to the masses in a cost effective, affordable, and institutionally responsible way.

2. Disaggregation of Education into Courses

In education, disruptive innovation, or the introduction of online courses on a sweeping scale, has enabled disaggregation to occur as it does in music: the course rather than the degree becomes the primary unit of production (the analogy in music is that the individual unbundled song, recorded as a digital track, represents the primary unit, as opposed to the previously unified and pre-packaged album/CD). Increasingly, institutions are coming to accept the demarcation of the course-unit, and are working to build educational plans based on the accumulation of course-units by students.

64 There may be a few exceptions, but generally stand-alone courses have not been found to be valuable. Even in the online space, early endeavors such as Fathom have not cashed out as expected. See Scott Carlson, After Losing Millions, Columbia U. Will Close Online-Learning Venture, CHRON. HIGHER EDUC., Jan. 17, 2003, at A30.
65 See discussion supra Chapter 2, section II.D.
66 See discussion supra Chapter 4, subsection III.A.2.d.
67 Note that this is not a completely new phenomenon -- some degree of flexibility in offering courses as stand-alone offerings has existed -- but it is an accelerating practice that is becoming commonplace, and beginning to be considered as valuable, at least potentially, as offering a full degree.
In education, however, unlike in music, the disaggregation of creative production units can and should co-exist with the traditional aggregated product, the degree, which is impossible to substitute and has a value that is greater than the sum of its parts.68 The university degree holds such value that it should be protected against devaluation, lying as it does at the center of the educational mission.69 But IP protection is not needed to protect the degree as a whole: it is so intrinsically valuable that it is already protected by the business model of the traditional university. The degree is protected by its desirability to student consumers, both as a path to being educated and a credentialization as having been educated. It is also valuable to many students for its experiential components, such as the on-campus living experience, direct interaction with teachers and encounters with fellow students, and so forth. As a centerpiece of the process of obtaining an education and proving oneself academically and pre-professionally, the university degree is still estimated by many to be an optimal path to success. This obviates the need to extend formalized protection, such as copyright, to the degree as a whole.

While copyright is not needed to protect university degrees, trademark may on occasion have a role in advancing their worth. For some institutions, the strength of their degree and the weight of their conferring degrees may mean that protecting their name, or in trademark terms their brand, is one way in which IP can fortify the value of their property, the degrees that they offer. This is one reason for which many elite universities are vigilant protectors of their trademark, and seek sanctions for misuse of their name and affiliations.70 As in the case of fashion, trademark serves to protect a valuable property that is neither fungible nor readily quantifiable, but that is a demarcation of quality that is intrinsically valuable to the founding entity. Other than brand protection, however, copyright or other formalities are not needed to protect the institution’s other valuable properties: the degrees it confers.

At present, therefore, two tiers of educational production, stand-alone courses and degree-granting programs, stand side-by-side. They may be intertwined, as for instance when schools

68 See discussion supra Chapter 4, subsection III.A.2.d.
69 The educational mission is generally agreed to be educating students and formally certifying that their education has been duly completed to an acceptable standard.
70 See, for example, the Harvard Trademark Program, which prevent unauthorized use of the mark, handles the licensing of the university trademark, and openly solicits information on unauthorized uses. HARVARD TRADEMARK PROGRAM, http://trademark.harvard.edu/ (last visited March 28, 2015).
that primarily offer degrees choose to offer stand-alone courses, but they should still be considered as distinct but equally worth preserving entities, and should be treated as such. One contrast is clear: while entire degree programs do not need copyright protection, stand-alone courses should be protected by copyright, as they are a specific, singular works that may have currency on multiple markets and to multiple audiences, particularly if disseminated online. Copyright protection in courses, however, must be coupled with business strategies that plan carefully for the commercial exploitation of academic work on a much broader scale than traditional education has known.

3. MOOCs as a Key Business Strategy Prior to Monetization

Universities should recognize that the development of MOOCs not only aims to further educational goals but also serves to advance key business purposes. First, MOOCs should be used to attract new consumers, at least some of which are likely to avail themselves of the resources of the underlying traditional institution offering the MOOC. Second, MOOCs should be offered for free, particularly at the outset of their introduction, as a means of exposing the university’s educational capabilities to new audiences. In this respect, MOOCs serve as loss leaders that may or may not be immediately monetized, but that eventually pay off by growing consumer interest, desire for products, and readiness to invest in new educational services and goods. Third, MOOCs should be used to protect core competencies. In other words, universities should protect their highly valuable degree programs, while offering MOOCs that expand their offerings at little or no risk to their underlying mission, products and goals. Concomitantly, universities should establishing property rights in the online space, and reserve their full rights to their online properties, including MOOCs, educational platforms, and other related products and services. In the event that MOOCs are monetizable, propertization should assure institutions the ability to reap the rewards of their programs either directly or when used or licensed by third-parties.

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71 See discussion supra Chapter 4, subsection III.A.2.d.
72 See discussion supra Chapter 4, subsection III.A.2.e.
73 See discussion supra Chapter 4, subsection III.A.2.d.
74 See discussion supra Chapter 4, subsection III.A.2.e. See also supra subsection II.A.2.
75 See discussion supra Chapter 4, subsection III.A.2.e.
4. Financing MOOCs

At present, some traditional non-profit universities are developing and offering MOOCs in a manner that is broadly analogous to open source production in the computer software field. That is, they are developing online courses primarily in-house, using internal financing (i.e., funds from the university budget and/or endowment), building out already-existing platforms and support services, and drawing on faculty labor and input (universities may seek out voluntary efforts from interested faculty, or they may make offer some form of compensation (for instance, offering reductions in teaching load in exchange for faculty involvement in online projects). One reason that this strategy has emerged is that universities are finding an increasing demand for inexpensive educational offerings, particularly as the cost of traditional education shows little sign of decreasing in cost. At the same time, however, it is unclear whether or not MOOCs can be sufficiently monetized to offset the considerable costs required for development, roll-out, and adaptation. This is the basic dilemma that competing with free, or almost-free, alternatives to traditional products, presents in the academic context; and it is compounded by the threat to traditional sources of revenue, particularly tuition dollars, that are also discussed therein.

There are a host of issues that arise with respect to the financing of MOOCs, which universities must bring to light and with which they must come to terms. Financing issues are deeply linked to labor issues, which are addressed in Labor, below. One fiscal concern lies in the difference in financial capability that divides institutions and the disparities that relative monetary positions are sure to create and exacerbate. This divide will likely have significant long-term ramifications, and therefore cannot be overlooked or kept out of institutional calculations regarding the future of MOOCs. At present, it is apparent that two kinds of traditional universities are funding online course development. Several well-endowed and prestigious schools, such as Stanford and MIT, are major players that can underwrite the development of both MOOCs and their supportive service platforms (such as the creation of the MIT OpenCourseWare system, which offers all of the universities courses online for free to any interested learners). Wealthy schools can afford

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76 See discussion supra Chapter 4, section III.B. See also supra Chapter 4, subsection III.B.4.
77 See discussion supra Chapter 4, subsections I.A.6 and I.A.7.
to take their time building out online courses, exploring the various avenues for deploying such courses, and ascertaining how to maximize the utility of online course development. They can effectively subsidize production, and may even be called upon to write off some of the costs associated with course development, experimentation, delivery and eventually monetization. There may be repercussions that flow from the development of MOOCs at the top of the educational pyramid, but the fact that it is occurring there, and that it can be best explored at that level, should at least be explicitly recognized.

In contrast, less wealthy schools, such as Arizona State University, presumably have to contend with developing online programs on a tighter budget (particularly if they are state institutions that receive government funding and are answerable to political parties and the public), which can place them at a considerable disadvantage with their better-endowed peers when contending with investment in cutting-edge technology, course build-out, and innovative change that may or may not lead to new and/or sustainable revenue sources. Moreover, due to cost concerns, they are more likely to be hard-pressed to monetize their online offerings, in order to amortize the costs associated with online build-out and to show tangible returns for their expenditures. This may affect both their ventures and the courses they offer, and may curtail their flexibility in ways that hamper them further in their development and growth, particularly as compared to their wealthier competitors.

Another issue compounds the problem: disparities between traditional schools offering MOOCs are further challenged, and possibly exacerbated, by for-profit initiatives that are proliferating in the online space. While outside the scope of this paper, considering the successful financing of MOOCs by traditional institutions should take into account the fierce competition posed by the for-profits, as well as the skewing of pricing models that occurs when for-profits and non-profits compete in the same general space (even if that space may be differentiated by various factors such as quality, consumer base, scholastic mission, and so on).

The financial structure of MOOC ventures may not be cleanly divided between non-profit and for-profit institutions: there are gray areas that proliferate in the educational landscape. For instance, some traditional institutions have chosen to create, finance, or support independent spin-offs that may be privately funded in part or whole by outside sources such as venture capital, angel investors, and so on. Some of these entities are structured on a for-profit basis, such as Coursera, while others are non-profit, such as edX. As wholly separate entities, whose educational role is distinct from that of traditional institutions, these entities are outside the scope of this paper. Nonetheless, they add a critical dimension to the financing structure of MOOCs.

Finally, some institutions, such as the University of Pennsylvania, are opting to segregate their online ventures, including MOOC offerings, into wholly separate programs that are created, administered, and treated as wholly apart from the traditional university, not only academically and pedagogically but also fiscally. In these stand-alone divisions, MOOCs can be produced without oversight of the traditional university overseers (such as the Board of Trustees), but equally importantly can be administered, financed and monetized in ways that do not necessarily require adherence to standard university practices, procedures, and norms (for instance, the directives set forth in Faculty Manuals or University Handbooks need not apply to online work). Along similar lines, monies may be earmarked by these institutions to fund online efforts in ways that may not require immediate accountability or short-term returns. While wealthier schools may be well able to afford such measures, they may again enjoy a competitive advantage that may be rational but not wholly equitable, a fact that should at least be acknowledged and circulated within the academic community.

5. Faculty Labor and Compensation; Adjunctification; Portability and Employee Mobility

Another major issue related to the financing and support of online education that should be recognized is that MOOCs are being created, taught, and administered by faculty: theirs is the labor that fuels the courses, and they are the pioneers who are building the courses on the ground. However MOOCs are ultimately financed -- whether they continue to be effectively subsidized by traditional institutions and/or private capital, or whether they eventually becoming
money-generating and self-sustaining enterprises -- faculty labor should be understood to be foundational to the production of online education, to an equal extent as they are essential in the real world space of universities.

Faculty labor and input should be considered part of the calculus of financing and monetizing MOOCs, as well as compensating those who labor to produce MOOCs and their related ventures. Such labor can be volunteered by faculty, as it is by some computer programmers in the open source movement.\textsuperscript{79} As in the case of open source software, faculty efforts in developing online education can stem from mixed motivations, such as ideological commitment to openness and collaboration, intellectual curiosity, entrepreneurial flair, interest in pursuing reputational gains among colleagues, pursuit of potential long-term rewards, and so on. When faculty choose to invest their own resources in online development by volunteering to give time to such work (possibly in exchange for reduced regular teaching loads), or by participating in online educational ventures, institutions should accept and appreciate such contributions. As in the case of open source, however, some rights to staking later proprietary claims should be reserved for successful faculty, particularly if their work eventually yields profitable results. Faculty must also make clear that while their efforts may be undertaken with some of the same driving force as open source, such as intellectual interest and collaborative openness, they are not bound to donate their work indefinitely and without benefit or cost. Even more so than in the open source movement, faculty operate within a closed system of employment that ties their compensation strictly to the institutions in which they work. While computer programmers can create start-ups, change jobs, sell programs, codes, or apps, and engage in other entrepreneurial activities rather easily, academics must function within institutional boundaries, whether those institutions are found online or in real space. Thus, the calculus of faculty labor differs from that of labor in the open source software movement. Faculty and institutions should recognize this difference, and should accommodate it by allowing faculty the freedom to move from the free contribution of labor to a more proprietary model when online education matures and becomes formalized, if not monetized, by its institutional founders. In the changing environment of the educational sector, this should at least help prevent some exploitation of faculty labor in the production of online educational content.

\textsuperscript{79} See discussion in \textit{supra} Chapter 4, sections II.B, II.C, III.B.4, III.B.6, III.C.2, and IV.D.1.
The nature of faculty labor, compensation, and the overall terms of employment are drastically changing, however, and the ripple effects this has in the virtual landscape should be seriously considered when crafting online programs and directives. Faculty labor has always been central to education, whether online or in real space. Historically, however, the majority of faculty tended to remain rooted at a single institution, and the lifetime tenure position was conferred to ensure a stable teaching force, to promote academic autonomy, and to underlie an institution’s claim to quality education.\footnote{See generally BILL READINGS, UNIVERSITY IN RUINS (2007)} Much of this has altered, although recognition of the transfigured labor market has been slow to follow the mutations. Faculty move much more frequently; tenure is being replaced by adjunctification, or a pattern of short-term positions that turn over and do not offer stability either to institution or to faculty members; and faculty labor, more than ever, has taken on many of the attributes of a commodity. Arguably, what faculty teach, both information and learning, has become commodified as well.\footnote{See ELI NOAM, TWO CHEERS FOR THE COMMODIFICATION OF INFORMATION (2001), available at http://www.citi.columbia.edu/elinoam/articles/Commodification.htm.} Among the traits of a commodity is that it is considered fungible, payable in clear-cut units, and often dislocated from intangible value-based claims such as those that have been vaunted in education, for instance being attached to a “higher mission” or “educating the whole person”. Today, faculty labor is increasingly detached from institutional longevity, loyalty, and academic goals such as research and scholarship. Compensation of faculty labor is a case in point: faculty, particularly but not limited to adjuncts, are paid in individual units of pay -- where the unit of production is a course -- rather than as a salary with benefits, performance-based raises, and other features of secure long-term employment. Faculty are expected to seek out jobs in an increasingly competitive and fragmented market, and expectations of tenure are decried as being increasingly unrealistic,\footnote{See, e.g., Resources on Contingent Appointments, AAUP, http://www(aaup.org/issues/contingent-faculty/resources-contingent-appointments (last visited April 1, 2015); Michael Berube, Among the Majority, MLA (Jan. 31, 2012), http://www.mla.org/fromthepres&topic=146; Colleen Flaherty, ‘It’s My Business’, INSIDE HIGHER ED (June 13, 2013), https://www.insidehighered.com/news/2013/06/13/aaup-session-centers-intellectual-property-and-academic-freedom-online-education-age.} if not outright undesirable.\footnote{See Christopher Beam, Finishing School: The Case for Getting Rid of Tenure, SLATE (Aug.11, 2010, 6:46 PM), http://www.slate.com/articles/news_and_politics/politics/2010/08/finishing_school.html.} Many have argued that this is deplorable and runs counter to the
educational mission writ large; but it is indisputably becoming part of today’s reality, and there is little to indicate that the trend will change.

The implications of faculty adjunctification and the disaggregation of educational value into the production unit of the course (whether stand-alone or as part of a degree) has both business and legal implications. The business implications follow upon the understanding that the nature and structure of faculty work have irrevocably changed. In a world of adjunctification, professors will, and have to, move when and where they must to follow the paying jobs. They no longer have job security, so they are forced to be itinerant. Therefore, job portability and employee mobility have now come to matter to a far greater extent than they once did. At the same time, however, the competitive, mutable and short-term employment market has the result of making course instruction a much more contested territory than historically had been the case: when tenure, full salaries and long-term benefits are practically eliminated, competition to secure teaching appointments for each course is intensified, and the need to secure compensation for each course taught becomes paramount to permanently unattached and adjunctified faculty.

It must be recognized that faculty are no longer compensated by tenure and its related rewards (job security, full employment benefits, academic freedom to do research and scholarship, and so on). It follows that they must be paid for the courses they teach, and such payment must be maximized in order to make teaching a viable means of earning a real livelihood (if not, education runs the risk of driving able teachers away from the profession altogether). Commodified courses should be adequately compensated, commensurate with the standard payment plans of education. Thus, for instance, teaching hours should be remunerated on a per-hour scale, but without regard to the number of students taught, unless those numbers require some additional amount of input (extra grading time, supervision of online discussion sites, etc.). But as courses become increasingly portable, faculty become increasingly mobile, and employment becomes increasingly disaggregate, compensation becomes only one prong of the business solution. An equally important prong is the treatment of faculty mobility and course portability, particularly in the fluid online education space. Institutions should craft policies that ensure that courses are portable, and should afford faculty the freedom to bring courses they have developed to other institutional settings when they move.
At the same time that they appropriately and adequately compensate instructors, however, institutions should also safeguard their own investment in courses and course support systems. These protections should be designed as business solutions that use copyright protections to support and advance the institutional goals of stability and viability. Overall, a balance must be reached that enables faculty to do their vitally important work and that enables institutions to support that work by providing context, resources, and a stable foundation for the educational mission writ large.

6. Monetization

In terms of business model strategies and solutions, the monetization of MOOCs on a really large scale is the end goal of many universities that are determined to adapt their business model to an increasingly technology-driven world. But universities will need to figure out how to make MOOCs pay. There are several possibilities, but each has its inherent challenges. One option is monetization by charging high amounts, to a large number of online students (MOOCs are, of course, “massive” by design), for courses available on demand, as well as ancillary services (such as one-on-one tutoring, skills assessment, career planning, and so on). This business model is at the center of the aspirations of universities and MOOC providers alike. Recent history, however, has shown -- through the failure of the Fathom consortium and other early online educational ventures -- that it is far from obvious whether, and how, this will transpire. On the one hand, the student audience is there: many students are actively participating in MOOCs, with varying success, and the demand is only escalating. On the other hand, it is not clear that students are willing to pay for MOOC instruction. It is arguable that there will be a sharp decline in student participation if MOOCs have a price tag, particularly if they are not directly related to course-credit or degree-granting options.

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84 Discussed infra section II.B.
85 See, e.g., The Hype is Dead, but MOOCs Are Marching On, KNOWLEDGE@WHARTON (Jan. 5, 2015) http://knowledge.wharton.upenn.edu/article/moocs-making-progress-hype-died/ (transcribing an interview with Daphne Koller, co-founder of Coursera, on the growth of MOOCs and the underlying business model).
Recent historical precedent aside, speculation is rife in educational circles that an innovative pricing model can work to make MOOC education profitable. For instance, if courses can be sold for credit and/or toward degrees, or can compete with for-profit courses, they may prove highly appealing to motivated students, especially those seeking to avoid the high cost of education today and uninspired by the traditional on-campus experience. Further, if ancillary services, like networking opportunities, career counseling, and so on start to emerge, the monetization of MOOCs may have more potential value, in real world terms, as a means to securing employment as much as (or perhaps more than) a means to gaining an education. Another option is monetization via advertising plays, such as targeted ad campaigns, pop-up ads, and so on. But this strategy is problematic because while this is the baseline model of making money on the Internet, it has historically had very low returns, as advertisers have shown they will not pay a great deal for online ads, and indeed will pay at rates that are far lower than standard rates in print and other real space venues (billboards, etc.).

A third option is monetization by moving to an all-online (or almost-all-online) institutional model. This is the most radical strategy, and has been undertaken only by a few non-profit institutions, such as Franklin Pierce Law School and Liberty University. Other institutions have made entire degree-granting programs online, such as bachelor’s degree programs at Arizona State University, Pace University, and so on. This seems to have succeeded best so far in targeted professional degree-granting programs, such as nursing, computer technology, accounting, and so on. While there are a few online bachelor’s degree programs that are ranked by U.S. News and World Report, and therefore presumably well-regarded, it is not clear how profitable they are. Theoretically, though, institutions that regard bricks-and-mortar space as inessential to their educational purpose will consider entirely online programs, consisting of individual courses that are mixed and matched by students in an a la carte manner, to be an attractive prospect.

86 Id.
a. Obstacles to Monetization
When online courses start to show a potential for monetization, a number of issues will almost certainly emerge. Illustrative of the complications that might arise is the following scenario: if a student enrolls in at University A, takes a for-credit MOOC at University B that is taught by Professor C (who perhaps developed the course at the behest and supported with the resources of University A) and hosted by online service provider D, who gets rights in the revenue stream? This must be established at the outset, and is most readily addressed by private contracting. The question will no doubt become still more complicated when for-profit and non-profit competitors begin vying for rights and revenues in the online space. Further complicating the matter, the sponsorship of MOOCs by corporate partners, federal funding and/or outside grants (public or private), strategic alliances among MOOC providers and universities, accreditation concerns, and as mentioned earlier employee mobility (for instance, faculty teaching multiple MOOCs and/or courses in different spaces; faculty replicating their courses in different venues; faculty shifting their time and resources among online and real world teaching priorities, and so on) will add yet more layers of complexity. Again, this will probably first be solved by contract, but eventually larger policy decisions may have to be made when some consensus in the educational marketplace starts to emerge.

7. Network Effects (Positive Network Externalities)
MOOCs have the potential to be great data mining resources, as will be discussed in Technology, below. This information can be shared among schools to create improvements in pedagogy. Another positive benefit is network effects: educational institutions can learn from each other; strengthen each others’ innovations; be pushed forward by good competitive pressures/developments; collaborate; share students; achieve economies of scale; and obtain the positive network effects that can arise when a great number of people are involved in creative, fertile activities that are pushed to new heights by technological advances and innovation.

89 See discussion in supra Chapter 4 subsection III.B.7.
It is well established that “employment conditions as well as geographic concentration of an industry can have a strong effect on the pace of innovation”\textsuperscript{91}. There are many implications for universities, only a few of which are relevant for the purposes of this paper. First, in locales such as Boston, universities are concentrated (Harvard and MIT) and MOOCs and MOOC providers can flourish (edX, MIT OpenCourseWare).\textsuperscript{92} In locales such as California’s Silicon Valley, universities and MOOC providers also flourish (Stanford and San Francisco State University; Coursera), and their presence is supported by the availability of venture capital and other outside investors, complementary tech start-ups, a highly skilled labor force in the tech sector, and a consumer base comprised of early adaptors (Boston is also developing these forces, but is arguably still playing catch-up). Second, the exchange of information and mobility of labor across companies contributes greatly to rapid progress and growth, while legal limitations on non-competition clauses helps germinate and disseminate ideas and innovative build-outs of such ideas throughout these sectors.\textsuperscript{93} Third, network effects stimulate collaborative and cumulative innovation,\textsuperscript{94} which occurs both within institutions (such as interdisciplinary scholarship) and across institutions (such as collaborative research and development).

**a. Promote Positive Network Effects**
Positive network effects should be supported throughout the educational space, but are even more compelling when technology advances their cause and achieves large scale results. To promote both of the facets of network effects outlined above, copyright in online courses should first be established and agreed upon, to ensure both that the institution will get paid back if those courses become profitable, and that faculty will continue to create, improve and teach the courses if they are duly rewarded for their efforts. Copyright and business strategies should be harnessed together to further promote positive network effects. First, as noted earlier, faculty should be

\textsuperscript{92} See discussion in *supra* Chapter 4 subsection III.B.7.
\textsuperscript{93} See discussion in *supra* Chapter 4 subsection III.B.7.
\textsuperscript{94} See discussion in *supra* Chapter 4 subsection III.B.7.
treated as skilled, mobile, and independent innovators, and therefore should be granted liberal rights in course mobility and portability to allow them to move across institutions and to take their copyrighted courses with them. This is comparable to the limited non-competition provisions typically seen in tech sector contracts, such as those that prevail in Silicon Valley. Further, while MOOCs are and will be shaped by institutions to fit the contours of their own needs, resources, and interests, they can benefit immensely from collaborative efforts and joint construction. Spin-offs that are meant to pool resources and foster swift or unconventional innovation should be a key part of educational institutions’ strategies. Concomitantly, institutions should have key incentives for collaboration involving research and development with respect to MOOCs. These incentives should include measures that both stimulate informal institutional exchange and support formal cross-licensing plans, and should ensure that the underlying processes are well facilitated, easy to deploy, and readily available.

In many respects, the positive network effects that can be achieved in the educational sector are similar to the characteristics of those found in the Open Source movement in the technology. In the tech world, the organization of the computer industry has been generally configured to allow innovators to participate in open source innovation while still contributing to, rather than borrowing or subtracting from, their employers’ profitability. Universities should model the incentives that spur faculty to innovate in the MOOC space on the incentives that are shared within the tech space. They should also borrow selectively from other features of the open source movement, such as drawing on the kinds of disclosure agreements that now abound among developers. In certain cases, such as courses that are unlikely ever to offer strong returns from monetization, experimental courses, courses involving creativity that does not need protecting (for e.g., some creative writing workshops), among others, universities should consider drafting

95 See discussion in supra Chapter 4 subsection III.B.4.
97 See discussion in supra Chapter 4 section II.E., III.C.2, and IV.C.2.
98 See discussion in supra Chapter 4, sections II.B, II.C, III.B.4, III.B.6, III.C.2, and IV.D.1.
IP-related contracts that are inspired by open source agreements. For instance, a generous license that allows multiple participants to contribute, but requires attribution, precludes others from staking ownership claims in the creative endeavor, and restricts IP rights to exclude others -- in other words, the kind of licensing agreement that has been instantiated by the GNU contract and the Creative Commons License, as discussed in chapter 4, pp. 57-58 -- should be as valid when applied to education as it is when applied to computer software.

Finally, educational institutions should model their efforts on another feature of the open source movement: they should endeavor, where possible, to avoid proprietary interfaces and closed systems. Maintaining such openness is particularly vital in the early stages of MOOC development, in which it is unclear which model is to be preferred and will prevail, and in which collaborative or exchanged work can be most helpful to a great many interested parties. It may be tempting to create a single entity with a closed system that dominates the market and capitalizes on first mover advantages. This is potentially becoming the case with Coursera, for instance, which is private, centralized, closed, and increasingly dominant. At present, as MOOCs are not yet readily monetizable, the almost uncontested market position of Coursera is not a marked concern. But as a closed system, with completely proprietary software, systems, data, and know-how, Coursera runs the risk of becoming the overwhelming favorite for course delivery among universities. There are obvious monopoly concerns that arise in this regard. There are also concerns that Coursera could create an entire ecosystem that is closed, and that precludes interoperability with other systems by design, thereby rendering it analogous to an Apple (or in earlier days Microsoft). Another concern is that such a closed system could negatively affect licensing across institutions and/or platforms, either by chilling cross-licensing efforts or by setting onerous terms on such efforts. The greatest concerns, especially at this early juncture in the MOOC universe, are that wholly proprietary systems could negatively affect or restrict interoperability down the road, with anti-competitive effects in the long run (for instance, if universities want to create networks with various other institutions). For these reasons, institutions should build open source systems into the groundwork of their MOOC-related projects and business plans.

99 See discussion in supra Chapter 4, sections II.D., III.B.6, and III.C.2.
100 See discussion in supra Chapter 4, subsection III.B.2.
101 See discussion in supra Chapter 4, subsections III.B.4, III.B.6, and III.C.2.
B. Legal

1. IP Solution to Disaggregation of Courses

The disaggregation of courses, coupled with the destabilization of academic employment, makes copyright in courses an immediate imperative. While degree programs are presently protected from disruption by their value to students\(^\text{102}\), courses do not have such protection, and the historical determination of how courses should be protected is far from clear or settled at law. As the online space grows, students will likely be incentivized to compare and shop around for online courses, while faculty will gravitate to course providers that compensate them for online course development and instruction. Institutions too will have incentives to construct online programs, but may shape those programs with an interest in generating revenue as much as educating students. Such courses have the potential to be monetizable, or to be valuable as transfer credit units at schools that accept them for credit in degree-granting programs. Therefore, compensation for those courses will require the establishment of institutional guidelines, procedures and agreed-upon practices to allocate course-related returns.

Copyright in courses should be established to ensure that copyright owners benefit from any royalties or other related revenue streams, and to regulate the administration of course proceeds. Copyright will also ensure that courses taught in multiple venues, or on multiple occasions, will be duly managed and regulated, so that schools that have invested in the development of online programs will be able to recuperate their investment and earn returns on their efforts. Faculty involved in online instruction will also be bolstered in their initiatives and supported in their efforts to receive compensation for online instruction, rather than having such work be perceived as extracurricular, voluntary, or otherwise not meriting remuneration. The protections extended by course copyright should strengthen institutional viability, as schools vie to find a competitive advantage in the online education marketplace. The scope and strength of coverage should be further extended by trademark protection in the institutional name, to ensure that the quality of

\(^{102}\) The degree will be protected by institutional structure: students will still have to enroll, matriculate, pay tuition, and earn a full degree (thus, there is no need for IP inhering in the degree, as the very process of obtaining a degree safeguards and guarantees its value).
the online product is associated with the quality of the institution (as it would ordinarily be in the case of real space instruction), and thereby to protect the “name brand” of institutions, which are often valuable properties that require vigilant safeguarding.\textsuperscript{103}

As mentioned in Faculty Labor, above, copyright in courses follows upon recognition that the work faculty undertake with regard to online offerings such as MOOCs exists above and beyond standard coursework, and thus is specifically worthy of compensation. For this reason, monetization of MOOCs will require allocation of some revenues to online instructors. The clearest path to revenue allocation is by determining copyright in courses and directing related royalty flows to and among the relevant parties. Copyright allows such revenue allocation to be made fairly, consistently, and transparently, and further allows these determinations to be attached to courses wherever they may be taught and under various circumstances (online vs. in real space, at one institution or at several, team taught or individually instructed, and so on). It also allows for fluctuations in revenue streams, which is likely to occur over time in such an emerging and uncertain space. But copyright allocation should be accompanied by business strategies that recognize from the onset the crucial element that faculty labor represents in the construction and deployment of online education. Such labor should be compensated in ways that are proportionate to the success of MOOCs in attracting, instructing and, where appropriate, charging students for their online education.

\textbf{2. IP Solution to Dispute over Course Ownership Relating to Work-for-Hire Doctrine}

The changing nature of academic employment is at the heart of the debate over copyright in courses because it increases the stakes in course ownership and rights to proceeds from courses that are taught for a fee. Academics have not been driven to argue over the nature of their employment in the courts, due in part to divided ideas in the field of what academic work really is, and in part to a lack of pressing monetary concern related to course instruction. The courts, moreover, have not been determined to settle the matter -- in some cases, a “teacher exception” has been articulated, but it hardly been clarified or consistently applied in litigation. But

\textsuperscript{103} \textit{See} HARVARD TRADEMARK PROGRAM, \textit{supra} note 70.
resolution of the debate is now critical, and academics should seriously consider bringing a viable case to the academic community, but also through the court system if necessary, in order to bring clarity and establish agreement with regard to the nature of their work. In so doing, academics should explicate the changing nature of their field, with respect to both employment and innovation in the venues where academic work takes place.

The legal implications begin with the understanding that faculty who are expected to teach courses, to change institutions, and to cobble together their professional work are far closer to an independent contractor prototype than to a full-time employee prototype. Faculty, particularly those engaged in online work, should seek to establish an agreement in the academic community that they primarily function more like independent contractors than like fully engaged employees and therefore merit ownership of copyright in their own work pursuant to the work-for-hire doctrine. This would eliminate the necessity for a “teacher exception” to the doctrine, and would simply settle the matter on the basis of well-established law granting copyright in creative work to independent contractors. Importantly, it would clarify the designation of course copyright and thereby bring consistency across the educational spectrum. It would also bring clarity to the table at a much-needed point, when educators are not only dealing with internal wrestling over copyright but also with an increasing array of interested third-parties, such as service and platform providers, spin-offs, for-profit competitors, and so on. Further, it is likely to make academic copyright easier to administer, as educators would have clear and consistent guidelines for course ownership to follow, enabling them to create administrative bodies, possibly the copyright equivalent to technology transfer offices, that could manage and allocate a range of complex copyright rights and royalties.

While it is still possible that a case could arise that resolves the applicability of the work-for-hire doctrine to the academic work force, currently such a possibility appears both uncertain and remote. Moreover, the work-for-hire doctrine has never been particularly agreed upon by educators, who who tend to feel that the hallmarks of teaching (autonomy, academic freedom, etc.) distinguish it from most typical employment situations. Whether or not it is true that teaching is somehow exceptional, dispensing with the doctrine clears the path for coming up

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104 See generally supra Chapter 2, Part II.
with better crafted, more widely agreed-upon solutions that do not require ongoing adjudication. For these reasons, and due to the increasing urgency for the need to have clear, flexible, and workable solutions, academic institutions should address course copyright via contractual and licensing agreements.105

3. Propertizing Courses

Academic copyright must begin with the propertization of courses.106 This allows education to incorporate the fundamental incentive scheme of copyright into its regime: creating, developing and owning courses can generate revenues that help enable academics to earn their livelihood, which will further encourage creation, innovation and production.107 It is particularly important that educators establish well-crafted policies that balance rights among academic stakeholders, due to the complex balancing of interests that the field requires in order to support and sustain its many goals, such as teaching and learning, research and collaboration, nurturing of students and extension of resources to the greater learning community, and so on. Propertization should begin with balanced initial allocations of copyright.108 Further, it should calibrate the durability of academic copyright.109 Propertization should also be crafted to promote collaborative and interdisciplinary efforts, not only in research and scholarship but also in teaching and outreach.110 Finally, propertizing courses should be accompanied by systemic mechanisms that effectively regulate the dispensation of rights, rewards, and responsibilities among copyright holders and stakeholders alike.111

105 Historically, many universities have considered official documents such as faculty manuals or handbooks as appropriate venues for addressing any course copyright policies. But for the most part these are inadequate to cover the range of copyright-related disputes that may now arise when courses are taught online and to diverse audiences.

106 This is relevant to online courses. In the case of real space courses, the institution is not likely to be involved in tussles over course copyright, unless a real space course comes into conflict with an online one. But there is no apparent reason to draw lines and exempt out real space courses.


108 See discussion in supra Chapter 4, subsection V.A.1.

109 See discussion in supra Chapter 4, subsections V.C.2 and V.C.3.

110 See discussion in supra Chapter 4, subsections III.B.4 and V.C.3.

111 See discussion in supra Chapter 4, subsection V.C.4.
Chapter 5: Industry Prescriptions

A strong example of an academic contract that propertizes online courses, sets the terms of licensing, and regulates online course offerings at a traditional institution is the Penn Online Contract\(^\text{112}\) (the “Penn Online Contract”), specifically prepared by the University of Pennsylvania (“Penn”) to manage its newly emerging online program. As such, it presents a strong example of a tailored disposition of rights.\(^\text{113}\) The Penn Online Contract stipulates that Penn faculty own their online courses and will license such courses back to Penn; Penn then licenses the courses back to the faculty for the duration of the online educational term (such as it is defined). A faculty member is not allowed to take a course elsewhere, that is, to rival online institutions and/or providers, and to offer the course in direct competition with a Penn online course. This provision applies equally to faculty who originate, develop, or repeat a given online course. The third-party course provider, Coursera, also enters into an agreement with Penn, which stipulates that Coursera intermediates course websites and online programs, but owns no rights in courses and course materials.\(^\text{114}\) Coursera is entitled to take a share of revenue streams flowing from online instruction, should any arise.\(^\text{115}\)

The Penn Online Contract is an excellent launching point for course copyright and content licensing in the online context. But there are additional refinements that should be considered as online education matures and mutates. For instance, exclusionary rights should be time sensitive and time limited.\(^\text{116}\) This means that institutions should not allow faculty to take their courses to rival institutions and offer them in direct competition with similar or identical versions of the original course, especially when the original course is still being offered at the home institution where it was first developed and offered. Importantly, however, this restriction on direct competition should be time-bounded, so that faculty can eventually have control over, and rights

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\(^{112}\) **Penn Online Contract** (on file with author).

\(^{113}\) See discussion in *supra* Chapter 4, subsection V.A.1.

\(^{114}\) This is an interesting reintroduction of the middleman, whose demise has long been discussed in copyright circles. Clearly in the case of education, the middleman will still have a significant role in the emergence and development of online instruction.


\(^{116}\) See discussion in *supra* Chapter 4, section V.C.
in, their own courses. Having a limited time of protection allows the initial university to reap the full benefits of its course development when such a course is at its peak value, presumably at its inception, without incursions by direct competition from its originating professor. But such protection cannot be endless, especially given the real likelihood that the originating professor will be called upon to teach the course on multiple occasions and at various locations. Historically, itinerant professors were fully free to take their courses and teach them at different locales. The difference is that they would not previously have been in competition with their own course, as it were, and would not have the opportunity to benefit from monetization of the course on multiple occasions. In the present day, allowing a time-restricted protection gives the founding institution some due for providing the resources to develop and offer the course, while still affording the professor the time-honored right to teach the course throughout his or her professional career. In the adjunctification landscape, this is the best balancing available with respect to online courses that may generate new but unpredictable monetary returns.

The university should be allowed to bar faculty from offering their online courses at rival institutions for a given period of time. This ensures that the university can recuperate its investment, including starting up the online program, offering and supporting courses initially, arranging a partnership with Coursera, and other start-up costs and expenses. Eventually, however, these costs will be amortized over time. After a certain point, the costs of maintaining an ongoing online program are likely to recede, and should be offset by profits (such as they are) as well as the university’s main sources of funding, including tuition, alumni giving, and outside grants. After a certain time, therefore, the university should allow the faculty member who retains an online course copyright to exercise the full array of her exclusive rights, including licensing with other schools, preventing others from copying her course, being able to go elsewhere with her course, and so on. This could also be made available as set of options. For instance, faculty should have the right to exercise copyright after a set statutory period of time; or faculty and universities should have the right to strike a bargain to trade and/or exchange course copyright for more traditional compensation (that is, a faculty member may effectively trade her course copyrights for promotion to tenure track or full tenure employment position, not

117 Id.
118 See discussion in supra Chapter 4, subsection V.C.2.
Unlike her ability to leverage her scholarship record to obtain tenure). The point is to increase the flexibility that course copyright should offer both faculty and institutions, but also to grant the full range of copyright protections to the copyright holder, particularly when the initial investment has run its course. The eventual ability to teach, license, contract, or sell courses freely are integral parts of the array of rights that copyright should extend to its holder. While institutional safeguards are necessary, particularly in the online educational space, they should not place endless limitations upon the faculty’s ability to exploit their courses and to bring such courses to the widest audiences possible in a manner that will enhance education overall.

The time sensitivity of academic copyright is critical to maintaining a balance of rights between faculty, institutions and other stakeholders. It also prevents rigidity and over-expansive scope with respect to copyright, which would otherwise run the risk of unduly hampering or burdening key academic freedoms. As in the case of music and other creative fields, overly restrictive ownership rules and practices are liable to dampen other vital activities that should be allowed to flourish, such as creative borrowing, collaboration, and cross-pollination among different institutions and individuals. For this reason, in education, as in music, generous licensing guidelines should be promoted and the possibility of alternative licenses (such as GNU and the Creative Commons License) should be included wherever appropriate and helpful to academic pursuits. In the case of music, for instance, performance rights ensure that a musician can cover another musician’s original work without having to seek permission to do so, but with a requisite royalty payment. The analogy in education should be the ability of a teacher to create a course that “covers” the work of another, possibly originating, teacher, without having to seek permission but with a royalty payment required if the course generates revenues. Some disputes may arise if a follow-on course hews closely to the original but does not wholly imitate or replicate it: the extent to which a “cover” is the equivalent to a music cover (which after all is a replication of the original work as far as its melodic composition is involved) may prove vexatious at the start. But the importance of allowing generous licensing of work, in order to leave room for a broad range of creative and collaborative work, is still more important than diminishing licensing rights to avoid such dilemmas. Educators should be able to clarify the extent to which courses can be licensed, covered, shared, or protected in due course. Eventually,

educational contracts and licenses should evolve to a point that is generally agreed upon and accepted as standard practice and even norm.

As noted earlier, the Penn Online Contract, particularly when modified by the suggestions offered herein, should offer educators a workable solution to propertizing online courses and setting the terms for the regulation and administration of rights that flow from these arrangements. Institutions should establish these governing contracts, but then should consider the best means to achieve the orderly dispensation of related rights and returns. Eventually, the educational community may need to consider whether external third-party administrators, such as the CROs found in music and other creative fields, may be helpful in administering rights more cost effectively, equitably, and evenly across the field. These organizations can be coupled with the establishment of a compulsory license, thereby regulating copyright holders’ rights but also extending rights to certain follow-on creators, collaborators, and end users. In this way, academic copyright can be expanded as the demands of online education become more elaborate and complex, while essential academic rights and freedoms can be secured, and possibly equalized, throughout the greater academic community.

4. Trademark in “Name Brand” of Schools and the Degrees They Confer; Trademark in Faculty

Copyright in online courses is likely to prove especially valuable to traditional institutions that can and should capitalize on their established reputations to bolster their marketability, appeal, and assurance in the market that they offer a quality product. As in the case of fashion, elite institutions have long known that their brand name has innate value -- Harvard, for instance, is as well-known and well-regarded as Prada, and can therefore set a premium on its product -- and thus work intensively and continuously to protect their brand (Harvard has a team of lawyers dedicated to protecting the Harvard name). In education as in fashion, then, trademark becomes an IP protection that has real economic importance, as discussed in chapter 4, pp.

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120 See supra note 112.
121 Alternatively, collaborators may want to rights as co-creators and/or co-authors.
122 See discussion in supra Chapter 4, subsection III.A.2, IV.A.2, and V.C.4.
123 See HARVARD TRADEMARK PROGRAM, supra note 70.
20. As the value of educational name brands is only likely to increase as online education expands (particularly students unfamiliar with the American educational system will be likely to seek out known entities for education, such as highly ranked schools and programs), traditional schools should follow the example of Harvard and its peers and not only trademark their names but also actively defend their trademarks.\textsuperscript{125}

Faculty too should consider seeking trademark protection, particularly in cases where their work is highly regarded, sought after, and valued. For instance, Michael Sandel teaches “Justice”, a course that is well known both at Harvard and online. By protecting his name brand, Sandel can ensure that his course is not replicated (hard though that may be) and exploited by rival institutions or professors. Moreover, he may be able to charge a premium associated with his name, the course, or his home institution (presumably exploitation of the school’s name would require some portion of royalties to be shared with the school, but this can be worked out by contract). Indeed, there is some precedent for the exploitation of academic trade brand online: Professor Arthur Miller’s attempt in 1998 to offer a course on civil procedure at Concord University Law School, a wholly online venture, was considered not only a violation of contract by Harvard but also an attempt to trade on their brand name, as the course was touted as a chance to study with “Harvard Law School professor Arthur Miller.”\textsuperscript{127} In lieu of such disputes, faculty and institutions should choose to trademark their name brands, create and enter into contracts that manage the deployment of their name brands and the dispensation and division of royalties.

\textsuperscript{124} This can be the case in music -- Tom Waits and Dolly Parton wielding trademark protection strategically are cases in point -- but it may be less so because there haven’t been quite as many rampant attempts to piggyback on the names of successful bands/performers (but see cases where political groups try to benefit by association with bands, such as use of Bruce Springsteen’s songs by members of the Republican Party and his protests). See, e.g., Doctor RJ, \textit{When Politicians Use Music Without Asking Permission}, DAILY KOS (Jan. 26, 2015, 7:00 PM), http://www.dailykos.com/story/2015/01/26/1360245/-When-politicians-use-music-without-asking-permission#.

\textsuperscript{125} This is not as far-fetched as it may sound: if a school or faculty member develops a course and it becomes hugely popular, and a competitor runs a knock-off course in direct competition, the siphoning off of students may prove costly to the originator. As in fashion, anti-counterfeiting can become a means of thwarting, defending, or recuperating damages against those losses.

\textsuperscript{126} See HARVARD UNIVERSITY’S JUSTICE WITH MICHAEL SANDEL, http://www.justiceharvard.org/ (last visited Mar. 29, 2015). Professor Sandel’s “Justice” lecture series is also available on iTunes U.

flowing from the use of their name brands, and agree to defend their name brands against incursions by entities that violate their trademark rights, agreements and accepted conventions.

**C. Technological**

MOOCs are on the cutting edge of educational innovation. It is widely believed that they have the potential to open education to new audiences and to transform learning and pedagogy alike, as discussed in chapter 2, supra. They also have great potential to be data mining resources (for instance, with every online click made by a student, institutions can track students’ interests, intent to learn, participation, and so on.). And they may conceivably be new resource generators for many educational providers and their strategic allies. Therefore, it is clearly valuable to universities to keep MOOCs in their sights and to keep innovating in that space. The promises that MOOCs extend, coupled with the pursuit of potential new revenue streams, comprise some of the reasons why universities are racing to stake a claim online. But the pursuit of colonizing the online educational space also raises the need for universities to invest in infrastructure, and possibly in data tracking and mining software. Further, universities will have to invest in an array of ancillary and support systems, such as grading and grades disclosure systems, payment systems, authentication software, and privacy safeguards, both to comply with federal standards and regulations (for instance, privacy requirements with respect to disclosure of personal information) and to satisfy student needs and demands. But such technology, as well as course platforms and online instruction, are sure to prove an expensive investment. Budgets for such investment may be available to wealthier institutions, but possibly not as readily within the reach of cash-strapped ones. Many institutions will be forced to make a calculus regarding expansion into online education, and are will have to choose whether to pursue the online option, either on a small scale or at a greater commitment level.

Course providers will also have to make considerable investments in technological systems and support. As in the case of institutions, this is likely to favor the larger, better-established providers, as well as those that have strategic partnerships with well-heeled institutions. Student privacy and security concerns, a counterpart to student identification and authentication, is liable to raise a host of issues. Moreover, many course providers, such as Coursera, are persuaded that
employment tie-ins are a natural and potentially lucrative complement to MOOC offerings. Many universities seem to agree, inviting providers to extend innovative job-related services to the MOOC students that are enrolling in online education. However, if course providers and universities start seeking out tie-ins with employers and other third-parties, they will require at least one of the interested parties to maintain and manage systems that can host job-related activities, networking events, and so on. Making these available, while protecting privacy and proprietary rights in data (such as students’ resumes, grades, etc.), is likely to require fairly sophisticated tracking and sharing systems. Again, this could prove costly, and could compel some institutions to work on collaborative tech solutions to share the costs and more effectively and efficiently manage the data and services involved. Finally, if MOOCs do prove to be financially rewarding, there will likely be contentious issues over ownership, licensing, revenue splits, and so on. This may be heightened if MOOCs become increasingly controlled by a few big providers, such as Coursera, as the bargaining power of the service providers will be strengthened if they are concentrated and powerfully appealing (that is, the only game in town). Technology that organizes complex and numerous licensing agreements, and that manages revenue allocations, should go a long way in helping institutions and service providers manage MOOCs and their related returns.

D. Cultural

1. Education as Constructed Commons

a. Cost to Education if it Expands Copyright: Loss of Education’s “Negative Space”
It is instructive to compare education with other creative content-rich industries to evaluate its position as a constructed commons,128 and a negative space.129 Fashion has never had a commons, but it arguably once functioned as a guild130. There are debates over whether or not its

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128 See discussion in supra Chapter 4, sections II.D., IV.C,
129 See discussion in supra Chapter 4, section II.D.
nature encouraged originality, but there were guild-like protections of original material, such as certain dress designs. But to date fashion remains a negative space, and relies almost exclusively on trademark among the range of IP protections available. Music was once a guild (as in the time of sacred music), but moved away from the guild to a system of patronage (supported mainly by aristocrats, municipalities/states/towns, subsidized institutions such as the Staatskapelle, and the church), and then to a market-based system (the iconic case is of Guiseppe Verdi establishing and wielding copyrights in his hugely successful operas). Some music was treated as common property -- for instance, blues, jazz, plainsong, gospel -- but arguably primarily because the originators didn’t have the power, opportunity, or backing (such as lawyers, agents, and other powerful allies) to assert their rights in their music compositions. Moreover, even when such music was propertized, it was often at the expense of the artists and to the benefit of the middleman, as in the case of Motown, due to copyright ownership asserted and exploited almost exclusively by the middleman (that is, the agent, producer, and/or record label). Education has been more readily characterized as a commons, or a “constructed commons”, and has traditionally been seen as a sphere in which IP has been kept at a minimum in order to foster its cultural values, such as academic principles of sharing, “standing on the shoulders of giants”, academic freedom, and so on. Like fashion, it has minimal copyright. But in other respects, as in scientific research and discovery, it more closely resembles music, with a broad, complex, and well-established system of rights in productive output (notably, patent rights and in some cases copyright in creative works such as publications and other scholarly works).

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131 See, e.g., Johnny Diaz, Fendi, Filene’s Basement Settle Suit for $2.5 M, BOSTON GLOBE (July 3, 2010), http://www.boston.com/business/articles/2010/07/03/fendi_filenes_basement_settle_suit_for_25m/ (discussing a massive settlement between Filene’s Basement and Italian fashion house Fendi over the retailer’s sale of counterfeit Fendi products).
134 See generally, GERALD POSNER, MOTOWN: MUSIC, MONEY, SEX, AND POWER (2002).
In contrast to the ideal of education as a constructed commons, however, some commentators have argued that propertization of academic work is part of an ongoing (and accelerating) trend of commodification or “corporatization,” that is undermining key academic principles.\footnote{See discussion in supra Chapter 4, sections II.F, II.H, and II.I.} It’s not clear which way the causation runs, however: is academic corporatization a trend whose time has come (due to external factors such as the rising cost of education, federal funding changes, job market demands, etc.), and universities are just bowing to the inevitable; or is it being driven by universities’ insatiable appetites for new sources of revenue to keep them self-sustaining? Still more importantly, it is far from clear whether propertization actually does undermine such academic principles. For instance, the principle of free and open collaboration has always been in tension with the desire of individual academics to publish, gain recognition for their work, and show mastery over the competitors in their field. How does propertization undermine these longstanding incentives and interests? It is just as likely, perhaps, that propertization merely offers academics another tool to managing and regularizing the work that they do.

The strongest argument supporting the proposition that propertization creates a more corporatized educational environment is the effect that it can have on long-term commitments between institutions and faculty. If courses can be taught in a number of unrelated venues, faculty mobility becomes a real and inculcated premise, allowing new fluidity in the educational labor market. If course propertization becomes innately valuable, it is likely to become more important for faculty, not just institutions, to monetize courses. If mobility is valuable and courses are valuable, publication may retain its value for recognition/reputational purposes but it is likely to become less important for job securing, retention, promotion, and tenure and longevity purposes. This diminishes the value of publication in a strategic sense for faculty, and trades off publication as a key skill for teaching courses (and in particular the large-scale courses that MOOCs comprise).\footnote{See discussion in supra Chapter 4, sections II.A, V.C, V.D.} All of these are fundamental changes in the nature of the educational structure, mission and rewards system. Academic institutions and faculty alike must consider these ramifications, and ask themselves if this is the direction that education should embrace, or if it sacrifices practices and principles that have served education best throughout its history.
b. How to Deal with the Constructed Commons of Education

Education calls itself a commons, with many of its features; and it has been characterized as a guild-like space\(^\text{139}\). Now, however, we should recognize that all the commons-like features and characteristics of education are increasingly falling by the wayside or being discarded and/or lost. Some of these features that are at risk of disappearing include a sense of the common good; an interest in self-policing for the benefit of community members; real collaborations (not merely those that involve partnership with commercial and/or for-profit ventures that are driving toward some kind of money-making end); a commitment to the protection of the rights, such as academic freedom, of community members; and a diminution of full-time employment and reduction or elimination of job security for employees. This represents a real challenge to vital pre-existing norms and practices that have been long established in education.\(^\text{140}\) It may be that these practices and values are deemed to be obsolete. If so, and if education is not, or no longer, a commons, then in order to keep its valuable output secure and to continue to supporting its production, educators should agree to propertize its output completely and to ascertain the IP-based rewards and allocations that relate to its output -- just as has been done in academic scientific research and development, and in bringing related R&D properties to market.\(^\text{141}\)

Even if the eventual propertization of courses is taken as a given, however, efforts should be made to sustain and strengthen some of the characteristics that education has traditionally preferred and valued, such as open collaboration, publication (for the sake of disseminating knowledge and information, as well as for garnering recognition), institutional commitment by faculty, and so on. These normative values and preferences, however, should be bolstered by the shape and structure of education and its institutions, rather than solely by IP allocations. For instance, strong tenure principles and practices should keep in place several of these priorities by creating a rewards structure that reinforces research, scholarship and publication (as a means of

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\(^{139}\) See Madison, Frischmann, & Strandburg, supra note 134.

\(^{140}\) See discussion in supra Chapter 4, section V.D.

gaining tenure and securing an academic reputation), longevity (the brass ring of tenure to be won by publication and good teaching), collaboration (strengthened by interdisciplinary programs that reward long-standing teachers who want to venture into other intellectual areas, which tends to occur more when faculty have tenure and the security that enables them to explore scholarship outside the parameters of their core competencies), and so on. In some of these cases, strengthening norms will not only reinforce the sense of shared values among academics, but it will also incentivize the creation of valuable institutional output. As in the case of scientific research and scholarship, for instance, rights in patentability do not serve as motivational factors for academic scientists, because the institution typically claims patent rights from the outset.\footnote{142} Publication rights, however, offer scientists rewards that are recognized, sought after and valued. The norms that underlie publication therefore operate by incentivizing production without granting IP rights in the final outcome of the work. Without these norms, there is little incentive for scientists to engage in academic research and development, and little recourse for a university to stimulate its scientific output. Thus, norms unite the academic community, and at the same time underlie its productivity.

Turning to a system that relies solely on copyright in course “properties” as a sinecure, or as the sole or primary relevant reward that faculty are afforded, educators will lose the benefits of the norms-based incentive system. This is likely to have several long-term results that will not be desirable to institutions and faculty alike. For instance, it may lead to increased competition among faculty for the highest-paying teaching positions and/or jobs, whether such are offered by MOOCs, for-profits institutions, or other venues. Faculty will also be incentivized to teach large online courses (such as survey courses) at multiple venues, as opposed to focusing on teaching at their home institution, thereby diluting the attention they bring to their real space jobs, and possibly diminishing the quality of those courses. It may also lead to similar discrepancies of interest, attention, and quality among institutions. For instances, institutions will be incentivized to race to secure funding for MOOCs, and to focus on online instruction, which may or may not be beneficial to students at traditional institutions. Institutions may also be predisposed, due to fiscal interests, to favor faculty who like to teach online, which may or may not include identifying and rewarding the best professors to suit the needs of the institution and its students.

\footnote{142} See discussion in supra Chapter 4, section V.D.
Bearing in mind these concerns, institutions should ensure that the propertization of courses is counterbalanced by efforts to retain core normative values, practices and aims. In this regard, valuing and agreeing to uphold the notion of a constructed commons, as well as expressing those values in practice and expression, should go far in strengthening an institution’s commitment to education, even as it extends its interests to the online space and to the new audiences that it finds therein.

III. MUSIC

A. Business

1. Problems with Current State of the Industry

The music industry has been transfigured by changes brought about by technological advances, most notably the advent of the Internet. In the late 1990s, recording music on digital tracks enabled the disaggregation of music into single units, such as a single song, contrasting with earlier iterations that bundled music into a larger collective unit, such as an album or compilation (for instance, an entire symphony). Music listeners began seeking out disaggregated songs in various venues, leading to the rise of the CD single, but also to the introduction of Napster, a free, peer-to-peer music sharing service that proved immensely popular. Napster introduced consumers to the idea that music could be obtained, shared, exchanged and listened to without cost; and it persuaded consumers that free music was viable, acceptable and desirable. Music producers were quick to recognize the threat to their business model posed by Napster, but slow to respond to its challenge by changing their business strategies and solutions. While generally seeming to agree that they should band together, music producers were in fact reluctant to enter the online music space and unable to come to terms for concerted music sales online. By being so reluctant to jump into the online music space, music producers lost a great deal of market share to Napster and its rivals, and further lost the opportunity to gain important first mover advantages in the music market. At the same time, Apple, a technology company offering personal music devices that are reliant upon disaggregated digital tracks (such as the iPod), finally brought the major music producers together and compelled them into contractual licensing agreements with Apple for the sale and licensing of music online via the Apple iTunes
The Apple model proved immensely popular, due in no small part to aggressive pricing of songs by Apple (beginning at 99 cents per song), and quickly became responsible for a large share of online music sales (and importantly legal music sales). While initially Apple was required to cross-subsidize support of music sales via the iTunes store with the sale of personal music devices, many industry observers suggest that, today, the store is far more profitable than Apple’s leadership let’s on. Currently, the iTunes model has proven the hallmark of the industry for online music sales, and now faces some competition with other venues, such as the behemoth Amazon. More significantly, a number of consumers seem to be moving away from a music ownership model, or even a licensing model, to online music streaming offered by services such as Pandora, Rdio, and so on. Music streaming most closely resembles broadcast radio, and therefore does not entail music sales. The music industry is now contending with the streaming model and the business challenges it presents to an industry that has already seen a large decrease in sales.

The music industry faces a host of challenges ushered in by the new online era. Reduced music sales, whether online or in real space, have become the new reality to music industry participants. Music disaggregation has resulted in lowered sales, not just of albums but also of songs; and this downward spiral has not abated to date. Revenues across the industry have hit new low-water marks, but it is unclear whether this is a “new normal” or whether they can be improved and/or turned around. To thwart some degree of copying, the music industry attempted to adopt technological anti-copying protections, or DRM, which has proven hugely unpopular among its customer base. The resistance to DRM took the industry somewhat by surprise, and sparked the recognition that while it may offer a viable technological barrier to copying, such protection comes at a significant cost in terms of customer satisfaction and acceptance. In the

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143 The terms of these agreements were arguably not optimal for the music producers, for instance, they were not able to singlehandedly set the terms and pricing of online music sales, but by the time they entered into an agreement with Apple, they had lost the upper hand and were more or less forced to take what they could get.

144 See, e.g., Chris Taylor, Apple’s Business Model is Backwards – And It Works Like Crazy, MASHABLE (Oct. 23, 2013), http://mashable.com/2013/10/23/apple-free-software-expensive-hardware/ (quoting Steve Jobs on Apple’s unusual cross-subsidy model saying “[t]he dirty little secret of all this is there's no way to make money on these stores,” and that the reason to keep the price low is “[b]ecause we're selling iPods).

case of Apple, the tradeoff was deemed too costly: after considerable consumer pushback, Apple permanently removed its version of DRM, FairPlay, from its system.

But the impact of these industry changes is not felt by music producers alone. Many composers and musicians are struggling to figure out how to make a livelihood in the music industry, particularly as revenues from recording have dropped off so significantly for all but a handful of star acts.\textsuperscript{146} Due in part to shrinking music sales, the divide between extremely successful artists (the “haves”) and struggling artists (the “have nots”) seems to be growing, although the extent to which this is a new or growing phenomenon is always subject to debate. It is true, however, that an increasing percentage of an artist’s revenue is accounted for by ticket and merchandise sales at concerts and live performances. In contrast, revenues from online music streaming are proving elusive, as streaming providers argue that the terms of their rights-related obligations leave them with very little margin with which to compensate performers (they further argue that limitations on advertising revenues, which are notably lower online than in real space, contribute to constraining their operating budgets). On the other side of the table, middlemen are struggling to find new roles, or to bolster established roles, in the new online music economy. Record labels are disempowered by sales declines, and have not yet found a substitute for the solid revenues that once were typically gained from the issuance of albums and CDs. Agents, talent scouts, marketers, music critics, and other intermediaries are likewise looking to establish their footing in an increasingly web-based economy. Their roles, however, are facing challenges from several directions, such as the rise of self-marketing via YouTube and other sites, the popularity of online reviewers who promote musical acts via v-blogs and other channels, the amelioration of widely available recording and sound editing software enabling musicians to create high quality recordings in their own home, and so on.

On the one hand, these advances are a positive development for the music marketplace, as fewer intermediaries can result in lower production costs and eventually lower costs of goods for consumers (if cost savings are passed on to consumers).\textsuperscript{147} On the other hand, however, these changes can reduce the availability and effectiveness of authoritative entities that screen for

\textsuperscript{146} This was always the case, but it is notably heightened today (and no patrons, guilds, etc. offer fallbacks anymore).

\textsuperscript{147} This is the model evinced by “store brands” in the grocery store context.
quality and value. For instance, a reduction of the role and viability of established, vetted and usually respected critics, when coupled with the emergence of unknown amateurs who are neither easily located nor readily assessed, may result in the promotion of musical acts that do not necessarily meet the highest quality standards but rather pass a nebulous popularity test. Moreover, the loss of other middlemen can similarly represent a significant cost to the industry. Some record labels, talent scouts, and agents historically chose the artists that they intended to represent, promote, and perfect over a long period of time. These emerging artists could find support, reinforcement, and resources that they might not have been able to attain without the backing of their industry representatives. While the historical record of music representation is far from unimpeachable, it does reveal certain benefits that afforded artists the room to mature, grow, and put out long-lived, classic albums and repertoires. Thus, while some have lauded the loss of middlemen, it should be recognized that such a loss is not clearly a net positive, and they should not be jettisoned without further thought.

2. Business Solutions

a. Change to Essential Business Model

The music industry has already been compelled to rethink its core business strategies and model. It has faced multiple challenges posed by high fixed production costs, content devaluation, losses in established revenues, and heightened competition from lower-valued goods. These trends have driven the industry to rethink its business strategies across the board, with respect to production, marketing and sales, the portfolio of properties, nature of contracts and licensing agreements, and treatment of end users and consumers. New business solutions should continue

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148 Of course, the traditional presence of established music producers and critics did not always result in the emergence of the finest and best talent. But it is arguable that establishment figures are held to some accountability, and called upon to explain and defend their choices to consumers and fans.
150 See discussion in supra Chapter 4, subsection I.A.1.
151 See discussion in supra Chapter 4, subsection I.A.2.
152 See discussion in supra Chapter 4, subsection I.A.5.
153 See discussion in supra Chapter 4, subsections I.A.6 and I.A.7.
154 See discussion in supra Chapter 4, section III.A.
to be adopted and refined, particularly as the music market confronts further changes in emerging technologies, practices, and consumer preferences.

Recently, changes to the basic contractual arrangements among industry representatives and artistic acts have emerged as a promising set of business solutions. These should be pursued at every level of musicianship, and should afford the artist the best possible returns on their creative output. One instance of a newly emerging contract is the 360 deal, in which the artist is compensated with a percentage of box office, or the revenues from sales of concert and live performance tickets. Artists should also be compensated for online performances of their music, including streaming, playing of their music over a sound system at a public venue, and so on. Artists themselves should also vigorously seek out new potential revenue streams and activities that may bolster their revenues in the future. For instance, some musicians have created websites that enable them to engage in outreach to listeners and consumers, including interactive chats, notification of early ticket sales, special song releases targeted at loyal fans, and so on. Some of these activities may eventually be made on a fee-paying basis. But others may remain free loss leaders, that build fan bases, loyalty, and interest in future performances, music and merchandise purchases, and sponsorship and/or membership drives. Similarly, musicians should seek to build their listener base via YouTube, online releases, and other activities that attract the attention and name recognition that in the long run are likely to contribute to music sales. Online radio streaming should also increase exposure to new audiences, serving much the same purpose as traditional radio broadcasting. The exponential and ongoing growth of Internet use and e-commerce can be a boon to artists, who should mine its potential for exposure, self-promotion, outreach and eventually marketing and sales. Taken together, new contracting arrangements that maximize performance-related rights and revenues, as well as new efforts to build reputation, renown, and audience approval, will reduce the industry’s historical dependency on single-stream revenues from album and song sales. This multivalent approach will create a portfolio of

155 See discussion in supra Chapter 4, subsection III.A.2.
156 For instance, skating rinks are now required to pay performance rights for playing music over their loudspeakers. At times this is pre-recorded music, but increasingly they are playing music streamed by Pandora or other services. This public performance of music should trigger a performance right obligation, whatever the source of the music played might be. See also discussion in infra section III.B.
157 See discussion in supra Chapter 4, subsection III.A.2.
158 See discussion in supra Chapter 4, subsection III.A.2.
business practices and legal rights that should generate various revenue opportunities and sources, which should counteract the loss of earlier revenue sources that have been eroded by technology and changing user practices and tastes.

**b. Music Licensing Arrangements**

Record labels should band together and create more contractual licensing arrangements that disseminate music to competitors that span both retail and technological sectors, rather than simply distributing their music via iTunes. These arrangements do not require new copyright measures, but instead entail application of existing practices to new commercial ventures that have not yet been fully exploited. Retail and technological competitors can be found both online and in real space, and can overlap or comprise multiple players: for instance, Amazon is now attempting to create a new music service via Amazon Prime, which the record labels should embrace. Music industry participants should also enter into better and more comprehensive licensing contracts -- in the case of Amazon, for instance, record labels have proven so resistant to change that the new streaming service targeted at Amazon Prime customers is missing entire record labels and/or copyright holders, such as Universal.\(^{159}\) This is detrimental to the industry overall, as it prevents healthy competition from improving access to a wide range of audiences, and may result in music releases becoming locked into the universe of one online merchant, such as the Apple iTunes Store. In Technology and Culture, below, locking music into one ecosystem will be detrimental to interoperability, the generation of diverse formats (such as MP3 and others), and possibly the quality of music dissemination and reception at the consumer end.\(^{160}\) Moreover, it can unnecessarily forfeit potential revenue streams, such as music sales on Amazon Prime and other competitors that emerge in the music retail and delivery business. In this regard, the music industry would do well to reconsider the history of how Apple compelled the record

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\(^{160}\) Potentially better compression formats that were not popularized by sites like Apple were eventually abandoned or relegated to niche markets. See also discussion in *supra* Chapter 4, sections III.B,
labels at the bargaining table to agree to cooperate in distributing songs via iTunes, which proved a very successful business strategy (and the only viable response to illicit music sharing) in the long run. This should spur industry participants to devise similarly innovative solutions that anticipate the need to meet new demands for music delivery on diverse platforms and in diverse venues.

At the same time, technology companies that are rivals to Apple in the handheld device space (including mobile telephones, tablets, music devices, and certain compatible devices, such as headphones and speakers), such as Samsung and others, must determine how to get record labels to distribute music on their devices, such as the Android, on a scale comparable to iTunes’ scale. Economies of scale should make music delivery systems more affordable, and therefore more desirable, to consumers. These companies should follow Apple’s model of initially leveraging their market segment in the handheld devices sector to promote aggressive pricing of music and stimulating early music sales, as well as establishing a solid customer base. Eventually, they should follow Apple’s model by gradually raising prices per song (if they can sustain it and keep their customer base), adding new features (such as offering sampling, free songs as loss leaders, strategic placement), incorporating interactive services, and so on. These companies should recognize, however, that Apple enjoys a huge competitive advantage, having effectively cornered the music market, and is likely to prove stiff competition that will likely defy incursions. Nonetheless, retail and technology companies should strive to negotiate deals with record labels to sell music via more venues, for instance, to effect music sales through music streaming providers, independent artists’ websites, real world locales (at concerts, open markets, Starbucks and other retailers), and so on. Historically, music producers have proved woefully slow to recognize the potential that innovative technologies can offer creative content industries.

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161 See discussion in supra Chapter 4, subsection III.A.2.
162 See discussion in supra Chapter 4, subsection III.B.5.
163 They should also capitalize on relationships with famous musicians, as the wildly successful “Beats” by Dre model, and its later acquisition by [Apple], has shown possible
164 Similarly, the Apple consumer base has allowed the company to corner the market on third-party applications, or Apps. This has allowed Apple to insist that many of its App partners design Apps that only function within the Apple universe, thereby thwarting interoperability and ensuring that Apple’s dominance in the market remains extremely difficult to challenge.
165 See discussion in supra Chapter 4, subsection III.B.6.
such as theirs.\textsuperscript{166} It behooves music industry players to hire technologically adept and forward-thinking strategists who can explore new devices, delivery methods, and use among early technology adapters.

c. Advertising
Advertising revenues have proven a tried-and-true avenue to monetizing content placement online.\textsuperscript{167} As in the case of print media, radio and television broadcasting, and other media, advertisement has historically been used to support the dissemination of content without requiring consumers to pay directly for access to the creative work that they enjoy. However, it has become increasingly clear that advertisers are not willing to pay as much for online ads as for ads in print.\textsuperscript{168} In the case of the Internet, therefore, advertising plays can offer relatively low returns.\textsuperscript{169} Nonetheless, music industry participants should explore advertising options as one way to bolster their flagging revenues. They should consider targeted marketing, such as ad placement for music on music-related websites, optimized product placement, or arrangements with large music intermediaries such as Ticketmaster, which should generate some revenue. Overall, however, music industry players are likely to encounter many of the same issues with monetization through advertising that other content industry producers have had: advertisers are not yet willing to pay enough for online ads to pay off in the long run, and advertising revenues will have to be merely a supplement to revenues drawn from steadier and more lucrative sources.

d. Reinforcing the Role, Utility and Value of Middlemen/Intermediaries
While some have argued that middlemen are, and perhaps should be, becoming obsolete,\textsuperscript{170} there are to the contrary several strong arguments for keeping middlemen alive. Music industry participants should consider the historical role of middlemen and the range of activities that they have spanned and continue to offer today. First, they screen musical talent for quality, originality, marketability, and other useful features. Further, they polish products and package

\textsuperscript{166} For instance, they were slow to recognize that ringtones on cellular devices could be monetized by making snippets of songs available for download
\textsuperscript{167} See also discussion in \textit{supra} Chapter 4, subsection IV.D.1.
\textsuperscript{168} See also discussion in \textit{supra} Chapter 4, subsections I.A.5, III.A.2.a, and IV.D.1.
\textsuperscript{169} See Zuckerman, \textit{supra} note 87.
\textsuperscript{170} See also discussion in \textit{supra} Chapter 4, subsections I.A.3.
them for commercial success (for e.g. high quality editing). Further still, they bring products to market through efficient, streamlined, and well-established avenues. Finally, they serve a critical function, distinguishing and promoting the best acts.¹⁷¹ Technology has placed access to some of these functions in the hands of emerging musicians and independent promoters, marketers, and even amateurs. For instance, technology is now making it possible for amateurs to attain quite high quality production values, and the quality of a recorded musical work cannot be so readily distinguished between commercially and non-commercially produced output. But technology has not yet displaced the role of professionals in the music marketplace. For instance, the Internet abounds with music critics, some of whom are more interested in real quality than commercial viability; and savvy online users are finding it increasingly easy to screen and search for good critics. At the same time, however, in depth criticism, based in experience, analytic skills, and longstanding engagement with the work comes at a cost, and often requires support systems to allow it to attain maturity (just as musical acts themselves may). Traditionally, journalism offered support to critics who were able to engage in deeply insightful critical thinking. Music industry participants should recognize the value of this kind of engagement, and should seek to foster and promote it, rather than to assume that it can survive online without formal support and adequate remuneration.

i. Keeping the Middleman Alive

The various roles of industry intermediaries do not yet seem to have disappeared. Even though some commentators argue that they are fast becoming obsolete,¹⁷² there are others who have moved toward recognizing the centrality and usefulness of middlemen to the process of bringing cultural content to market.¹⁷³ Digital era innovations are not quite threatening the entirety of

¹⁷¹ One caveat is that the definitions of “the best” musical talent that middlemen use may well be founded in various factors, such as sales-worthiness, popularity with audiences, and so on, which are not necessarily proxies for quality, greatness, uniqueness or originality. Nonetheless, for the most part, their criteria tend to be known quantities, and many choices made my middlemen will be put to the test of time.
music intermediation: for instance, agents are still needed to locate talent (even though some may have moved more online), marketers and producers to bring works to commercial fruition, critics to assess the output, and so forth.

Equally importantly, the online music world requires rights-clearing entities (CROs) that should continue to administer the complex portfolio of rights that accrue upon the production and dissemination of musical works. The importance of these entities will not diminish anytime soon, as the industry is dependent on their services for rights management and administration. But CROs should also strive to ensure their centrality by diversifying the services they offer, the resources they command, and the relationships they can build with artists over the course of entire careers. CROs, for instance, should undertake new roles in managing music, and should follow the examples of BMI and ASCAP, which are continuing to offer new outlets, support systems, and resources to emerging and established artists alike. These ventures make it clear that innovative intermediaries should stake their position in online music spaces, but should expand their capabilities and services to meet the needs of artists in managing a host of musical products and venues, such as digital streaming, direct-to-consumer online sales, and so on. These practices increase efficiencies for artists seeking commercial success that will ensure their livelihoods, and also increase the centrality of middlemen as vital authorities who can manage and clarify musical rights and returns.\(^{174}\)

Another middleman that should be recognized, but that often goes unremarked, is the astonishingly powerful role that technology companies play in the music world. Technology companies increasingly add new levels of intermediation in various ways. First, by featuring music on a website or online store, a technology company that offers or serves as a music vendor is making a decision that affects the market visibility and viability of an act. Second, a popular online vendor can use its market share to compel artists to release on its site, or in exclusive partnership with it, or to engage in ancillary activities with it such as offering tie-ins with its products. Third, an online vendor that has significant market share can dictate key contractual terms for online distribution and sales to producers\(^{175}\). Fourth, a technology company that is or

\(^{174}\) See discussion in *supra* Chapter 4, section III.B.

\(^{175}\) This is increasingly becoming evident in the case of e-books.
has an online vendor can compel artists and producers alike have to make their product compatible with its devices, and can extract promises that they will commit to limiting such compatibility to a finite set of devices, products and future roll-outs.

In sum, as bricks-and-mortar retailers have disappeared from the music landscape, online retailers have gained increasing clout. In the case of a behemoth like Apple or Amazon, they can set the terms by which music is delivered to the masses. They can also, however, offer sites where musicians can release new music, possibly at lower costs than via record labels, and possibly offering them a larger cut of the revenues than the record labels historically offered (as in the case of e-books). The issue here is that the musician is likely to be responsible for doing what record labels have typically done, such as finding audiences, garnering positive reviews, standing out from the crowd, etc. This is a tradeoff that is not easy or obvious: as authors who self-publish e-books on Amazon have found, the work of intermediaries, such as marketing, outreach, rights management, and so on are often easier to outsource to third-party entities that specialize in such services than to assume and add to the creator’s responsibilities and demands. Musicians and other industry participants should not jettison middlemen in favor of an online distribution model, particularly via Amazon, Apple, or other market-dominating entities, without recognizing the potential quandaries that may arise from a self-publishing model.

2. Interoperability

The point of interoperability is that it will presumably make more music available to more consumers, on a wider variety of platforms, which will in turn encourage audiences to consume more. That is, a consumer who knows that she can have a song available in the cloud, on her devices, as her ringtone on her mobile telephone, and wherever and whenever she may want it, may be more likely to buy or license a song, or indeed multiple songs, precisely because the music that she desires is readily available in multiple forms and therefore is generally ubiquitous. But interoperability also benefits the marketplace on a more universal scale. Companies that make interoperable devices can innovate products that are available to an array of consumers, at

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176 See also discussion in supra Chapter 4, subsections I.A.3.
177 See also discussion in supra Chapter 4, sections III.B.
highly competitive prices. Where interoperability prevails, no one company can create a closed ecosystem, or a network of its own products that locks in consumers and does not allow them to pick and choose from among the best offerings on the market. No one company can attain a monopoly or quasi-monopoly position in the market, as it cannot concentrate consumers within the walls of its ecosystem. Finally, interoperability helps to ensure that pricing of products is subjected to downward pressure due to competition among market rivals. This benefits consumers, and enables them to select the exact combination of products, devices, and content that they choose from among the multiple providers that operate in the given market.

**a. Private Companies Striving for Interoperability**

Private companies should strive for interoperability, as it offers the best option by relying on private arrangements to maximize individual corporate goals (primarily, of course, profitability), industry-wide improvements (such as streamlined ways to disseminate content), and end user benefits (such as the greatest availability of content across multiple platforms and devices). But interoperability is most likely to prevail when companies’ interests are aligned, such that they act in concert toward unified ends, as discussed in chapter 4, pp. 34-36, 39-41, 56-58. This is a challenging proposition, in part because the rewards of closed ecosystems are numerous: a company that can corner a market will be able to exploit its advantage by offering exclusive products to its market, which can expand its per-consumer profits while drawing new consumers into the fold and driving them completely away from any competitors’ markets.

A vivid illustration of the costs, benefits, and complex dimensions of the interoperability challenge is offered by the Apple Company.\(^{178}\) By taking an early lead on personal devices, Apple gained a huge first mover advantage and garnered a large share of the consumer market well in advance of its competitors. It has built on that advantage by building and guarding its closed systems, which in some respects are not designed to be interoperable with other systems. For instance, while Apple music devices can play music imported from non-Apple sources (such as MP3-format songs, CDs, and so on), music purchased via the iTunes Store is intended for compatibility only with Apple music devices (although iTunes songs can be copied or “ripped”,
doing so interjects another layer of effort in the music downloading and saving process). Further, it has added to its line of products so that Apple customers can continue to expand their own collection of Apple closed-system products: for instance, a consumer can own an iPod, an iPhone, an iPad, and an iMac, on which her content can of course move freely; but she cannot easily and effortlessly move that content onto an Android or an MP3 player. Apple’s devices have proved so popular that now third-party App providers and sellers flock to the Apple App Store to sell their products, resulting in well over 1 million apps available to date. This reinforces the locked-in nature of the Apple universe, and when new users are considering which system to enter, they are persuaded by the sheer size and relative strength of Apple’s panoply of offerings, which again reinforces the growth of Apple’s customer base at the expense of its competitors.

The entire cycle of closed systems maximizes profitability for Apple, but runs wholly counter to the premise of interoperability. In essence, then, keeping the system closed would appear to be best practice for Apple, at least as far as cornering the market (and eventually perhaps attaining the supra-normal returns of a virtual monopoly) is concerned. But more recently, a countertrend has begun to emerge: Apple has found that the immediate demand for third-party applications, or “apps”, is so immense that it is strategically advantageous for Apple to host some third-party apps that are not exclusive to the company, but that are available on a number of its competitors’ servers, sites, and/or delivery systems. In other words, Apple is strategically opening its universe to offer interoperable apps when consumer demand makes the benefits of selling those apps surpass the costs of limiting its sales to exclusive products. This offers one argument in favor of interoperability: when users want maximum mobility of their creative content, creating or hosting third-party providers can prove more profitable than the rewards of exclusivity.

Another important argument against closed ecosystems is that by keeping interoperability alive, companies can cross-market not just within one space, such as the world of individual digital devices or systems, but potentially across new spaces, such as cloud storage (or whatever comes next). Right now, Apple may have created a tightly-controlled ecosystem that is still going

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179 See Sarah Perez, *iTunes App Store Now Has 1.2 Million Apps, Has Seen 75 Billion Downloads To Date*, TECHCRUNCH (June 2, 2014), http://techcrunch.com/2014/06/02/itunes-app-store-now-has-1-2-million-apps-has-seen-75-billion-downloads-to-date/.
strong, if not actually growing. But in the technology world, standing alone can ultimately mean being left behind. It is increasingly likely, and it appears that Apple increasingly agrees, that it is preferable to keep open the possibility of creating interoperable systems for content delivery and sharing so that it can tap new markets that are still to come. Particularly in the world of creative content, where it is not yet clear what the future of content delivery holds (or where it will be newly profitable), it may behoove Apple and its competition to look at interoperability as a means of keeping flexible and open to new channels of content dissemination, user access, and possibly new creative generation.

b. Governments Forcing or Incentivizing Interoperability

Given the current socio-political landscape and climate, it seems highly unlikely that a government agency will arise to compel, reinforce, or require interoperability through regulation or mandate. There are some technology-related areas in which the government has (so far) found a compelling interest in promoting certain standards, such as net neutrality, the ICANN system, and so on. However, promoting cooperation instead of competition is not quite comparable to establishing overarching systems of online operations. Any attempt that touches upon private actors is far more likely to be a lightning rod, and equally likely to come under assault by free market advocates who contend that private actors should be wholly unfettered in their practices, choices, and commercial plans.

Nonetheless, the government should strive to incentivize interoperability by crafting policies that make it more profitable than not to make interoperable systems. Such efforts will require some industry lobbying, which can be rendered especially powerful if efforts can be made to align the interests of as many content industry companies, tech companies, Internet service providers, consumer advocates, and other key players as possible. Government incentives should operate on a number of planes, including for instance: (a) offering faster or cheaper bandwidth to companies with interoperable systems and/or devices; (b) offering some tax relief to companies that actively pursue interoperability in their design choices (again, this may not prove politically feasible); (c) passing regulations that would make it harder to place digital protections on recorded content; (d)

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180 In differing ways, Microsoft, Nokia, and RIM Blackberry are cases in point.
offering incentives to content producers to sell content to companies with interoperable systems; and so on.

3. Licensing/Streaming

Some music industry observers contend that music, like other creative content (for instance, book publishing and e-books) is moving away from an ownership model toward a content streaming and licensing model. They argue that consumers are relinquishing a preference for physical ownership of content and moving toward a preference for content that is readily available but not owned. For instance, music content may be licensed by a consumer, kept in a cloud (possibly temporarily), and consumed until the licensing contract ends; then the content is either kept (bought), or, more likely, cycled through (that is, forgotten, replaced, discarded) by the consumer. This form of consumption essentially treats music and other creative content as a commodity: although in the case of creative work the commodity itself is ephemeral, it is still subject to transactions, retail pricing, and so on. The only difference that has emerged in this era is that its value is not for the most part seen as lasting or meriting saving in a permanent medium.

a. Promoting Licensing/Streaming

The key ways in which music industry participants should satisfy consumer demand and promote music licensing and streaming are straightforward. First, as has already been undertaken by Apple, the industry should change the preponderance of online music distribution contracts to be licensing-based, rather than sales-based (some outright sales may still be retained, such as the sale of CDs on Amazon and other online stores). Second, the industry should change music broadcasting rates by standardizing them across the board, putting online music streaming such

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183 See also discussion in supra Chapter 4, sections II.A.2, III.B, IV.A, V.C.
as Pandora, Rdio, on a level playing field with traditional radio broadcasting. Third, the industry should encourage record labels to agree to pricing of music sales and streaming, so they can uphold content prices to keep the industry viable long-term. Fourth, if possible, the industry should create policies that encourage record labels to enter into agreements with Amazon, Pandora, Rdio, and other distributors on a relatively equitable footing.

These efforts are paramount to making licensing rights more readily available and profitable, primarily by standardizing and streamlining their operations in various digital contexts, and by expanding the range of business arrangements that can be made by music producers who seek to capitalize on growing digital audiences. However, it is important to recognize that some open questions are bound to persist. First, as in the case of interoperability, it is far from clear which of these initiatives are politically possible. Even if the music industry can shape business practices via incentives-based initiatives, there is likely to be some degree of resistance, if not outcry, when large-scale cooperative agreements are introduced and attempted. For instance, the music industry response to standardization of online music streaming, and reconciliation with traditional music radio broadcasting, has been rife with dissent among interested parties. Further, the likelihood new entrants, such as independent start-ups, will be interested in joining such agreements will complicate matters, both due to discrepancies among players and due to the ongoing nature of rollouts that will require some negotiation and resolution. Finally, industry observers and participants may raise concerns that policies promoting wide-scale private arrangements, particularly those promulgated by governmental fiat, may skirt freedom of contract principles. The music industry should be prepared to address these concerns, and should realize that they must be allayed in order to achieve the maximum possible industry buy-in.

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184 Importantly, the industry should also fight vigorously against antitrust suits that may be brought alleging industry-wide price-fixing, as has occurred in the book publishing industry with respect to e-book pricing. This will likely entail a combination of lobbying, outreach, educational campaigns, and so forth.

185 The dominance of Amazon as a retailer and pace-setter is admittedly bound to make this a challenge.

4. Making a Music Market

Music industry participants, including music-related creators, producers, retailers, technology companies, and providers (such as ISPs), should join forces and create a consortium to address and resolve some of the most pressing industry-wide issues, as discussed in chapter 4, p. 80. Such a music consortium should create a newly unified market in music content and related products, with some emphasis on targeting the challenges of the digital music arena. It should also serve as a voice for the industry, which will be essential when the industry needs to lobby for change among consumers, policymakers, funders, and other stakeholders. If successful, the consortium can offer a model that other content producers, like e-book publishers, will be able to emulate and adapt as best suits their fields. While the effectiveness of the RIAA in representing the industry is a much-contested issue in the industry, it should be well-suited to adopting these priorities and initiatives. The industry should put these interests before the RIAA and seek to reform it accordingly.

a. Making a Music Consortium Entails Some Baseline Efforts

Any efforts at creating a music consortium will find it essential, but challenging, to bring a fully representative sampling of music industry participants to the table. As seen in the case of fashion and other creative industries that are trying to create consensus on industry-wide policies and practices, it is always hard to align interests, fix agreed-upon goals, address the needs of varying constituents, set markers for success, and so on. The best solution that the industry must embrace is to set limited and agreed-upon tactics, goals and practices. Further, industry participants should agree from the outset that canvassing user experience and satisfaction will bring critical information to bear on the industry’s goals and plans. This is a relatively uncontroversial precept, as consumers are the ultimate target of the industry, and their consumption will keep the industry both viable and innovative. Thus, industry participants should make certain that they include representatives of the user community in any determinations of industry policies, direction, and initiatives. These consumer representatives may include non-profit organizations that are well-regarded lobbyists for consumer interests, knowledgeable users, or other groups that offer a representative sampling of user preferences.

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187 Indeed, these are prototypical collective action issues.
b. Business Goals of the Music Consortium

Once industry participants establish a music consortium, they should explore more ambitious goals for the consortium to undertake that can improve the music market. One goal should be to create a kind of exchange or open market in creative properties, which should be concretely measurable in production units (such as single digital tracks or songs) for maximum efficiency. The features of a music exchange or market should to some extent resemble a commodities market, and should include: (a) a liquid market in readily available properties; (b) properties bought and sold on an exchange; with (c) open and transparent pricing showing where revenues are made, expenses incurred, and how returns such as royalties are allocated (how much do record labels get; how much do artists earn per song; and so on). The point of such an exchange should be to make consumers feel confident in their knowledge, choices, and the allocation of their support. This will enable them to feel confident that (a) they have maximum music availability; (b) they are making an informed choice among comparable offerings; (c) they know where their money is going, who it’s paying (many music consumers want to compensate creative talent, but feel too much is going to the middleman, such as labels, providers, marketers, and so on), and on what basis pricing decisions are made; and (d) music is fairly priced. These measures should go a long way toward reassuring consumers that the music market compensates artists fully and fairly, and that consumers are supporting costly production of high quality products or inexpensive production of disposable products, both of which are possible and indeed desirable in a rich and active market.

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188 One caveat is that technically and functionally music properties are not and cannot be commodities, in the sense that they’re not fungible, not easily quantified, and so on. But they can still be sold more openly and widely, with more information to consumers as to pricing, payment of royalties, and so on.

189 It is not possible to predict whether or not this will put an end to consumer dissatisfaction or demand. For instance, in the case of e-book publishing, consumers felt that electronic books “should” cost less than hard copy books, as the costs of physical book production would presumably be lower than the costs of creating wholly electronic properties. See, e.g., Jeremy Greenfield, Consumers Upset and Confused Over E-Book Pricing, DIGITAL BOOK WORLD (Apr. 18, 2012), http://www.digitalbookworld.com/2012/consumers-upset-and-confused-over-e-book-pricing/. Consumer dissatisfaction was roiled in the industry when e-book publishers were seen as unfairly propping up elevated e-book prices. Id. The antitrust lawsuit that was brought against e-book publishers effectively put an end to this latter concern, but it came at a critical cost to the industry. See Nate Raymond & Alison Frankel, Apple Agrees to Conditional $450 million e-books antitrust accord, REUTERS (July 16, 2014, 1:21 PM), http://www.reuters.com/article/2014/07/16/us-apple-ebooks-settlement-idUSKBN0FL22P20140716. Many publishers now contend that they are losing money on book sales, and
Treating music like a commodity may or may bring prices down, but it should be accompanied by an outreach program that informs consumers of the value of their commodity, and the fact that the value is benefiting the “right” people, like creators, producers, technicians, and others who are integral to the process of music production. As the consortium matures and becomes adept at undertaking these tasks, and at the same time garners acceptance and trust of the user community, industry participants should consider further expanding its role. One avenue they should consider is to use the consortium to open up delivery channels that are owned, managed, administered, and developed in-house, by members of the music industry, rather than relying solely on third-party distributors. These services should include music streaming sites, online stores, recording and production service providers, and other music purveyors (such as tie-ins to printed music, learning software, instrument sales, and other music-related output).

c. Copyright Goals of the Music Consortium

Industry participants should ensure that IP lobbying (both public and private, including efforts within the community and before policymakers and the public) are part of the consortium efforts. Consortium lobbying should be targeted at concrete aims and directives. For instance, one important goal is the reform of online music streaming, which is proving immensely popular that the industry decline is unsustainable. See, e.g., Natasha Bertrand, How Amazon's Ugly Fight With A Publisher Actually Started, BUSINESS INSIDER (Oct. 7, 2014, 1:14PM), http://www.businessinsider.com/how-did-the-amazon-feud-with-hachette-start-2014-10#ixzz3VzXm7By0. Moreover, the dominant e-book seller, Amazon, is now demanding that e-book publishers negotiate new contracts (many of the existing contracts are set to expire soon) that offer far more favorable terms to Amazon, and that further reduce publishers’ margins. Id. It is arguable that had publishers undertaken a large-scale, even international, campaign explicating basic publishing industry practices and defending their pricing, they would have avoided some of the customer blowback. If music is able to establish a consortium that addresses some of these matters efficiently, publishing will do well to learn from and emulate its example.

In many respects, this is comparable to the fair trade/fair market movement in coffee. It is possible that music producers and other participants will prove resistant to creating purveyors of music materials. This is similar to objections that are currently being voiced by e-book publishers with respect to selling books online: many book publishers do not like Amazon, and do not feel they can clear their margins if they accede to Amazon’s contract terms, but at the same time they do not want or feel equipped to enter Amazon’s logistics space and create online retailers themselves. Again, music industry participants should set the pace here, and if they prove successful, should point the way to online retail opportunities for a host of creative content industries.

See also discussion in supra Chapter 4, sections II.A.2, III.B, IV.A, V.C.
among consumers and yet less popular among musicians due to its minimal royalty returns. In this regard, the consortium should at a minimum lobby for standardized practices in music delivery systems, ensuring both that radio broadcasting is not operating at an advantage versus its online counterpart and that an innovative venue for music delivery is not strangled by onerous regulations, excessive regulatory rates, and unfair pricing constraints.\textsuperscript{193}

5. Open Questions

As noted, it is possible that the market created by a music consortium would raise antitrust concerns among policymakers and/or industry critics (as in case of the recent price-fixing lawsuit successfully brought against e-book publishers). An open question arises if the industry brings technology companies into their purview in order to bolster their interests, strengthen their position, and involve a highly interested and critical commercial ally. Music industry participants certainly should consider technology companies as essential partners whose cooperation and support are likely to prove beneficial overall. But the inclusion of tech companies such as Apple may have adverse affects as well, such as heightening the scrutiny and concern of policymakers who are alert to antitrust behavior, such as price fixing, cartel-like practices, and so on.

Another concern is that a music consortium that yields real power, and that tries to effect real change, is inherently a novel and risky proposition. Even attempts by an existing industry representative, the RIAA, have proven a double-edged sword: for instance, their lawsuits against alleged individual infringers have created a great deal of consumer consternation and backlash, and have not appreciably succeeded in quelling infringing activities (such as uploads to peer-to-peer file sharing services) to boot. One possibility that industry participants should contemplate is to agree amongst themselves to create a consortium that is meant to exist and operate on a time-limited and experimental basis. Another possibility is to approach government representatives, policymakers, and other key political figures to seek early approval of the consortium, even prior to taking action. After all, the content industries, music included, are responsible for billions of dollars of commercial activity, and the long-term protection of their

\textsuperscript{193}The problem here is that there are vested interests that are strongly opposed to changing the copyright terms for music streaming. But concerted efforts on the part of a band of industry participants will likely prove more successful than leaving the online streaming companies to fight their battles alone.
property rights is readily acknowledged to be integral to the U.S. economy. By obtaining a broad base of buy-in, the music industry should secure its interests in creating an effective consortium, which it should then use to innovate in both policy and commerce. Finally, the largest open question is whether a music consortium would effect or contribute to improvements across the industry that put it on a better track toward commercial health and long-term profitability. Perhaps the biggest counterargument to such concern is the fact that the industry is facing immediate challenges that are not being solved, and have not been solved, since the incursion of disruptive innovation in the late 1990’s. The creation of a music consortium is a proactive and innovative step in another direction; and whether or not it is the right direction will only be seen as the industry rallies to its cause and deploys its defenses, strategies and plans.

B. Legal

1. Copyright Solutions

a. Clarify Copyright Terms of Creative Borrowing (Such as Sampling, Remixes, Mash-Ups, Etc.)

The music industry should appreciate and encourage the growth of technology-enhanced musical creativity across the spectrum of artists, emerging talent, and enthusiasts. Techniques such as the use of computers to generate music, sample works and blend samples into interesting pastiches or new compositions altogether, privately record music with high production quality and showcase works on websites and blogs, and other newly emerging and innovative practices, are more likely to keep the field fresh and appealing than to stifle commercial results. Creative borrowing in content fields should be recognized as a net positive feature of creativity, rather than as an impediment to protection of already-existing copyrights and products.194 For these reasons, the industry should welcome genuine artistic borrowing, but should develop clear policies, guidelines and norms as to what constitutes, or will be deemed, acceptable creative use and what will be regarded as overly imitative reproduction and appropriation. The industry should strive to leave ample room for new forms of creativity, such as sampling, which not only

194 See also discussion in supra Chapter 4, section III.B.
can contribute to new and interesting music composition and production, but also can create entire new genres of contemporary work such as “mash-ups”.\textsuperscript{195} At the same time, the industry should not be constrained from seeking to obstruct clear violations (such as lifting an entire line of melody and passing it off as original without attribution or compensation to the artist), a task which should be made easier by the clearer guidelines called for here. The music industry should recognize that the sphere of creative artists in the musical world is ever-expanding, accelerated by the access that technology offers to budding talent and amateurs alike. Thus, the industry should actively seek the participation of as wide a range as possible of musicians, including amateurs and fans, at copyright drafting sessions, and should invite creators from the newer musical genres and practices, such as hip hop, rap, sampling, and so on are suitably represented.

In shaping copyright policy and practices, the music industry should promote regulations that extend the definition of musical “covers”, and the right to make musical covers, to encompass a broader range of work and practices, so that composers who want to use earlier works (or portions or variations of work, such as chord progressions, melodies, and riffs) are able to avail themselves of prior works without being burdened by onerous licensing rules.\textsuperscript{196} The industry should likewise consider increasing the scope of permissiveness with respect to very short portions of works, or “snippets”, and establishing guidelines that either make snippets very easy

\textsuperscript{195} One example is the rise of club DJs who specialize in mixing and “scratching” albums, and sampling pieces of work, and cobble these elements together to create startlingly original new works. While they have not generally sought copyright in their works (in part because they can be ephemeral, created in the course of a single night), they have built their reputation on this form of musical creativity, thereby revealing the appeal of their output to their audience. Artists such as Girl Talk, White Panda, and Danger Mouse have built massive followings by blending existing works in new ways. See, e.g., Julie Zeveloff, \textit{GIRL TALK, How I Actually Create The Musical Mashups That Make Crowds Go Insane}, BUS. INSIDER (July 18, 2011, 5:10 PM), http://www.businessinsider.com/how-girl-talk-makes-music-2011-7 (noting the millions of fans garnered by Greg Gillis, the artist behind Girl Talk); Forrest Wickman, \textit{The Grey Album Gets Remastered}, SLATE (Nov. 28, 2012) http://www.slate.com/blogs/browbeat/2012/11/28/the_grey_album_remastered_download_or_stream_the_unauthorized_remastering.html (describing the revolutionary nature of Danger Mouse’s Grey Album, which was released in 2004 and blends Jay-Z’s Black Album with the Beatles’ White Album). For a general overview of mashup culture, see \textit{Top Ten Mashup Albums of All Time}, VIBE (June 14, 2013), http://www.vibe.com/2013/06/top-10-mashup-albums-all-time/.

\textsuperscript{196} The tangled and cumbersome rights clearing processes in film, which has resulted in some long drawn out battles over licensing rights -- and which has obstructed the production of several films due to the inability of the parties to come to a resolution over rights -- is a case in point. In several of these cases, the use of as little a portion as a few seconds of an earlier work is at dispute. This is a cautionary tale, revealing the risk of throttling an industry that an overly restrictive rights policy is bound to pose. See also the discussion in \textit{supra} Chapter 4, section IV.A.
to license, curtailing the right to assert copyright in these short sections of work, or exempt them from copyright claims altogether, possibly under an expansive fair use treatment. The distinctive treatment accorded to snippets should not affect copyright in the work as a whole: it is only when the fragment is at issue that this exceptional treatment should occur. The industry should apply this treatment to very short works that are meant to introduce the listener to the work, as in the case of iTunes’ free snippets that introduce listeners to works that they have sought on the iTunes Store website. This treatment would be analogous to that of snippets in the context of Google Books and its related search features.

There are clearly roadblocks to this option. First, treating a portion of a work as wholly distinct from the work itself is a complicated matter, and diverges radically from standard copyright practice. At the same time, however, the use of stand-alone snippets has taken on new dimensions that also have little historical precedence. It is conceivable that the law can and should to these new practices and concerns. Further, the terms of the treatment of snippets must be defined and agreed upon. For instance, the definition of a snippet is open to debate, raising such questions as: what is its length (30 seconds, 1.5 minutes); does its length vary in relation to the length of the entire work, its recognizability, or other factors; does its accepted use vary with regard to the proposed use; can its use be restricted at its inception, so that maximum commercial value can be exploited until its peak viability is exhausted; and so on. Another concern is whether the fair use doctrine, is the appropriate means for exempting snippets from licensing rights and responsibilities. For instance, under a fair use exemption, any use of snippets would be permissible, which might prevent music creators from recovering licensing royalties in an array of uses that were not initially intended, such as movie rights, or imagined, such as the use of snippets in new digital contexts that are still to emerge. Lastly, if snippets prove to be immensely valuable, as has proven to be the case with respect to cellular telephone ringtones, although on decline in recent years, the market for ringtones hit $600 million in 2006. Breeanna Hare, Whatever happened to the ringtone?, CNN (May 16, 2013, 9:50 AM), http://www.cnn.com/2013/05/09/tech/mobile/ringtones-phones-decline/. Even following a drop off in sales, ringtones still accounted for $167 million in sales in 2012. Id.

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197 See the discussion in supra Chapter 4, section IV.A, V.A.
198 See the discussion in supra Chapter 4, subsection V.A.3.
199 See the discussion in supra Chapter 4, sections I.A.9, II.J, V.A.3.
200 See the discussion in supra Chapter 4, subsection V.A.3.
201 Although on decline in recent years, the market for ringtones hit $600 million in 2006. Breeanna Hare, Whatever happened to the ringtone?, CNN (May 16, 2013, 9:50 AM), http://www.cnn.com/2013/05/09/tech/mobile/ringtones-phones-decline/. Even following a drop off in sales, ringtones still accounted for $167 million in sales in 2012. Id.
composers and producers are not likely to be willing to forego easy and reliable revenue streams that increase the revenues they can extract from their copyrighted material.\textsuperscript{202}

The industry should be prepared to hear lively dispute within its ranks, and should be ready to formulate responses that are transparent, flexible, and as even-handed as possible. Nonetheless, it should anticipate resistance among various interested parties. As mentioned, one downside is that liberalizing the use of snippets is likely to have some negative commercial ramifications. For instance, in the absence of copyright or licensing rights, certain lucrative uses of snippets, such as the sale of ringtones on cellphones, would not be monetizable, and the device manufacturers would likely be loathe to relinquish those revenue streams. Vested interests, therefore, would be opposed to the liberal use of snippets as much for commercial reasons as on principle, and would likely vocalize its resistance to relinquishing new revenues.\textsuperscript{203} This would make the liberalized and/or cost-free use of snippets a tough sell. Still, the industry can propose a tradeoff or a compromise, such as guidelines that contextualize the use of snippets and only allow them in certain accepted contexts. But raising this objection reveals just one point of complexity in a policy change that is no doubt bound to be challenging, fraught and protracted. The industry should recognize these challenges, and should anticipate various lobbying activities, such as seeking carve-outs or exceptions, which industry participants are likely to pursue, and which moreover is likely to make changing copyright a messier, harder to agree on, more costly to administer, and even more complex than it already is.

If the industry does not want to commit to a complete overhaul of policy and practice, it should consider another option that would enable the creation of a kind of hybrid copyright. In this scenario, a composer would seek copyright in the complete work as usual, but voluntarily and expressly reserve the right to allow other to use snippets under a kind of partial Creative Commons license.\textsuperscript{204} While possibly complicated, particularly for the composer who must determine in advance how she intends to manage her composition, the hybrid copyright should allow both the protection of vital copyrights and the freedom to release portions of a musical work without completely relinquishing control over and credit in the snippets that are put to use.

\textsuperscript{202} See the discussion in \textit{supra} Chapter 4, subsection IV.A.
\textsuperscript{203} See the discussion in \textit{supra} Chapter 4, subsection V.D.4.
\textsuperscript{204} See the discussion in \textit{supra} Chapter 4, sections III.B, IV.D, V.D.
This should allow artists in pop, hip-hop, rap, and other genres that tend to be particularly subject to (and open to) creative borrowing of snippets to extend, and avail themselves of, the possibility of sharing without endangering their revenues in the work as a whole. The industry should follow the main precepts of the Creative Commons license, while not being constrained to adopt its exact model if it is not agreed upon by stakeholders. One such precept maintains that in the case of creative borrowing, liberal licensing and/or the expansion of use of borrowed works should be accompanied by norms and practices of attribution and recognition. (see Cultural, below)

**b. Objections: Costs to Music if it Tailors by Changing Copyright**

When pricing changes the IP balance altogether, it can be a good example of the limitations of the ability of copyright to manage or change an entire industry. In the case of music, sales of individual of units of work (songs), which disaggregated earlier larger units (records), has lead to a precipitous decline in net sales in the industry (even factoring out unpaid downloading and copying). The industry has stayed somewhat healthy through the "360 contracts" that make revenues from sales related to musicians' work, such as concert tickets/tours, merchandise, promotional materials, and so on. But in music, a strong IP regime, even wielded with some major enforcement efforts (such as lawsuits instigated by the RIAA), and coupled with attempts at some price discrimination, may not have lead to optimal industry production and profits.

The limitations to wielding copyright rest in several factors. First, simply expanding the scope of copyright in musical components, such as expanding copyright to cover snippets of songs, however minute in length of melody or notes (for instance, a simple 3-note or 3-chord progression), may lead to greater revenue streams. However, it will likely be unduly burdensome on some legitimate uses of those works or components (for e.g., there are only so many note or chord progressions possible in music, and they may be used by composers without

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205 See the discussion in *supra* Chapter 4, sections I.A, V.D.4.

206 See, for example, iTunes movement away from the uniform $0.99 prices on songs to a three tiered system. Brad Stone, *Want to Copy iTunes Music,? Go Ahead, Apple Says*, N.Y. TIMES (Jan. 6, 2009), http://www.nytimes.com/2009/01/07/technology/companies/07apple.html (noting Apple’s introduction of tiered pricing as well as, perhaps not coincidentally, the elimination of its DRM software).

207 See the discussion in *supra* Chapter 4, sections II.F.
intent to copy prior works). Moreover, expanded copyright will likely impose substantial licensing and/or cross-licensing costs (and related transaction costs, such as those related to negotiation, formalization, and so on) on an already-burdened industry. And they may have unintended consequences on the future use of snippets as new digital innovations emerge and compete for market share.

Second, infinitely expanding copyright can sweep into its scope formerly legitimate uses that have typically been permitted, including certain personal uses (such as copying on multiple devices that one owns, making copies of songs for one’s friends), playing music recordings in private settings, as well as certain non-commercial uses or uses that fall in gray areas (such as playing music in public venues like a restaurant or sports facility).\(^{208}\) This can have adverse impact on users, follow-on creators, and a range of music aficionados, giving rise to audience pushback and resentment of the industry. In some cases, it may lead to users seeking ways to gain access to illicit music sources, simply due to the perception that the scope of what is allowed with one’s fairly purchased or licensed music has been reduced. While this kind of unintended consequence can be deleterious in the short run, it can be disastrous in the long run, particularly if it forms the basis for an entrenched antagonism to the music industry that persists among generations of its user base and fan base.

Third, music, like many other creative industries, has functioned as a kind of constructed cultural commons, with norms and practices that cannot be superseded or replaced wholesale by copyright alone.\(^{209}\) Thus, expanding copyright risks undermining the commons by over-restricting it and under-valuing its utility in keeping the industry healthy, balanced, and productive. As user-generated content is increasing, and likely to continue to increase, it becomes a new source of potentially marketable and commercially exploitable works for music industry professionals. The incorporation of UGC in the music marketplace is a notable development of the digital era, and should not be curtailed by overly restrictive copyright of original source material. By threatening to impose stringent copyright restrictions on such resources, the industry runs the risk of persuading creative artists that creative follow-on

\(^{208}\) See the discussion in *supra* Chapter 4, sections II.G.

\(^{209}\) See the discussion in *supra* Chapter 4, sections II.J, IV.C.
borrowing is not worth the cost or effort. If expansive and/or restrictive music copyright undermines or discourages user-generated creative content and alienates an active part of the user base, it may not be worth the costs of advancing and enforcing original copyrights that are part of music’s heritage and serve as building blocks to follow-on works.

Fourth, no amount of copyright-based action alone will likely be able to thwart the most egregious online pirates from setting up online file sharing and/or streaming services (technology may advance to the point where this can be identified more quickly, thwarted by blocking devices, or by other means, but this would not constitute a pure copyright-based solution). It may be the case, therefore, that the industry must resign itself to allocating only a limited amount of resources to thwarting piracy, and recognize that it is unlikely to stop piracy in its tracks in a cost-effective and final manner.

2. Solutions Based in Anti-Piracy Measures

The music industry should continue to pursue forceful measures that thwart, challenge and sanction illegal music sharing and streaming sites such as BitTorrent, Pirate Bay, and so on. However, the industry should work harder to distinguish this kind of large-scale pirating from the individual, small-scale activities that they have pursued, perhaps too aggressively, under the aegis of the RIAA. Clearly the industry is aware of the negative popular reactions and public relations backlash that the individual lawsuits have generated, and is retreating somewhat from their earlier stance of challenging a host of relatively minor alleged offenders. In their defense, piracy is a problem that plagues the industry and that is as impossible to destroy completely, like a many-headed Hydra that grows a new head in the place of each that is slain. But anti-piracy measures could be better implemented and pursued if efforts were more concerted both here and internationally. Some initiatives in this regard have emerged recently, and should be pursued and expanded, ideally on a global scale (especially as piracy often entails international players). The industry should concentrate its efforts, possibly via the music consortium proposed earlier, in


211 See the discussion in supra Chapter 4, sections V.C.
order to have a wider and more meaningful impact on piracy than the piecemeal efforts of its constituents will otherwise effectuate.

3. Increase Secondary Liability for Copyright Infringement

The U.S. domestic music industry should consider following the European model of secondary liability for copyright infringement, which can confer responsibility on various third-party providers, such as content portals, delivery systems, and ISPs, as well as websites that serve as conduits such as YouTube, Pinterest, MySpace, and others. Industry participants may object to such broad policy changes for various reasons, arguing that an expansive scope of secondary liability deflects the problem onto ancillary parties; increases their burden and/or transaction costs; may make third parties more aggressive at surveilling and curtailing activity on websites like YouTube and other sites oriented toward user sharing and activity, which may hamper creative user activity, limit growth and innovation at such sites, and restrict a venue for new and potentially marketable musicians to bring their work to the attention of music producers and other industry players.

4. Fix Regulation of Online Music Streaming (Including Pricing of Rights/Royalties)

The music industry should normalize, strengthen and streamline the regulation of online streaming and licensing on services such as Pandora, Radio, and so on. It should also lobby to change the rules and rates related to performance rights and royalties so that streaming companies are able to be on a level competitive playing field with other broadcasters such as traditional radio.

5. Streamline Music Rights by Unifying and Strengthening Collective Rights Organizations

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See discussion in supra Chapter 4, sections I.A II.A.2, III.B, V.C.
Some commentators contend that one of the strengths of the music industry is the growth and development of its rights-clearing organizations.\textsuperscript{213} They further argue that concentrating the various collective rights organizations that currently manage the array of music rights and royalties into a single entity will streamline processes and will help make the industry function more efficiently.\textsuperscript{214} The music industry should seriously consider proposals to unify the CROs, and should pay particular attention to the positive effects that such unification may promise. Advocates of streamlining the CROs argue that the move will reduce transaction costs; improve transparency; facilitate and ease the entry of new composers and artists in the market, and increase their access to the array of services that CROs have to offer (such as informational workshops, technological support, advice from senior artists and management, as well as the central service of managing music rights and royalties); reduce costs and complications relating to licensing and cross-licensing; achieve economies of scale by pooling the resources and expenses of CROs; and various other efficiencies.

But while considering the prospect of streamlining music rights, the industry should ask whether having multiple agencies has promoted innovation through competition among the various entities. For instance, new technologies launched under the aegis of BMI, such as the music recognition software Shazam,\textsuperscript{215} can spur ASCAP to innovate in its own areas of technological expertise. In sum, the music industry should ask whether or not streamlining rights organizations will help make the industry more robust. If the industry determines that streamlining promotes licensing and makes rights-clearing easier, it should move forward with the proposal, and defend its decision on the basis that streamlining rights management aligns well with the direction that the industry appears to be taking (that is, the increased reliance on licensing rights).

\textbf{6. Proactively Tackle Future Technologies That May Be Unfairly Disruptive}

\textsuperscript{213} See discussion in \textit{supra} Chapter 4, section IV.A.
\textsuperscript{214} See Carroll, \textit{supra} note 132.
The music industry should remain alert to technological innovations that may challenge its commercial practices and profits. For instance, the industry should ensure that if an equivalent to Aereo, or a similar company that engages in commercially challenging music broadcasting, emerges, the industry should lobby and/or litigate against its incursions.\textsuperscript{216} The industry should be prepared to defend itself against innovative but illegitimate services that threaten the businesses of legitimate providers.\textsuperscript{217}

\textbf{C. Technological}

\textbf{1. Interoperability}

The industry should work to make devices more interoperable and to encourage companies to be willing to arrange interoperable systems and content-sharing agreements. (see Business, above, and Cultural, below)

\textbf{2. Technological Protections}

Technological advances are increasing the efficacy of anti-copying measures such as DRM.\textsuperscript{218} Vigorous industry efforts have also resulted in legislation, such as the DMCA, that legitimizes and supports the use of such protections.\textsuperscript{219} However, consumer resistance to anti-copying devices and measures has created an ongoing tension between the industry and the user community, resulting in public and costly battles that do not serve the industry well in the long run, either in terms of loss of good will or with respect to economic losses (for instance, Apple was compelled to remove FairPlay from its devices, presumably incurring wasteful losses in the process\textsuperscript{220}). Resorting to restrictive technological anti-copying measures is therefore a fraught

\textsuperscript{216} See discussion in \textit{supra} Chapter 4, sections V.A, V.E.
\textsuperscript{218} See discussion in \textit{supra} Chapter 4, subsections I.A.10, IV.C, and V.A.
\textsuperscript{219} Digital Millenium Copyright Act, H.R. 2281 105th Cong. (1997)(enacted).
proposition, even for an industry that has been ravaged by rampant copying and file-sharing online.

There are several courses that the music industry should pursue, but each of these comes at some cost. First, the industry should intensify its efforts to patrol the Internet for potential large-scale violators, and should litigate most forcefully against those whose incursions are of a magnitude worth pursuing. This would reduce the impact of anti-copying campaigns on individuals and smaller-scale alleged offenders, and possibly minimize the public relations effects of music industry litigation. The problem with this tactic is its innate cost: pursuing large, offshore and decentralized sites is always a challenge, and has not proved to be successful as a deterrent to new entrants in the file sharing space. Second, the industry should encourage the development of music recognition software that can recognize copyrighted music (for instance, building on innovative music recognition apps such as Shazam) so that licit and illicit sharing or streaming can be differentiated, and further pursue the development of software programs or apps that can block illegal streaming at the user end (for instance, building on blocking devices used by parents to prevent their children from seeing undesirable material online). This requires collaboration with technologically advanced companies, software engineers, or other innovators, and thus is dependent on outside forces to achieve effective results. Third, the industry should strive to ensure that its technological protections do not hinder important baseline practices and norms, such as fostering user activity and supporting long-term interoperability. With respect to the former, recent technologically-imposed restrictions on user activity have raised the ire of many consumers and consumer advocates. For instance, Apple has restricted the ability of Apple devices and iTunes to make personal copies of iTunes music to only a limited number of devices. This is a reduction of earlier practices and norms, and a curtailment of personal use that has been criticized by more than one commentator.221 This is a significant incursion on user rights, that has limited positive commercial impact, as it is not likely preventing personal copying that would have significant retail value.222 These kinds of measures may be popular in the music industry, as beleaguered participants tend to consider all forms of copying to pose a threat to

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222 See discussion in supra Chapter 4, subsections III.B.5, V.B.4, and V.D.4.
their rents. But the industry should resist such knee-jerk reactions, and should consider keeping personal use as free from constraint as possible to be an important aim, not merely for public relations reasons but also to maximize consumer satisfaction among those who purchase or license music with the intention and desire of listening to and enjoying their music on as broad a range of devices as they can command. And fourth, the industry should promote collaborative and cumulative innovation in various areas that have an impact on music content creation, delivery, scalability, shareability, and other features that promote the commercial viability of the industry’s diverse creators, stakeholders and users.223

3. Payment Systems

In music, where the disaggregated unit seems parsed into increasingly minute segments (initially digital tracks and/or songs, now portions or snippets of the work), micropayments would be a useful feature to help users pay for music without feeling stung by seemingly unfair or unwieldy price-per-unit costs (for instance, it can be irksome to an ordinary consumer to be charged a few pennies, or a fraction of a penny, per work). The music industry should welcome and adopt a viable micropayment system, one of which is likely to emerge in the near future.

D. Cultural

1. Work to Promote Interoperability and Open Source Production and Sharing

As stated earlier, the music industry should work to promote interoperability among music production, marketing and delivery systems, devices, portals and streaming services, and other providers and operators in the field. (See Business, above) By pushing for interoperable systems, content companies can strive to maximize their access to content delivery systems and end-user markets. (See Business, above) This is not readily addressed by policy-based solutions, in part due to the unpredictable nature of technological innovation and change. Cultural practices, however, can be driven to change by advocacy efforts that are made to creative content industries and related technology providers and that emphasize the benefits that accrue from interoperability and the positive returns that technology companies pursuing interoperability can

223 See discussion in supra Chapter 4, subsections II.A.3, II.J, III.B.3, IV.C.3.
eventually realize. The music industry should point to increases in profits that occur when consumers are able to access music in as broad a way as possible, as indicated by trends in consumer preferences and purchases. Content companies should also lobby for governmental incentives that promote interoperability, even as they are bound to recognize the many possible shortcomings of such solutions, such as the challenges of lobbying and consensus-building; the slow pace of regulatory change; transaction costs; and so on.

The industry should also point to the success of other fields that have benefited from interoperability, particularly when changing practices and norms have led to the emergence of collaborative solutions, such as the open source movement and the innovation it has spawned. The music industry should recognize a model in the computer industry and its successful incorporation of open source software in its commercial practices and production. There are many parallels that can be drawn between the history of music production, such as group movements that involved creative sharing and exchange, decentralized creation of new styles, genres, sounds, and songs, and innovations in music instrumentation, implementation, and production, and the open source movement in software, which likewise gives rise to innovation outside the contours of privatized ventures that are wholly commercially driven. The music industry should emphasize that this kind of production is vital to the generation of new musical works and genres. A strong cultural emphasis on music’s normative practices, including valuing non-formalized production and unconventional creation and sharing, is necessary to ensuring that music continues to flourish, not just as a creative industry but as a set of creative practices yielding a rich, diverse and lasting heritage of cultural work.

2. Emphasize the Constructed Cultural Commons of Music

In a constructed commons, creative work occurs within the borders of spaces that are delineated, to varying degrees, by members of the productive creative class as well as other interested

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224 See discussion in supra Chapter 4, sections II.B, II.C, III.B.4, III.B.6, III.C.2, and IV.D.1.
It is debatable whether the universe of music can be described as being parsed into such definite clusters that are self-regulating and self-patrolled. But music does share many features of the constructed commons, with institutions that set the terms and act as administrators for important rights, such as PROs, those that speak for industry participants and lobby, legislate, and engage in legal actions on behalf of the industry, such as the RIAA, and those that undertake many of the protections that commons and guilds can offer, such as musicians’ unions, guild-like organizations (for e.g., the Songwriters Guild of America), and the like. Therefore, the music industry should recognize that it bears many of the features of the constructed cultural commons, and should learn from the examples of comparable commons in other creative fields.

The music industry should recognize and condone, and openly extol where appropriate, the centrality of the constructed cultural commons in the production of music. Music has enjoyed many of the same norms as other creative fields, in which reputation, paying homage, attribution, awards and other rewards, and peer recognition of creativity have long been respected. These norms-based measures not only give artists incentives to create and improve their output, but they also play an important role in buttressing the more tangible returns artists gain from the business and copyright side of music production. Thus, they add value to the more formalized incentive scheme of copyright and other property rights. The importance of such norms is heightened when creative borrowing occurs in a field and may not be compensated. For instance, taking a line, a riff, a chord sequence, a melody, or any recognizable part of a prior work cannot occur without compensation, and if it is not to be monetary, it should be compensatory in less tangible but still valuable ways. Recognition in music contributes to professional success (as in education, cuisine, or virtually any other creative field), and if “imitation is the highest form of flattery”, it should also be an explicit and attributed act. This is not a sinecure when wholesale theft occurs; it is a tradeoff made when users borrow from original works for legitimate creative reasons, such as to create a new work that is inspired by an original one.

However, the industry should understand that the culture of recognition coupled with appropriation absolutely mandates the buy-in of artists across the spectrum. Music’s history is

226 See discussion in supra Chapter 4, sections II.J.
227 See discussion in supra Chapter 4, sections III.B.4.
228 See discussion in supra Chapter 4.
rife with examples of great musicians (such as African-American musicians in genres including jazz, blues, R&B and American roots music) being subject to appropriation of their original works without receiving compensation, recognition, or any form of reward, tangible or otherwise. The industry should be aware that music copyright is intended in part to forestall the wholesale appropriation that can occur, and that can either dis-incentivize creative artists who are uncompensated or simply mean that they continue to create without being able to earn a livelihood from their creations. If the music industry chooses to limit music copyright’s scope in order to promote creative borrowing -- particularly the kind that occurs when eager amateurs take music into their own hands and homes and create works that are inspired by love -- then it must strive to ensure that the norms of music otherwise duly appreciate, intangibly reward, and recognize the original composer. The industry should emphasize that the constructed cultural commons of music considers “making a name for oneself” to be an important goal, not just a vanity project. Monetizing creativity should be valued, but in the interest of growing and nurturing creativity, as well as replenishing music’s treasure trove, recognizing and honoring creativity should likewise be valued and promoted across the music industry spectrum.

3. Support UGC, Openness, Users’ Rights, and the Public Domain

The music industry should recognize and make room for creative borrowing, which can generate new works that are commercially promising and culturally enriching. Nowhere is this more important than in the support and openness that are required for user-generated content to thrive. Supporting UGC should be considered in part an effort to advance content production that will provide new revenue sources for the industry, particularly as innovative music delivery systems make such music more accessible, desirable and marketable to new audiences. But it should also be considered as part of a plan to promote users’ rights, particularly when taken in conjunction with efforts to curtail DRM, expand interoperability, support existing personal use, and enable new genres that are predicated on creative borrowing, such as sampling, to emerge and be sustained. The music industry should also be aware that championing users’ rights will help contribute to improving relations between the industry and its audiences, which naturally will

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229 See discussion in supra Chapter 4, Part 4.
230 See discussion in supra Chapter 4, section V.D.
advance its bottom-line goals, as these same audiences overlap extensively (if not wholly) with its consumer base. In other words, the support between the industry and its end users and consumers must be mutual, and must be recognized and advanced by both sides. Finally, there are entire areas of music production that are non-commercially based, and these works are equally important to the collective cultural trove as those that have some commercialized or professionalized basis. These non-commodified works are an important part of the public domain, and while they may be brought into the domain of protected music at some future point (as occurred in the case of many later-copyrighted works), their IP status does not determine their worth, but rather instantiates and formalizes only a part of their worth. Creative content industries like music should be keenly aware of the value of a rich public domain, and should take every action possible to sustain their public domain, both for commercial reasons and for broader normative ones.\textsuperscript{231}

4. Need to Address (And Improve) Users’ Attitudes

Broadly speaking, the music industry’s recent history of interaction with its user base has been thorny and fraught with misunderstanding, miscommunication, and mistrust. The industry should recognize that improving communications, and thereby improving users’ perspective on the industry, is an immediate goal that will lead to stronger commercial prospects in the long run. There are several corrective measures that the industry should begin to implement immediately, such as initiating public awareness campaigns that will help users to understand the costs of pirating, not merely to music producers but especially to creative composers and performers. By increasing musicians’ outreach to listeners via online efforts, advertising, and campaigns, the industry will help users and listeners feel they are paying artists rather than primarily supporting middlemen. The industry should coordinate outreach efforts, such as colloquia and other exchanges that allow emerging and/or struggling artists to discuss their concerns with receptive audiences, and to explain exactly how piracy makes unwarranted inroads on their livelihoods. Increasingly, many listeners and amateurs are endeavoring to join the ranks of bread-winning musicians; and their concerns and interests should also be taken into account by more influential members of the industry. The music CROs have already begun to point the way to addressing the

\textsuperscript{231} \textit{Id.}
range of musicians that they serve by offering an array of services that help manage their rights, defend them against infringement, and educating them as to rights, responsibilities and defenses that are at their disposal.

**a. How to Get Listeners to Pay For Music?**

One of the most challenging, but obviously most vital, imperatives facing the music industry is how to get users to pay for music when many of them (particularly the generation that has come of age with file sharing services) have become accustomed to getting access to music for free. The strategies for meeting this challenge that the industry should adopt are varied, and some will require refinement or restructuring as the degree of their efficacy is revealed. First, as discussed earlier in this section, industry participants should approach listeners at the points where they are currently getting access to music, and to monetize uses that are commercially viable and valid. For instance, music that is used in video games, as background music in various settings (whether live or recorded), and so on, can and should be monetized by the enforcement of copyright. This may entail carving out exceptions to other important policies: for instance, if the industry decides to allow expansive use of snippets for non-commercial use, it may opt to exempt commercial use of snippets, as in the case of ringtones, and require that such use remains compensable. Second, in pursuit of new revenue sources the industry should scour new points of contact, such as music festivals and fairs, album releases (for instance, possibly charge a premium for pre-releases, offering additional content only available online, and so on), artists’ websites, and other sites at which artists and fans are likely to interact. Third, the industry should emphasize subscription services, whether such services offer music streaming, licensing or purchasing, as well as membership-based groups, or organizations that turn listeners into regularly-paying subscribers. Fourth, the industry should harness the resources of PROs (such as clout, technology, administrative/organizational framework and support system, scope of artists, range of reach, lobbying arm, and funds) to support artists’ outreach to their audiences. This should not be limited to educational campaigns, but should extend to marketing, public relations, efforts to reach audiences via various media, and a range of other activities. Eventually,

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*232* Such services are, roughly speaking, online versions of earlier album subscription services, such as the now-defunct Columbia House Record Club. In their day, these subscription services were both popular and lucrative; and their newest iteration should have the potential to match or exceed their appeal and success.
the PROs should be able to help musicians monetize these strategies, for instance by charging for, and selling music and merchandise, live public appearances. Finally, the music industry should strive to show users how to support composers and musical acts, whether by micropayments, advance music purchases, voluntary donations, or other innovative alternatives to standard commercial practices that are sure to emerge as online payment becomes more widely accepted, standardized, and adopted by a majority of Internet users, not just in the creative fields but universally.
CHAPTER 6: SALIENT FACTORS

INTRODUCTION

An array of diverse creative content industries are wrestling with many of the same disruptive innovations and challenges as those faced by the fashion, music and education sectors. They are well-suited to following the kinds of analytical evaluation that these three industries have undertaken; however, each industry will naturally be required to construct its own tailored response to disruptive innovation, and its own set of business and intellectual property ("IP") strategies and goals that will lead to long-term viability and growth. How best to tackle these complex issues? Following is a blueprint that is necessarily broadly drawn, but that also poses specific questions designed to shape an analysis, lays the groundwork for inquiry into industry-specific needs, and provides examples from a range of creative content industries to illustrate possible solutions. While these prescriptions are intended to lead to well-crafted and tailored solutions, they are more a starting point for prompting proactive reflection among creative content industries than a final resting place. Most importantly, they stand as an action plan, and allow the earlier analysis of fashion, music and education to light the way for creativity in other sectors to be incentivized, monetized, and made accessible to new and existing users, disruptors, innovators and creators.

The analytic framework that creative content industries begins by dividing the fundamental areas of inquiry into four broad rubrics that are parallel to those used in the earlier analysis of the fashion, music and education industries. Within each of these areas of concern, the framework poses a set of central questions that address the basic structure and makeup of a given industry, in terms of business plans and strategies, IP-based practices and policies, technological solutions and guidelines, and cultural values and norms. Depending on the answers to these inquiries, the framework then offers possible business and IP-based solutions. Finally, real world examples are suggested as both guidelines and instructive models for success, with the caveat that even their paradigms may shift and require adaptation to a host of challenges, including environmental, political and/or regulatory changes, shifts in consumer preference and/or user adoption and practices, technological advances, and other reconfigurations of the creative landscape.
I. BUSINESS

A. Introduction to Business Issues

The first set of issues that creative content industries should consider involves the business plans and practices that they have mapped out. These questions work at both structural and operational levels—that is, they ask how the industry is configured and how it carries out its functions—and each question works on a stand-alone basis and in conjunction with others. They are for the most part addressed separately, except when they are so linked as to form a unified or overarching concern. Taken together, they are linked by their centrality to the industry’s particular business paradigm. The questions presented are: (i) How fluid/resilient/adaptable is your business model? (ii) Can you change your profitability paradigm by moving to revenue-generating sources; and how much can you change or affect your pricing and/or price discriminate? (iii) How important is licensing vs. ownership to your business model? (iv) Do you (still) rely on middlemen/intermediaries? If so, how good are your PROs/CROs/clearing-houses? and (v) How do you remunerate your labor?

B. How Fluid/Resilient/Adaptable is Your Business Model?

1. Questions for Analysis

Creative content industries should begin their analysis with an assessment of the disrupted landscape they face, and move toward identifying and implementing tailored solutions that will optimally meet their challenges and position them for future growth. The inquiry should start with an analysis of the dominant business model that is currently being deployed. The questions raised should be familiar from the earlier discussion of the three creative content industries. First, how high are industry production costs? Second, how fixed are industry production costs? That is, can such production costs be changed by technology? And can the industry harness
technological innovations and changes to its benefit by reducing production costs? Third, do recouping costs need to be built into the business model? That is, does the investment have to be profitable early on in its life cycle, or can its expenditures (including start-up costs) be amortized over time, subsumed into other larger capital outlays, or otherwise absorbed? Fourth, in which core property or properties does the industry’s value-add proposition inhere? That is, can creative works be treated differently when they are offered on a stand-alone basis versus when they are offered as part of a package? Fifth, has the industry fully exploited its currently protected IP holdings? And has it taken into consideration and adjusted to any expansions in its rights to such exploitation that have been recently granted by copyright policy and law? Sixth, how dependent is the industry on advertising revenues? Does it have the ability to move beyond advertising—

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1 In the case of music, the industry can reduce costs of using agents and representing new artists by searching for musical talent on YouTube and other online sources. See Chapter 3, Section V.F. In the case of education, the industry can use cheaper and larger online courses to supplement their regular courses, teach more students for more revenues, or use third-party educators to add to course catalogs. See Chapter 2, Introduction. In the case of fashion, the industry can use social media to disseminate patterns, use websites like etsy.com to sell lower-end but unique designs, or use bloggers to move merchandise rather than expensive print magazines.

2 In the case of universities, for instance, some costs can be deemed part of an annual operating budget, and can be offset by various funds, such as endowment, grants, outside funding, or funds raised by lucrative activities at the school (like football games, executive education, and so on). See Business Models for Online Higher Education, HANOVER RES. REP., http://www.hanoverresearch.com/insights/business-models-for-online-higher-education/?i=non-profit-organizations.

3 In the case of education, this distinction has been drawn between single courses versus a degree-granting program; in the case of music, distinct treatment is given to single songs versus entire albums (including artwork, lyrics, and other features of a CD’s jewel box).

4 In the case of music, this may include exploitation of performance rights at a broad range of venues, such as restaurants, sports facilities, etc.; ringtones and other new forms of content delivery; copies made across different devices, or that exceed the authorized copies permitted on given devices; and so on. See, e.g., Jennifer Mariano Porter, Comment, Compulsory Licensing and Cell Phone Ringtones: The Phone Is Ringing, a Court Needs to Answer, 80 TEMP. L. REV. 907 (2007); Ellen Rosner Feig, Do Cellular Ringtones Violate the Copyright Act?, LEGAL ZOOM (Dec. 2009), https://www.legalzoom.com/articles/do-cellular-ringtones-violate-the-copyright-act. In the case of comedy, this may include recordings of live performances, staged readings, etc. See Michael J. Madison, Response, Of Coase and Comics, Or, the Comedy of Copyright, 95 VA. L. REV. 27 (2009). In the case of cuisine, this may include performance rights, such as chefs doing demonstrations, lectures, television shows, competitions such as Iron Chef, etc. See Malla Pollack, Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal, 12 CARDOZO L. REV. 1477 (1991). In the case of yoga and certain sports activities, this may include teaching moves and poses, routines, programs (Tabata, CrossFit, etc.), football plays, etc. See, e.g., Alexander Bussey, Streching Copyright to its Limit: Copyrightability of Yoga and Other Sports Movements in Light of the U.S. Copyright Office’s Characterization of Compilations, 20 JEFFREY S. MOORAD SPORTS L.J. 1 (2013).
supported models? ⁵ Seventh, can competitors secure first mover advantage and capitalize on their standing within the industry? ⁶ Eighth, how important is price signaling to the industry? Do consumers rely upon clear, transparent and readily available pricing information, as exemplified by the case of commodities, or do consumers accept (or embrace) price opacity? ⁷

2. Business Solutions

Content industries must realistically assess their production costs and values. They should harness technology on all points of the value chain, from creation through production through marketing and distribution and sales. They should also consider new ways of using technology to garner more profits out of their properties wherever possible. If feasible, content industries should consider forfeiting short-term payoffs in order to secure market position (possibly using loss leaders as a strategic tool) and to seek a long-term payoff. ⁸ They should also continue seeking advertising revenues, but should attempt where possible to reduce reliance on advertising-supported models by exploring other revenue-generating models. Advertising should

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⁵ In the case of music, this may include revamping business models for online music streaming and other forms of digital music delivery.
⁶ The case of Apple iTunes is one of the clearest examples of such first mover advantage and the advantageous positioning it has secured for the company in the music sector (despite the fact that Apple is primarily a technology company, it is still a hugely dominant player in the music industry to date). See generally supra Chapter 3, subsections II.B.1 & III.A.2.
⁷ In the case of music, pricing of music is generally clear (but the allocation of revenues among industry participants may not be available to outside audiences). In the case of fashion, arguably price opacity is accepted and/or embraced by consumers, some of whom enjoy the “hunt for the bargain,” sales, and other common industry practices. In the case of education, pricing is somewhat clear, as the sticker price of schools is readily available. However, “discounts” given in the form of scholarships, grants, loans, and other aid can have a considerable effect on sticker price. Some of these may also be negotiable, variable, and highly unstandardized. Therefore, opacity goes hand-in-hand with tuition pricing at traditional schools. However, in the case of single course units, there may be less variation between the price that is stated and that which is actually paid.
⁸ In the case of education, the elite institutions and some spinoffs, such as Coursera, are sacrificing immediate payoffs in the search for market position and ultimate profitability. Coursera has shown that ensuring first mover advantage has significant benefits, as it has been able to corner the MOOC market among elite institutions, virtually compelling many schools to join its ecosystem and thereby reinforcing its lock-up. See generally Michael Horn, The Intrigue of Coursera, FORBES (Dec. 19, 2013), http://www.forbes.com/sites/michaelhorn/2013/12/19/the-intrigue-of-coursera/. Much like technology companies that are able to corner the market and compel consumers to work within their ecosystem—even at the price of interoperability—the ability of content industry participants to corner a market may be the single most important step in ensuring their competitive viability over the long haul.
be considered a useful tool in sustaining the industry, but not a silver bullet that solves the industry’s profitability equation.

3. IP Solutions

Content industry participants should consider the extent to which they want to invest in trying to secure market position by the business strategies outlined above. They may then choose to add layers of IP to ensure protection of their revenue-generating properties while still covering other goals, such as retaining maximum flexibility, gaining buy-in from labor, and ensuring that they are not locked into a single system until the market leaders have been established.

4. Examples

Most commercial industries producing highly finished content are likely to factor high production costs as a major expense, such as entertainment, journalism, and print publishing. Other more individualized industries may have slightly lower costs, such as comedy, yoga, magic, and exercise.9 Some content industries may be able to harness technology to increase the value that their properties offer. For instance, the publishing industry should try to profit from licensing rights in extracts or abstracts of works that can be widely made available through electronic devices, as the music industry has done with ringtones. Google Search already makes short snippets available, but has secured a ruling that they fall under the fair use exemption to copyright protection.10 However, longer extracts and abstracts may still be fair game, and may be

9 See generally Christopher J. Sprigman & Dotan Oliar, There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy, 94 VA. L. REV. 1789 (2008) (discussing comedy); Kristen McCallion & Sara O’Coin, Yoga, Exercise or Dance, INTELL. PROP. MAG., March 2013, at 28, available at http://www.fr.com/files/Uploads/Documents/McCallion,OCoin.IPMagazine.YogaExerciseDance.March2013.pdf (discussing Yoga and exercise); Jacob Loshin, Secrets Revealed: How Magicians Protect Intellectual Property without Law, in LAW AND MAGIC: A COLLECTION OF ESSAYS (Christine Corcos, ed., 2010) (discussing magic). There are a few caveat here. For instance, creating new exercise classes, such as cycling/spinning, step aerobics, weights classes, or pole dancing classes may require some investment in creating and perfecting the equipment and training. But these creative endeavors generally involve a single performer, minimal props, and relatively low production costs.

10 See generally Google’s Publication of Electronic ‘Snippets’ as Part of Plans to Digitise Books Is “Fair Use” Says US Judge, OUT-LAW (Nov. 15, 2013), http://www.out-
sufficiently valuable that they can be monetized (albeit perhaps modestly). Publishing as well as entertainment and media companies, such as the film industry, should also experiment with a “windows” model of new product releases, in which staggered releases maximize the profitability of new works when they are first revealed and at the height of their popularity with most audiences. The film industry is leading the way on this charge, and the music industry is beginning to explore its options to follow suit, but there are further expansions of staggered release models underway, as well as changed models of simultaneous release, often with multiple or varied products, that are beginning to come into play.12

Many of the content industries will need to lengthen their timelines to profitability in order to explore, shape and fine-tune these new business models. Journalism, publishing and other content providers with high production costs may need to resort to cross-subsidization within their parent companies, where possible, to defray the immediate costs of such exploration and expansion.13 Keeping long-term strategies is especially necessary in a quickly changing environment, where many complex forces can rapidly change the direction of growth, the domination of the market by industry leaders, the system or entity that emerges as a powerhouse driving the market, and the shape that products, devices, and outcomes will take. The examples of cellular telephones (the dominance and decline of Nokia),14 television recording devices (the

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12 The music industry is also searching ways to inform its consumer base of compensation models to artists and creators in order to justify their revenue models and pacify consumers. This is a potentially powerful tool to use in conjunction with these new revenue-generating plans.


triumph of VHS over BetaMax),\textsuperscript{15} computer hardware (the declining market share of once-powerful entities, such as IBM, Hewlett-Packard, Dell),\textsuperscript{16} and computer software (the relative decline of Microsoft versus the rise of Apple)\textsuperscript{17} all provide ample evidence that markets change extremely swiftly, possibly ever more swiftly as technology evolves at lightning pace, and the advantages of consumer lock-in and a self-contained ecosystem may be offset, or even erased, by the disadvantages that lack of interoperability generates when the market turns to new systems, devices, and controlling forces. For entertainment and media industries, this appears to be a challenging proposition: they have traditionally been driven by the need to realize immediate returns on their products. However, the long-tail of entertainment—for instance, the realization of longer-term profits in international markets in the film industry—has begun to spark a recognition that long-term payoffs may be the best path to long-term vitality.\textsuperscript{18} As technology continues to force these recognitions, content industries should continue to pursue longer term, and possibly riskier, solutions to their business endeavors.

In terms of determining where an industry’s value-add inheres, various content industries should consider unbundling their offerings and attempt to profit from sales or licensing of individuated works. This may prove, however, to be a challenge. In the case of journalism, for instance, the customary product is an entire newspaper or magazine. However, many publications are discovering that a subscription model for a publication—traditionally the practice for retaining readers and thereby retaining the viewership for the advertising supporting the publication—only works online when an audience is willing to pay for the entire product. The \textit{Wall Street Journal} has succeeded in this practice,\textsuperscript{19} but few others, including even the venerable \textit{New York Times}


and the *Times* (London), have been unable to follow suit.\textsuperscript{20} Further, some stand-alone products may not be desirable enough that a readership is willing to pay for them: in the case of the *New York Times*, few readers proved willing to pay for editorial content (op-ed and opinion pieces) that was placed behind a firewall and available only on a subscription basis.\textsuperscript{21} The experiment of placing editorial content behind a paywall was abandoned due to an apparent lack of interest among its readership in paying for editorial content.\textsuperscript{22} But it was also doomed by the ready availability of such content through workarounds that do not require payment: for instance, the same content offered via various services (Lexis and Westlaw), or linked by third parties and thereby made available through blogs, sites, and other online resources.\textsuperscript{23} Even in the case of new revenue initiatives, such as offering versions of news publications on tablets, hand-held readers and other devices, the results have been decidedly mixed, and have run into many of the same issues that basic online services have faced.\textsuperscript{24} Nonetheless, the verdict is still out on paywalls, and major journalism sources are still striving to make them revenue-positive in new and emerging media.\textsuperscript{25} Newspapers can continue to experiment with various blends of paywalls, subscription services, or metering-per-pay models, and it is possible that they will eventually find a successfully balanced solution. But there remains little doubt that new media will continue to push journalism to identify its most valuable properties—those for which its readership will pay—and that the proliferation of diverse sources, free content, and freely available links will continue to pose significant challenges to traditional journalism’s long-term success.


\textsuperscript{21} See Reagan & Hatch, supra note 20.

\textsuperscript{22} The New York Times itself is now behind a partial paywall. That is, it offers free access to a limited number of articles per month (10 articles per month as of this Article). However, the success of its current model remains mixed at best. See id.

\textsuperscript{23} See *We Take You Beyond the Paywall . . . to Deliver More Relevant Results*, LEXISNEXIS, http://www.lexisnexis.de/whitepaper/beyond-paywalls-whitepaper.pdf.


These roadblocks reveal that the disaggregation of content on the Internet is a challenging proposition: if journalism cannot be fully protected behind a paywall and is widely available for free or competing with free resources, it is very unlikely to be a source of revenue, and it is unlikely to be a reliable source of viewership for supporting advertisers. On the other hand, in the case of more protected properties, such as e-books in the publishing industry, content may be more readily monetized.\(^26\) While offering some of their works through lending libraries, the publishing industry may prove successful in keeping their e-book properties profitable by imposing similar restrictions on them to those imposed on digital tracks by the music industry. Further, if abstracts, excerpts or other kinds of properties become desirable to consumers—perhaps enhanced by products such as Google Books\(^27\)—publishers may find new revenue sources in the sale or licensing of portions of written works.

\section*{C. Can You Change Your Profitability Paradigm by Moving to New Revenue-Generating Sources? How Much Can You Change or Affect Pricing and/or Price Discriminate?}

\section*{1. Questions for Analysis}

This layer of analysis, which is critically important to content industries confronting disruptive change, overlaps with the first set of questions but extends it further. Content industries should scrutinize their profitability paradigm, or business models and strategies for attaining profitability, to ensure that they are taking advantage of all commercial opportunities that have been opened or expanded in recent years. First, as suggested earlier, can they increase revenues from properties that they already own via exploitation of related rights? Second, can they adjust, differentiate, or otherwise tweak pricing to maximize their returns in rent-producing properties? Third, can they create business synergies other content industry players or complementary enterprises? Fourth, can they improve advertising-related returns? Fifth, can they improve their


exploitation of the digital realm? Sixth, can they leverage their digital presence to pursue new markets and opportunities?

2. Business Solutions

New technologies can increase potential revenues in already-existing content and products. First, as earlier suggested, content industries should assess whether they are able to increase revenues from properties that they own and/or to which they have proprietary rights, including but not limited to performance rights, ancillary rights (for instance, merchandise tie-ins),28 related entertainment rights (films, ringtones, Disney tie-ins),29 digital rights (for instance, rights in online streaming on Hulu and other such sites),30 and so on. Second, they should critically assess the extent to which they can change or adjust pricing, create pricing tiers to serve differentiated market segments, and/or price discriminate as a means to maximizing returns in rent-producing properties. Third, they should aggressively explore various opportunities: (i) to cross-license with partners from various industry sectors; (ii) to merge with (or acquire) complementary partner or products or otherwise vertically integrate; (iii) to sell or license their products in new or emerging markets; and/or (iv) to create new or variegated distribution schemes. Fourth, content industries should examine the extent to which there is room for increased advertising and for improving advertising-related returns (which should in turn increase advertising rates in both traditional and digital channels). Fifth, they should explore their ability to expand into new online venues (such as YouTube, sites, blogger tie-ins, and so on). Sixth and more generally, they should pursue new markets and technologies as they emerge, recognizing that the risk of such investment may pay off with the reward of being early adopters, and possibly market leaders, in newly colonized digital spaces. This may be a delicate balancing act: content industries will need to ensure that they are not being taken advantage of by new technologies

28 See generally GREGORY GOODELL, INDEPENDENT FEATURE FILM PRODUCTION 252 (1982).
(such as Aereo), but at the same time will need to be open to new technologies that innovate in ways that benefit their business model (for instance, using the Internet to disseminate product, build user bases, move merchandise, and so on).

3. IP Solutions

Many of the solutions presented above are inextricably intertwined with IP-based practices and policies. The exploitation of IP-protected properties is the clearest example, but other strategies such as cross-licensing, vertical integration, and expansion of IP-protected properties in online fora are equally certain to involve IP practices. Content industries should ensure that they have strong governance methods for these ventures, and should lobby to secure industry-wide backing for favorable conditions for IP exploitation, such as strong clearing-house institutions, capable regulatory oversight, and so on.

4. Examples

Exploration of IP-related rights has expanded not only within content industries but among them. The expansion of commercial exploitation of secondary and ancillary rights has already begun in many established content industries. In the entertainment and media industries, several large-scale approaches to new media markets and opportunities are afoot: for instance, the film industry continues to move aggressively to license works in international markets; to diversify its online offerings via strategic alliances with Netflix, Hulu, Amazon Prime, Apple TV and other venues for digital release; and to increase its availability on a host of personal electronic devices via relationships with Apple, Android, and other technology companies. Further ancillary rights


Interestingly, non-traditional producers are moving in on this space, as Amazon itself is beginning to launch movies on Amazon Prime. See Amazon to Produce Original Movies for Theaters, Prime Instant Video (Jan. 19, 2015), available at http://www.businesswire.com/news/home/20150119005090/en/Amazon-Produce-Original-Movies-Theaters-Prime-Instant. It will be interesting to see if this
can and should be explored, such as the limited release of snippets, trailers, ringtones, and other individuated properties that are valuable to consumers. Likewise, expansion should occur with respect to merchandising rights such as merchandise tie-ins (for instance, film tie-ins tend to be hugely profitable, such as t-shirts, mugs, McDonald’s Happy Meals, “action figures” based on heroic movie characters, and other branded products that rely heavily on the exploitation of trademarked properties).  

In other creative industries, the pursuit of commercialization of products and performances is also growing. In comedy, recording rights in performances have been well established as monetizable property rights. Building on these rights, comics also establish rights in live performances (whether or not performed in a studio, on a stage, or elsewhere), licensing rights in stand-up performances on television, cable (such as HBO), and online (released on such sites as Hulu, the Daily Show, and so on). In cuisine, star chefs are similarly establishing rights in live performances (whether in their own kitchens and restaurants or elsewhere), licensing rights in performative acts on television, cable, and online, and are seeking to expand rights to their demonstrations when undertaken in less traditional venues, such as at food festivals, in private residences, and so on. Increasing attention is being paid to rights in performance in sports and fitness related fields. In yoga, certain star practitioners or gurus, such as Bikram, have sought to establish trademark in signature practices and moves. In fitness, some companies have sought trademark in distinctive classes, such as Reebok Spin classes, CrossFit training methods, Tabata high-intensity workouts, and so on. In many of these cases, trademark has been sought, appropriately, to protect valuable and often innovative additions to the field of creative endeavor that pushes movie producers to be more innovative, or if it will stiffen competition that crowds them out of the lucrative Amazon market. Id.

33 See, e.g., Jeff Jensen, McDonald’s Hungry for Disney Tie-Ins, ADVERTISING AGE (Apr. 17, 1995), http://adage.com/article/news/mcdonald-s-hungry-disney-tie-ins/81441/. This is analogous to the merchandise tie-ins that are proving so popular in music, such as concert and band t-shirts and other memorabilia.

34 See Michael J. Madison, Of Coase and Comics, or the Comedy of Copyright, 95 VA. L. REV. ONLINE 27, 35 (2009).


and practice. Indeed, in this regard the expansion of rights is a useful way to seek to maximize returns from legitimately protected properties. At the same time, however, as discussed in the Culture section, below, expanding rights must be counterbalanced against the need to preserve key elements of a creative field’s mutually agreed upon culture, values, norms, and practices.\textsuperscript{38}

With respect to pricing, content industries should tackle pricing plans that both maximize their immediate returns from properties and capitalize on the potential for future returns, some of which may be experiencing growth due to the emergence of new technologies and venues. In the publishing industry, the explosive growth of e-books should compel publishers to undertake new approaches to pricing of product licensing and sales.\textsuperscript{39} As distribution is facilitated by the Internet, publishers should be able to deliver e-books to various audiences both efficiently and at cost points that are calibrated to different market sectors. Technological tools, algorithms, and other strategies should be harnessed to put into place refined pricing schemes, allowing publishers to derive the best returns possible from their e-books, e-readers, and related materials. While there is bound to be pushback from distributors, retailers, and third-party participants, publishers should be in a position to control the initial pricing and terms governing the dissemination of their product.\textsuperscript{40} Some publishers should also consider tying in marketing, promotion, and possibly retailing in their arsenal. Vertical integration offers a means of freeing the publisher from the distributor, and thereby enhances the autonomy of the publisher over the pricing of both hard copy books and e-books. In relation to pricing plans, creative content

\textsuperscript{38} See infra Part IV.
\textsuperscript{40} One caveat is that publishers must steer clear of behaviors that may trigger antitrust concerns, such as making concerted efforts to control pricing and delivery terms, or other such potentially cartel-like behavior. The case of the retail and distributor giant Amazon versus the publisher Hachette, as well as the conglomerate Time Warner, are illustrative. See generally, e.g., Jim Milliot, \textit{BEA 2014: Can Anyone Compete with Amazon?}, PUBLISHERS WEEKLY (May 28, 2014), http://www.publishersweekly.com/pw/by-topic/industry-news/bea/article/62520-bea-2014-can-anyone-compete-with-amazon.html; see also David Streitfeld, \textit{Hachette and Amazon Dig in for a Long Fight over Contract Terms}, N.Y. TIMES (May 28, 2014), http://www.nytimes.com/2014/05/29/technology/amazon-hachette-book-publisher-dispute.html? r=2; David Streitfeld, \textit{Amazon Stops Taking Advance Orders for ‘Lego’ and Other Warner Videos}, N.Y. TIMES (June 10, 2014), http://bits.blogs.nytimes.com/2014/06/10/amazon-stops-taking-advance-orders-for-lego-other-warner-videos/.
industries, including publishing, should also appropriate rent-maximizing pricing strategies and schemes devised by other industries.\footnote{See Moran, supra note 13, at 441-55.}

Illustrative are the film, television, and entertainment industries’ differentiated pricing plans that serve important strategic goals in targeting consumer markets, cross-pollinating viewership, and taking advantage of a property’s maximum value at its peak commercial moments, typically upon first release or run. The cable television industry achieves these goals by offering bundled packages of channels that viewers must subscribe to in order to have access to their preferred programming.\footnote{See generally Gregory S. Crawford & Joseph Cullen, Bundling, Product Choice, and Efficiency: Should Cable Television Networks Be Offered a la Carte?, 19 INFO. ECON. & POL’Y 379 (2009).} In this way, viewership of a popular channel, such as HBO, can effectively subsidize viewership of other, more niche channels, such as TMC, TLC, and so on. These packages of channels are also priced variously, so that viewers may choose how many stations to purchase and have available. At the same time, “on demand” offerings make immediate viewership of stand-alone shows both immediately accessible and profitable on an individuated basis.\footnote{See generally Ronald J. Rizzuto & Michael O. Wirth, The Economics of Video On Demand: A Simulation Analysis, 15 J. MEDIA ECON. 209 (2009).} The film industry similarly engages in tiered pricing, in part by offering movies at different prices based on the popularity of venues, the time of release (first-run or second-run shows),\footnote{See Reel Time, supra note 11.} and so on. The film industry also engages in tiered releases of its output through a series of “windows,” beginning with the most lucrative first-run window in which the movie is priced for maximum returns, followed by windows of release on cable and DVD, Netflix, streaming, and eventually second-run releases, television screenings, online streaming, and so forth.\footnote{See id.} This also enables the film industry to time international releases in ways that will maximize their popularity and returns in multiple international markets.

Other creative content industries, such as e-books and music, should consider these models of release and determine whether they fit the contours, demands, and business models that will increase their returns. The publishing industry has already incorporated the windows scheme of release in its conventional area, first releasing books in hard cover, followed by paperback, trade
paperback, and similarly lower-priced versions.46 In the case of e-books, it should consider first releasing digital copies at a premium price, without distribution to libraries and lending sources, followed by less expensive releases to e-readers and eventually online. Similarly, the music industry should consider releasing digital tracks in various windows, with differentiated pricing that reflects the time of release, popularity of the work, and other key factors. Particularly in the case of music streaming, this option offers the industry the opportunity to release the work to large audiences without undermining their revenue models. In some cases, such as the subscription-based models of Rdio, Spotify, and others, the windows model is already proving effective, and thus should be further pursued to capture new markets without sacrificing immediate or long-term returns.47

D. How Important Is Licensing Vs. Ownership to Your Business Model?

1. Questions for Analysis

The opening ante question for content industries is whether the industry is adhering to a traditional ownership model (in which product is sold by the company and owned outright by the consumer) or it should move to a licensing model. They may, naturally, choose a hybridized model, in which some products are sold—in the publishing industry, for instance, hard copies of books sold in traditional retail stores—and others are licensed—in publishing, e-books transmitted digitally—while still retaining an interest in other rights, such as performance rights, which likewise flow from their properties. There are consequences, however, to adopting a model primarily based in licensing rather than sales. In some industries, the move to licensing may shift the battleground of rights: that is, copyright may still be crucial to allocating rights and reaping revenues, but rights based in ownership may become less worth fighting over, and rights


47 This has been presented as an alternative to the kind of release, and the concerns, recently raised by the dispute between Taylor Swift, an enormously popular artist, and the online streaming site Spotify. See Pamela Engel, Taylor Swift Explains Why She Left Spotify, BUS. INSIDER (Nov. 13, 2011), http://www.businessinsider.com/taylor-swift-explains-why-she-left-spotify-2014-11.
based in licensing may become paramount.\textsuperscript{48} Services based in licensing content likewise become more valuable, and often more contentious, when the model changes, and in particular when technology allows consumption of licensed content to become more immediate, streamlined, and often transitory.\textsuperscript{49}

\textbf{2. Business Solutions}

Content industries that focus their energies on building out licensing of their properties should ensure that adequate support mechanisms are in place to facilitate the smooth flow of content to satisfy consumer demand. First, they should equalize and fully operationalize licensing-based services, such as online release of products and services, streaming, and so on.\textsuperscript{50} Second, they should strive to promote interoperability among content providers, both among creative and technological allies, thereby allowing content licensing to occur on many platforms. This will further enable consumers to have as wide a range of choices as possible on which to have access to the content they license. Not only will this increase consumer satisfaction, but it will also likely increase consumers’ willingness to pay for products that they can immediately use and enjoy. For some consumers, this may also be considered an acceptable tradeoff: that is, an increase in immediacy of goods and services may counterbalance any reduction in actual ownership or longer-term rights (which accompanies a diminution in outright sales).\textsuperscript{51} Third,

\textsuperscript{48} In the music industry, licensing rights are becoming increasingly dominant, particularly as an increasing number of music-related transactions are occurring online. \textit{See} MICHAEL UPshall, \textit{CONTENT LICENSING: BUYING AND SELLING DIGITAL RESOURCES} (2009). There are some exceptions, however, such as music rights in the ownership of valuable properties such as back catalogs of content, classic music albums and recordings, and so on. These can be significant revenue sources over time, for instance as reissues, revivals, remastered albums, and so on are enduringly popular among music listeners and consumers.

\textsuperscript{49} In the case of music, iTunes and similar music-playing services (and related music-playing devices) allow streaming and other transitory ways of consuming entertainment to become more dominant, pervasive, and negotiable among interested parties.

\textsuperscript{50} In music, the iTunes model illustrates how important a strong mechanism is: its ease of use and consumer-friendly features, coupled with Apple’s licensing contracts with record labels that secured a large music library, catapulted it to overwhelming success that continues to date.

\textsuperscript{51} It may also counterbalance any reduction in the actual rights consumers have in the use and enjoyment of their products. For instance, if Apple iTunes music consumers are only permitted to make 10 number of copies of their music on personal electronic devices, the fact that they can listen to the music on various devices may seem a kind of fair compensation or trade. \textit{See} Manage Your Associated Devices in \textit{iTunes}, https://support.apple.com/en-us/HT204074.
content industries should strengthen cloud-based services to afford consumers strong, stable, and adequate storage of their licensed content, as well as ready access to such content. Fourth, they should consider creating strategic alliances with companies that facilitate online payments, micropayments, data encryption, and other technological services and products needed to support online commerce.

3. IP Solutions

First and foremost, content industries should ensure that licensing mechanisms, such as collective rights management organizations, are well-established, funded, and secure, and that they operate efficiently and smoothly. Creative content industries that rely on such clearinghouses should be aware that expansion of services, products and resources to creators will benefit the industry as a whole, and will increasingly enhance consumer satisfaction as more consumers become engaged in creating, adapting, or otherwise interacting with creative content. Further, content industries should equally ensure that cross-licensing mechanisms are securely in place and efficient, entailing solid contractual ground rules, reasonable balances struck with respect to non-competition agreements and the like, and other practices, policies and norms that support critical exploitation of cross-licensing opportunities.

4. Examples

Licensing of creative content is expanding in an array of industries. Examples abound, including streaming of films, television shows and series, e-books, and any other content that may be streamed online rather than outright purchased. Technological innovations are helping to support, if not promote, the availability of licensed content, including the expansion of cloud computing and cloud-based software; improvements in streaming technology; increases in availability, speed and bandwidth with respect to Internet connections, as well as management of Internet provision by Internet Service Providers (ISPs); the growth of data storage and security in personal computers and devices; and the expansion and multiplication of electronic devices that enable consumers to obtain quick, easy, affordable, and typically temporary access to a range of creative content. This last factor is significant, as it appears to reflect a growing preference
among users and producers in favor of licensing content. Content industries should recognize that building user satisfaction is the most direct and reliable inroad to creating a system in which licensing becomes the de facto practice, and which eventually becomes the prevalent and preferred mode of consumption of creative commercial content, goods, and related services.

**E. Do You (Still) Rely on Middlemen/Intermediaries; If So, How Good Are Your Pros/Cros/Clearing-Houses?**

Creative content producers are not alone in facing the challenges posed by disruptive innovation. As discussed earlier in chapter 4, intermediaries and middlemen are also essential participants in content industries who are being confronted by changing roles, business models, and risks that threaten their long-term viability. Challenges within the content industries raise important questions about the position, both actual and potential, of middlemen in their given field. First, are there still roles, or are there newly emerging roles, for middlemen to undertake in order to facilitate production, commercialization, and other aspects of creative content generation? Various aspects of middlemen’s roles traditionally include (i) agent and talent scout services that identify, select, and cull artistic talent, which may include connecting artists with content companies and nurturing artists throughout their career; (ii) editorial and other services, which may include refining content, checking accuracy, finessing production values, and preparing works for commercial roll-out; (ii) marketing services; (iii) product distribution services (both in real space and digitally); (iv) management of IP-based rights and rewards, which may include collective rights management; (v) credentialization, accreditation, authentication and authorization, which may include critical roles such as publicly reviewing works; (vi) curation; and (vii) reward of exceptional work, which may include extending or facilitating praise, prizes, or other reputational boosts to deserving creators. Second, are there roles for middlemen that are irreplaceable by digital technologies, or that cannot be perfectly substituted by disintermediated processes? Third, are the roles that middlemen play valuable enough to content industries that they will continue to receive remuneration—in other words, will they get paid? Fourth, is the role of intermediaries that manage IP-related rights, such as Collective Rights Organizations

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52 It may be, however, that the market is driving consumer preference by increasing its offerings of licensed content. But users do not seem to be resisting in any concerted way, at least; and many users do seem satisfied to relinquish long-term ownership for more immediate but transitory availability.
(CROs), still valuable to content industries? For those industries that do not currently have rights-clearing organizations in place, this question should add: would establishment of a CRO improve efficiency and revenue maximization of IP-related rights? Fifth, is there a role for technology companies to serve as middlemen, possibly by brokering arrangements or alliances among content companies, creating innovative software and devices that facilitate content dissemination and consumption, or otherwise shaping the course of creative output (and possibly creative content itself)?53

While it is clear that challenges to intermediaries arise in part from changes wrought by longstanding content industry participants, there are also challenges that arise from newer arrivals in the creative fields. This raises a host of questions, beginning with the identity and nature of the more recent participants. Are there encroaching competitive sources of labor in the creative industries? In the online sphere, the emergence of blogs, online magazines, scholarly resources, such as the Social Sciences Research Network, or SSRN, the scholarly database of articles,54 and other sites, demonstrates the willingness of interested parties to contribute their labor toward the production of content-rich materials. In many of these cases, the labor of creators and contributors is donated voluntarily, often without compensation. Moreover, the fruits of their labor, such as websites, databases, blogs, magazines, and so on, are released via the Internet directly to the reader, thus throwing into question the relevance and role of a middleman. Another recent phenomenon, likewise facilitated by the Internet, is the increasing prevalence of amateur creators, many of whom are artistically inclined but lack professional standing, that are bringing their user-generated content to large-scale audiences.55 Again, these creators are able

53 In the case of music, the Apple iTunes model serves as a powerful example of how a technology company has come to play such a vital intermediary role. Apple was able to broker agreements among record labels for the online release of digital tracks—a function that had not previously been mastered within the industry—and was further able to create electronic devices, software and services that made the dissemination of music readily, easily and affordably available to listeners. This has had an indelible impact on the course of the music industry worldwide. It may be arguable that creative content itself is and will be shaped by the iTunes model—as artists recognize that their path to renown rests in part on iTunes release, they may be incentivized to make digital tracks that work best on iTunes technologies. For a general discussion of iTunes’s role as an intermediary, see W. Jonathan Cardi, Über-Middleware: Reshaping the Broken Landscape of Music Copyright, 92 IOWA L. REV. 835, 852-53, 859 (2007)
55 In the case of music, these artists have turned to sites such as YouTube, MySpace, SoundCloud, and others to release their creative efforts in the hope of attracting online audiences. In the case of fashion, some amateur fashion lovers have created designs, assembled outfits, and crafted a unique fashion “look”.

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either to find or to build online venues that afford them immediate and direct access to audiences, bypassing the necessity for a traditional facilitator or intermediary. Lastly, in some content industries, newer participants are entering the market via solely online venues, rather than establishing a presence in real space, and are directly bringing their products to consumers via online outreach, marketing and delivery.\textsuperscript{56} In sum, the emergence of new participants directly questions the role and relevance of middlemen, and asks: (i) is intermediation necessary, (ii) does it add value to the content generation chain, and (iii) is it worth preserving, configuring to fit the contours of the new content economies, and remunerating?

1. Business Solutions

Content industries should determine the utility of middlemen to their various enterprises. As noted, the roles that middlemen play, the points of contact at which they facilitate industry processes, the services that they offer, and the value that they add to creative endeavors are highly diversified and most likely difficult to isolate and quantify. Nonetheless, some creative industries will find that middlemen have valuable contributions to offer—and at times, this recognition may occur while change is occurring, or after it has taken place, when the value of the middleman becomes apparent in his or her absence.\textsuperscript{57} To avoid this shortcoming, content industries should scrutinize the benefits that middlemen confer and only countenance the reduction or elimination of their role when it is clear that those benefits are outweighed by the costs or fees that middlemen impose over the course of content commercialization.

\textsuperscript{56} In the case of education, online education providers, the majority of which are organized on a for-profit basis, resort solely to the Internet to reach and educate learners. Only some of these providers seek or obtain credentialization by traditional educational accrediting bodies.

\textsuperscript{57} In the case of music, it is clear that talent identification, music production, marketing, and other functions are still best served by traditional middlemen, whose skill and expertise have not proven readily replaceable or reproducible. Moreover, music criticism, promotion, and “evangelism”—that is, praise of musical talent that critics can spread to build audience recognition and appreciation—has proven equally indispensable to the music industry’s vitality. Notwithstanding the ability of amateurs to adopt some of these roles via the Internet, they have yet to demonstrate a commensurate capacity to the professional middlemen who still fulfill these vital roles.
Overall, content industries should begin with the premise that middlemen are sufficiently valuable to merit retention and fair compensation. As technology develops and comes to offer innovative substitutions for intermediation functions, this baseline should naturally be revisited and, where necessary, revised. But such an undertaking should be made with caution, and with an understanding that it will have deep repercussions on the industry as a whole. As a corollary proposition, content industries should support and sustain the frameworks, institutions, mechanisms, and inputs that are critical to keeping middlemen operational, effective and secure. In the case of agents and talent scouts, for instance, content industries should support their efforts to cull talent from both digital sites and real space locales. In the case of credentializing and authenticating critics, reviewers, and curators, content industries should recognize the many layers of value that they add to content dissemination, consumer appreciation, and other aspects of content generation. Further, content industries should not only ensure that audiences are aware of the valuable role that critics and other such intermediaries play, but they should also continue to vest such critical participants with authority in their given field. This is not to suggest that critics do not have an obligation to defend themselves and to demonstrate their enduring importance. But at the same time, content industries have not typically ceded critics their due, nor have they communicated faith in critical faculties to their audiences. Content industries should recognize the integral role of critics and other such intermediaries in serving as a bridge between creators, producers and audiences, and such a recognition should be tangibly expressed. One means of such expression is to remunerate critics, reviewers, curators and others; another is to continue to turn to and rely upon them for a host of activities, such as supporting artistic and cultural competitions and prizes, underwriting critical publications and reviews, sustaining institutions that promote creative talent, and so on. At the same time, content industries can and should also pursue critical figures that emerge through less traditional venues, including those enabled by the Internet, such as blogs, online publications, amateur enthusiast and hobbyist sites, and others. By bringing these outsiders into the mainstream, content industries can strengthen their position in the digital realm, while at the same time reinforcing the sense among their audience that critical intermediaries remain informative, valuable, and vital.

Moreover, the more cautious industries are, the more time they will buy themselves to learn from the example of other content industries’ experiences. This may enable them to avoid costly mistakes that can take years to undo, if undoing them is even possible.
For their part, middlemen must prove their utility to content industries as well. Middlemen involved in creative content production should strive to distinguish their products and services from amateur productions by adding value and retaining high quality standards. They should also work to distinguish their product from those produced by non-professionals and to demonstrate that their labor cannot be readily displaced by advanced technologies alone. Intermediaries such as critics and curators should pursue online roles that play to their strengths, such as websites and blogs that highlight their knowledge, experience, and critical prowess. They should consider banding together to create high-value sites that are often attractive to educated, interested audiences; at the same time, they should strive to monetize their offerings in creative ways, using a combination of advertising support, subscription-based offers and services, and where possible strategic alliances with content companies that can help underwrite their work. These activities can include joining online websites, group blogs, joint databases, scholarly resources, and other collaborative efforts that highlight the strengths of professional critics and reviewers while creating new opportunities for emerging talent, whether professional or amateur. Intermediaries involved in credentialization and accreditation should work to ensure that their services are deemed essential to quality control by both content industry participants and their

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60 In the case of music middlemen, such as record labels, this should include keeping high quality of audio, recording, sound editing, and so on. In the case of fashion middlemen, such as fashion retailers, this should include maintaining both quality and exclusivity of curation, skillful promotion of designers, and so on. In education, this should include accreditation institutions and bodies, which subject educational institutions and programs to a process of peer review as a basis for measuring and authenticating institutional quality. Among these recognized bodies are regional accrediting agencies, such as the New England Association of Schools and Colleges, national accreditors, such as the Accrediting Council for Independent Schools and Colleges, programmatic accreditors, such as the Accreditation Council for Business Schools and Programs, and specialized accreditors, such as the American Bar Association. Other middlemen in education that facilitate quality control are entities that review colleges and universities, such as U.S. News and World Report’s annual ranking of schools and programs, as well as other trusted reviewers that help applicants differentiate among educational products and services.

61 In the case of music, personal computers can now easily be loaded with relatively sophisticated sound recording, mixing, and editing software programs, thus enabling talented amateur musicians to create and record digital tracks with remarkably polished finishes. This notwithstanding, however, there remains a distinction between even well-produced “demo” tracks and professionally produced tracks for commercial release. It behooves music middlemen to bring this distinction to the fore, and to make clear that they are adding value by bringing music production to a professional level that remains higher quality than even the best home-produced efforts can attain.
consumers. Likewise, intermediaries involved in authentication and authorization should increase their efforts to provide vital services online to content industry participants that are engaged in digital dissemination of their products and services. In all of these cases, middlemen and intermediaries in the content industries who are confronting either obsolescence or competition should lobby extensively to protect their value-add proposition and should strive to prove to industry participants and their audiences that their ongoing vitality is crucial to industry survival and health.

2. IP Solutions

Content industries often monetize their properties via licensing, cross-licensing, and other IP-related transactions, agreements, and alliances. It is imperative that the content industries buttress these practices by streamlining the mechanisms that allow them to proceed and minimizing the costs that they incur. In some content industries, the solution has been to put into place and institutionalize formal content management organizations or clearing-houses that handle rights licensing, revenue collection, rights and ownership issues, and various transactional concerns. But in the case of content industries that have not yet instituted formalized clearing-houses, not only the utility but also the cost effectiveness of introducing such an intermediary must be carefully evaluated prior to instigation.

First, content industries should recognize that adding an institutional intermediary to rights-clearing processes is bound to involve the imposition of significant systemic transaction costs.

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62 In the case of education, accrediting bodies are considered vital to maintaining educational standards, and receiving accreditation remains a necessary prerequisite to maintaining institutional standing, or obtaining external funding (such as federal and state grants).

63 In the case of education, online educational providers are increasingly offering authentication and authorization services to students for various reasons: to allay privacy concerns; to secure identity of students; to thwart attempts at online cheating; and to ensure that students receive proper recognition for their work.

64 The music performing rights organizations (PROs) are well-established examples of successful collective rights management organizations, and their development is instructive to content industries seeking current examples of successful rights-clearing institutions. See generally Merges, supra note 59.

65 See generally Merges, supra note 59, at 1295, 1320. In music, PROs do not operate cost-free. Further, music rights are managed by several different organizations in accordance with the rights involved, which raises costs and arguably diminishes efficiencies. Costs associated with PROs are spread across industry
Perhaps the most important concern in this regard is that the imposition of transaction costs due to the introduction of rights-clearing intermediaries should not impinge upon the actual creative processes taking place at the inception of creative content. That is, creators, artists, and other content generators should not be intimidated by the prospect of transaction costs, such as the necessity of paying clearing-house dues or other up-front fees or expenses, and thereby evince a reluctance to undertake the creative process and the eventual effort to bring their creative work to commercial producers and markets. Countering this possibility, however, is the potential that rights-clearing organizations have to enable the metering of rights that are generate revenues (such as royalties) and to enable or facilitate more fine-grained payments to creators and/or rights holders. Also countering the concern that creators may have regarding transaction costs is the prospect that rights-clearing organizations can also be expanded to offer a range of services to emerging creators, and may thus prove to be well worth the costs associated with membership and participation in their institutions.

Further, impending transaction costs should not impede or constrain collaboration among content industry participants. In some content industries, the prospect of transaction costs imposed by clearing-rights organizations may be daunting to participants who have historically engaged in transactions and alliances without intermediation. This is a reasonable concern in the case of industries that have a rich, historic, and well-founded public domain, and in which therefore the establishment of rights and the management of rights are liable to represent a major, costly undertaking. In other content industries, \(^{66}\) however, the prospect of transaction costs imposed by rights management organizations may be offset by the prospect of clearing the path of IP-related barriers—such as multiple individually-held rights that must be negotiated and agreed upon ex ante—and thereby enabling collaboration to move forward apace. \(^{67}\) Content industries with a

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\(^{66}\) Again, in fashion the historic practice industry-wide has been the creation of works that are not protected by copyright and that therefore enter into the public domain. See supra Chapter 1, Section II.A. Many commentators, as well as fashion industry insiders, have argued that superimposing a rights-based model, as well as rights-based institutions such as clearing-houses, will impose weighty transaction costs on the industry. See id.

\(^{67}\) It is interesting to compare creative content concerns with the issue of transaction costs as it pertains to collaborators in patent-related work, particularly in areas such as scientific research. In the patent context, there is an acute concern with clearing multiple rights prior to engaging in cumulative innovation, on
vested interest in seeing collaborative efforts grow and thrive should ascertain whether collective management of rights would be deemed an encumbrance to previously unfettered transactional practices or an aide in clearing a path to multi-layered or multi-party ventures.

Lastly, content industries should scrutinize the nature of the collective rights management they are considering implementing in order to determine the structure that will best fit the contours of their landscape. As earlier discussed, the most effective CROs are structured to be maximally cost effective, and avoid unnecessary bureaucracies liable to impose heavy administrative burdens on industry participants. Also discussed is the ability of CROs to meter usage of IP-protected properties and to collect per-use or collective royalties, fees, and other payments. In some instances, clearing houses can manage not only rights but also access to materials in its

which much scientific research and patentable work is predicated. This is often referred to as the threat of “patent thickets,” and is especially relevant where rights in underlying scientific materials, such as gene sequences, are concerned. See generally Intellectual Property and Genomics, NAT’L HUMAN GENOME RES. INST., http://www.genome.gov/19016590. The fear of encountering patent thickets, or “a dense web of overlapping intellectual property rights that a company must hack its way through in order to actually [generate and] commercialize new technology” can be a major impediment to productivity. Carl Shapiro, Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting, in INNOVATION POLICY AND THE ECONOMY 119, 120-21 (Adam B. Jaffe et al. eds., 2000). Clearing these thickets, analogous to clearing copyright rights, is a vital step that must precede innovative and patentable activity. Id. In the case of scientific research, rights clearing organizations—whether formally instigated, privately undertaken, or narrowly engaged—may serve to help overcome the impasse that overly onerous rights can present, thereby opening the path to collaboration and improving the prospect of rewarding scientific research & development (“R&D”) throughout the greater scientific community.

68 See MIHALY FICSOR, COLLECTIVE RIGHTS MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 129-32 (2002). Michael Einhorn identifies several characteristics that are useful in determining the nature of rights that must be managed, which in turn helps to refine decisions concerning the optimal corrective rights management system and institution to administer such rights. Michael Einhorn, Transaction Costs and Administered Markets: License Contracts for Music Performance Rights, 3 REV. ECON. RES. COPYRIGHT ISSUES 61 (2006).

69 See supra notes 59-Error! Bookmark not defined. and accompanying text. As in the case of music, some CROs may be large, bureaucratic, but still relatively cost effective. ASCAP and BMI are quite positive examples, despite their size and overwhelming share of the clearing-house practice in the music sector. It is not the size of these institutions that makes music rights clearing somewhat cumbersome—rather, it is the nature of complex and overlapping rights, such as sound recording and performing rights, which are more a historical artifact (and anomaly) than a recent development, that can weigh down the industry with a certain amount of superfluous transaction costs.

70 See supra note Error! Bookmark not defined. and accompanying text.
purview, and can undertake duties analogous to database management.\textsuperscript{71} This may entail making materials available to select members of a group who have agreed to cooperate or collaborate on creative efforts (as in the case of scientific research) or to a wider audience that is interested in the resources being managed (as in the case of scholarly or specialized research databases). Other CROs may actively engage their members by offering a range of services, information, resources, and other input that may be critical to emerging artists and creators.\textsuperscript{72} These are secondary features that broaden the appeal of CROs, but also offer support to content generators whose work forms the basis of creative industries. Finally, some collective rights organizations may be well-positioned to improve payment systems that collect and distribute royalties and other IP-related revenues. Content industries should consider this a potential avenue for exploring cost-effective revenue collection and distribution.

3. Examples

Content industries that depend upon multiple properties, complex contractual and licensing arrangements, products that may require an array of rights to be cleared such as tie-ins and other forms of brand-based marketing, and so on are well-advised to consider instituting centralized rights-clearing organizations. The film industry, for instance, shares many of the characteristics of the music industry, yet its products often involve even more complicated rights-clearing processes than do typical music products, as multiple markets, products, venues for viewing (virtual and real), follow-on products (such as sequels) and tie-ins (such as merchandise rights) tend to be involved. A centralized rights management institution could facilitate cross-licensing of rights in the components of films that draw on various cultural resources and references; and it could manage the rights in the release of films, both at the inception of the works’ launch and

\textsuperscript{71} In the case of scientific research, this may entail managing access to gene sequences or other fundamental research materials that otherwise might be propertized and thereby trigger onerous licensing and cross-licensing arrangements to advance scientific R&D.

\textsuperscript{72} For example, the two major music PROs, ASCAP and BMI, offer member musicians a broad range of services and resources. See ASCAP Member Benefits, ASCAP, http://www.ascap.com/benefits/; Royalty Information, BMI, http://www.bmi.com/creators/#royaltyinformation.
throughout their long trajectory across various markets (such as DVD release, international release, second-runs, revivals, remasterings, and so on).  

Other creative content industries that have not traditionally relied on IP rights and are currently considering implementing a formalized IP rights regime are also well-advised to consider collective rights management. Implementing a systemized approach to rights management is particularly helpful at the outset of large-scale propertization, as it should set the terms for an orderly deployment of rights and rewards. As in the case of the fashion industry, bringing a new set of rights into play—such as the proposed copyright in fashion designs, adds layers of complexity that are only likely to increase as rights-based transactions, such as licensing, cross-licensing, and so on grow in size and complexity. Creative industries that have remained relatively rights-free, such as comedy, cuisine, yoga, and certain sports activities (gym training classes, football plays, some non-traditional sports training, and so on) fall in the broad category of regimes that have not had a complex system of formalized rights but are currently considering where IP rights fit into their landscape. In these diverse cases, collective rights management should be an important consideration and not a last but a first resort.

F. How Do You Remunerate Your Labor?

1. Questions for Analysis

Content industries rely on skilled workers, gifted artists, trained researchers and technicians, and other highly valuable creators to conceive, generate, and produce the creative content that they

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purvey. Such industries should recognize the centrality of these workers to their enterprises, and should ensure that their remuneration enables them to make a livelihood and to create in the most optimal circumstances possible. Notably, the central premise of intellectual property law and property—that creators are incentivized to create when their work receives adequate reward and recognition—finds its best expression in the compensation structure of creative content industries. Therefore, content industries should examine the structure of labor rights and rewards, the terms and conditions of labor, and the environment in which workers create and operate, and should adjust their business models and legal solutions to optimize creative ventures and output.

Content industries should ask a series of questions that will help to determine the structure of rights and remuneration of labor in their sector. The first set of questions relate primarily to knowledge workers in content industries such as education, scientific research, and so on. First, what is the status of industry workers: are they primarily full-time employees (in which case the employer typically retains and owns rights pursuant to the work-for-hire doctrine) or independent contractors (in which case the employee may retain rights pursuant to Community for Creative Non-violence v. Reid74). Second, do workers have professional status, and are they well-compensated for their creative or innovative output, whether or not they retain IP ownership rights? Some indications of professional status include autonomy in the work that they undertake, rights such as academic freedom, and so on. Third, are workers compensated for their creative or innovative work by non-tangible rewards, such as authorship and publication rights, reputational benefits, awards and prizes, credit for work, and other resume-enhancing rights? Fourth, do workers have job mobility and knowledge portability? Fifth, are workers limited in their knowledge portability by standardized non-competition agreements or arrangements (short- or long-term) that prevail in their field? Sixth, and relatedly, are workers eventually able to resort to standardized workarounds in order to bring their know-how, expertise, and knowledge to their new employment?

The second set of questions relate primarily to working artists in content industries such as music, fashion, entertainment and media, journalism, comedy, cuisine, or yoga. First, are working artists independent, or do they work with a middleman who typically retains ownership

rights in their creative output? Second, do working artists typically create without retaining a full roster of ownership rights (for instance, in the cases of fashion, cuisine, yoga, and with some exception comedy), but are otherwise compensated (for instance, live performance payments, reputational benefits, publication rights, grants and funding, and so on)? Third, how are working artists compensated with respect to licensing rights? Are they compensated by standard contractual licensing agreements that give them a percentage of royalties (in which case IP arrangements must regulate and administrate the payout of royalties), or are they otherwise remunerated (such as on a flat fee basis)? And fourth, do working artists have the ability to assert other IP rights, such as trademark rights, in some aspects of their work?

2. Business and IP Solutions

In the case of labor, content industries will need to consider business and IP-related solutions contiguously, as the status of industry workers will be inextricably linked to their IP rights, and may in fact determine their IP rights. On the one hand, content industries whose workers are long-standing, full-time employees, with tenure rights or rights comparable to tenure (such as full-time employment, retention rights, or partnership rights) should realize that their workers are professionals who may not retain IP rights in their output subject to the work-for-hire doctrine. Nonetheless, such content industry professionals may be compensated by more than just salary and benefits: they generally tend to have rights such as academic freedom, publication rights, peer recognition, eligibility for prizes and awards, and so on. In these cases, content industries should realize that IP rights may not be paramount for securing the rewards of creativity and innovation. Thus, content industries should understand that while professional workers may forfeit some of the purely financial rewards of IP rights, such as royalty streams or payouts from commercialized IP properties, they may be making a tradeoff, and arguably a fair and balanced tradeoff, for other compensations, rights, privileges and rewards.

On the other hand, however, content industries whose workers are short-term, subject to firing, have little professional autonomy or rights such as academic freedom,75 and are not particularly rewarded for creative work, should realize that their workers are functioning more like

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75 In education, such workers are often adjunct or non-tenure track professors, and graduate students.
independent contractors, and that their employment does not hinge upon long-term prospects or payoffs. These content industry workers are not likely to have the option to balance rewards, both tangible and non-tangible (such as publication rights or securement of employment based on creative and innovative output), that established professional employees in a tenure or partnership-type track position enjoy. In this case, content industries should consider whether their employees should be deemed independent contractors and granted IP rights in their output, or whether another form of compensation should be extended in order to keep them remunerated, foster their creativity, and retain them over the long term.

Content industries should also take into account their workers’ job portability and knowledge mobility. In cases where workers are highly mobile and can bring their skills to bear on a number of desirable positions in their industry, content industries can argue that perceived shortfalls in their immediate contract terms are counterweighted by the freedom to leverage their work to secure a stronger position in the future. This should give content industries flexibility in setting the terms of employment of their workers, and should assist them in cases where they intend to retain the bulk of IP rights in creative properties. At the same time, however, it should imply that highly skilled workers would be desirable throughout the field and therefore both valuable and mobile. This should indicate that worker salaries are likely to be elevated by competition, and in these cases content industries should be aware that they will have to keep salaries at a highly competitive level to retain their best workers. Further, content industries should consider the standard in their field regarding the retention of IP rights as part of an employee’s portfolio, rather than as part of the employer’s holdings. In some industries, IP rights may travel with the employee, particularly if the employee is able to create or self-fund independent ventures, such as startups or spin-offs. In such cases, content industries should realize that their ability as employers to retain IP rights may be limited by convention, competition, or self-sufficiency on the part of the employee. All of these factors must be taken into consideration when content industries consider the balance of compensation, rights, and rewards in its labor pool.

In content industries that center on the output of creative artists, compensation of labor should be structured to remunerate artists fairly at different points on the spectrum of creativity, longevity

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76 For example, in start-ups, high-tech entrepreneurs bring key IP rights to the table.
and success. In these industries, companies and intermediaries may follow industry standards with respect to retention of IP rights, such as performing rights, sound recording rights, rights in previously-issued material, and so on. At the same time, however, content industries should recognize that artists may value tradeoffs that are similar, if not analogous, to workers in other creative fields. That is, relinquishing IP rights may be more viable for artists who are seeking to establish long-term careers in their field, and who believe that reputational payoffs may flow from joining well-known institutions (such as renowned publishing houses or imprints, record labels, newspapers or magazines, film studios, restaurants, or yoga studios), from capitalizing primarily on immediate live performance rights rather than on recorded rights, and from working under the protection of established parties (such as music or literary agents) rather than striking out on their own. In this sense, content industries should recognize that some working artists may prefer some of the conditions of long-term “employment” to the retention of IP rights in their work. However, while acknowledging this tradeoff, and while recognizing that the balance of power initially favors the industry in this case because artists who are making this choice may not yet be secure, and may not yet have leverage, content industries should recognize that the terms of such contracts are liable to shift if and when the artists they are fostering develop reputational markers such as widespread recognition, star power (that is, the ability to draw and keep large audiences in attendance), the ability to move products (such as recordings) and sell branded merchandise, and so on. Content industries should realize that they have a vested interest in fairly compensating their emerging talent, for many of the same reasons that have been enumerated here: first, the mobility of their workers, and the portability of their works, serves as a counterbalance to the power and leverage wielded by companies and intermediaries; and second, while IP rights in creative output may be retained by the industry and/or its representatives or intermediaries, the creative endeavor itself remains in the control of the artists, and future creative works rest, naturally, on their efforts alone.

3. Examples

The computer software industry illustrates one way in which division between the retention of IP rights and compensation, as well as related rights and rewards, may operate. In the software industry, long-term employees are deemed skilled professionals who are well-compensated with
salary, benefits, and often stock options, but who do not typically retain IP rights in their professional output. These employees also garner reputational benefits in the field, in part by being recognized for their work (for instance, the developer of a software program may be named, be eligible to receive awards, earn noticeable bonuses, and so on), and in part by being sought-after among their competitors and peers. Due to the desirability and job mobility of such workers, software industry companies often try to condition their employment on agreements to stay with the company for a given period of time, or not to transport their work or know-how to a competitor. These non-competition agreements, widely known as non-competes, however, are difficult to enforce, often limited in scope and strength, and subject to lengthy and expensive dispute in the courts. Moreover, skilled software development workers consider such non-competes to run counter to the balance of rights and rewards that are standard in the field. While the software industry may disagree, it is also aware that they may on occasion prefer not to honor non-competition agreements when they are trying to lure a worker away from a competitor. These are among the reasons that job mobility and knowledge portability remain at a premium in the software development industry.

In other creative content industries, such as film, entertainment, and music, established star artists may resemble skilled and talented software developers in certain features of their labor: they have mobility and portability of their talent and success, they cannot be bound for long periods of time by the equivalent of non-competition agreements, and they enjoy reputational


78 Employees may retain rights in work they have created on their own time and using their own equipment, but they must be scrupulous in segregating such efforts, and may face contentious claims if their work leads to IP-protected properties and success. The allocation of IP rights to the employer, which is the norm in the computer industry, is typically made pursuant to standard work-for-hire doctrine. http://wttnews.com/articles/7421/; http://www.tms.org/pubs/journals/JOM/matters/matters-9608.html.

The applicability of the work-for-hire doctrine to education is discussed in Chapter 2.


80 See Weinstein, supra note 79 (noting that many non-competes are not enforceable).

benefits from being associated with, promoted and protected by well-established companies (such as film studios), agents, and other industry representatives. While they typically do not retain IP rights in their output, some of these artists do in fact carve out certain rights that they choose to retain (which is becoming increasingly prevalent as artists become more aware of their rights and options); and even where they retain no IP ownership rights, they do of course retain rights in royalties and other IP-related returns.

They may also resemble tenured faculty in other features of their labor: they have status, longevity, and more or less tenure for life (that is, they are retained by a record label, and upon attaining a certain level of success, are likely to be retained by that label for their entire career). Multiple rewards and rights accrue to creative workers who have achieved high levels of success in their profession: they collect long-term royalties from recorded performances (including reruns and re-issues), long-term reputational payoffs (being a star for a given film studio, record label, or publishing house is mutually beneficial and redounds to the credit of both institution and artist), earnings from IP-related sales, licensing, merchandise, and so on. In this regard, star performers are even better situated than their counterparts in certain other content industries, as they enjoy the benefits of long-term employment as well as earning IP-related royalties; however, like their counterparts, they do not typically retain ownership in the underlying works (although, as noted earlier, this may be changing).

The difference between established artists and emerging artists, however, is stark, and should be recognized and taken into account by content industries. Emerging artists also typically do not retain ownership in their underlying properties. They do earn royalties in their work, but some of these rewards may be sacrificed for placement and visibility goals: for instance, releasing works online may gain audience share, but is not likely to be immediately monetizable. Further, in certain industries the initial contractual terms governing emerging artists may cede the lion’s share of profits in early works to the companies that represent the artists (and typically own the IP rights in their output) rather than the emerging artists themselves. In music, for instance,

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82 See infra note 87 and accompanying text.
83 For instance, they may also benefit from ancillary relationships based in branding and brand promotion, which raises trademark implications that are out of the scope of this paper.
84 This holds true for several industries, such as music, film, journalism, publishing (e-books), and so on.
initial recording contracts often require artists to cede a large percentage of up-front earnings to
the record label, only yielding returns to the artists after a large number of recordings have been
sold. Similar patterns can be found in other industries as well. In film, for instance, initial
signing contracts often require artists to agree to a flat-fee payment for their performance in a
new release, thereby forfeiting rights in royalties that will accrue if the film becomes successful
and over the lifetime of the film.

It is arguable that the differential in terms (and returns) between star artists on the one side and
emerging artists on the other side can be explained by the respective difference in bargaining
power and leverage that they can wield. Still, content industries should be aware of the
discrepancy, and should recognize that in some fields, such as entertainment, publishing, and
journalism, emerging artists may be particularly disadvantaged by not having rights that are
triggered by long-term success. This may prove a disincentive to emerging artists, but it also may
prove an incentive for them to move from traditional contracting arrangements to more
innovative and more favorable arrangements where nascent technologies make them possible. In
the case of music, for instance, some emerging recording artists are now retaining or re-obtaining
rights in their work, releasing works directly on the Internet and thereby bypassing traditional
intermediaries such as talent scouts, agents and record labels. In the case of film, some
emerging actors are requesting up-front payments coupled with the right to take a percentage of
future royalties (and possibly secondary rights). In the case of publishing, some emerging
authors are likewise releasing works directly on the Internet, self-publishing via online
publishers or e-book purveyors such as Amazon, and retaining rights in royalties (and secondary

85 See generally M. William Krasilovsky, The Business of Music: The Definitive Guide to the
Business and Legal Issues of the Music Industry (2007); see also Mitchell Einhorn, Gorillas in
(2008).
86 See Mark Litwak, Contracts in the Television and Film Industry ch.4 (2010).
87 For example, Ingrid Michaelson financed and released her first hits. See Jim Farber, It All Adds Up for
Music with its Masters, Forms Blackened Records, LA Times (Nov. 30, 2012),
http://articles.latimes.com/2012/nov/30/entertainment/la-et-ms-metallica-leaves-label-forms-blackened-
records-20121130.
88 See Dina Appleton & Daniel Yankelevits, Hollywood Dealmaking: Negotiating Talent
Agreements for Film, TV, and New Media ch.7, § 4 (2010).
rights).\textsuperscript{89} And in the case of journalism, some emerging authors are retaining rights to publish their articles in multiple venues, thereby retaining the ability to gain multiple streams of royalties in a given work or body of work.\textsuperscript{90}

Finally, in the case of performance-based industries, content industries should be aware that artists are more likely to focus on live performance fees, merchandising revenues, and IP-based rights and returns that are performance-related, due primarily to the fact that live performance will usually garner greater returns than recorded performance.\textsuperscript{91} In fields such as comedy, cuisine, yoga, or sports instruction, artists will be aware that creative content, brand and value are integrally tied to the persona and performance of the artists themselves: their expertise and know-how, but also their recognizable “brand” identity, their delivery of a performance, their signature characteristics, and so on. In this respect, content industries should recognize that some of the value that performing artists (broadly speaking) offer will inhere as much in their brand and performance as in their lasting recorded creations. In comedy, for instance, comics make the bulk of their revenues in live stand-up comedy, appearances in other live shows (such as star turns in Las Vegas), appearances on television shows (which will trigger recorded performance rights), and so on. While some comics may earn revenues in recorded performances, the market for such recordings is relatively low, and has not seen the returns that it once did. In cuisine, many chefs make substantial revenues in live performances, such as appearing in their restaurants and offering courses to aspiring cooks, private appearances, and appearances on

\begin{itemize}
\item \textsuperscript{91} There are some exceptions, as in the case of comedy recordings made by famous comics, which peaked in the 1950s-80s with the works of Mel Brooks, Richard Pryor, Bill Cosby, Bob Newhart, and Jerry Seinfeld, among others, but these remain the exception rather than the rule.
\end{itemize}
televised cooking shows (which again will trigger recorded performance rights). While chefs do realize returns on specialized cookbooks that trade on their identity and brand, these are closer in nature and size of returns to merchandise and other brand-related products. In yoga and sports-related fields, instructors tend to realize the majority of their revenues in instruction, again including live performances, instruction, and lectures. While they may earn revenues on related materials, such as instructional manuals, CDs or DVDs, or a trademarked set of moves, poses, or plays, these are likely to be ancillary proceeds that supplement the bulk of their performance-related returns.

The implications for content industries that should be recognized here is that artists in performance-based practices will be empowered in negotiations over IP rights and returns by the strength of their creative position: they themselves are the product that is not only valuable but also non-fungible, inhering as it does in their very identities and identity-based performances. While such artists may not need to retain ownership rights in their recordings (although some might, especially if they have the leverage to be able to negotiate such ownership), they also have a powerful argument for garnering significant rights and returns in their performances. As in any situation, of course, established artists are more likely than emerging artists to have and wield real bargaining power. But the take-away that content industries should have is that in performance-related creative fields, performing rights and returns are liable to be the point of contention and control. Insofar as performing artists are able to seek out either new and possibly dis-intermediated means of dissemination of their content or to retain the right of ownership over their content, industry companies, representatives and other intermediaries are well advised to find suitable means of granting artists a host of rewards, services, and other value-adds in order to retain the talent that fuels their field and underlies their path to success.

In sum, content industries should be aware that the terms of contractual arrangements among companies, representatives and other intermediaries, and creative workers and artists are not fixed in stone but are subject to change, and are being subjected to change via the disruptive innovations that have transformed virtually every aspect of their operations, performance and ongoing viability. By taking into account labor relations, and adjusting their business models and legal strategies, content industries should be able to secure fair terms for their companies and
artists, so that both established and emerging creators feel tethered to the content industry in which they should create and thrive. This may mean that content industries will be obliged to grant a greater share of rights and long-term returns, broadly predicated upon success, to both established and emerging artists. It may also mean that the retention of ownership rights in promising IP properties becomes an increasingly contested issue in the content industries—and an issue, moreover, in which artists have greater leverage than they once had, owing primarily to their ability to bring works directly to their audience via new digitally-enabled technologies, mechanisms and devices. But this need not be a cause for alarm among the content industries. Rather, it should be a cause for reconsideration, and possibly recalibration, of the relationship between companies and artists, and of the balance of IP rights and returns that are the prevailing standard in the content industries of today and the future.

II. LEGAL

A. Introduction to Legal Issues

Legal strategies are necessarily crucial focal points for creative content industries striving to rise to the challenges of disruptive innovation. As seen in the cases of the fashion, music and education sectors, they are perhaps the most complicated of areas in which to tackle change, but also among the most powerful and effective tools for building strength and shaping solutions. The means to weigh and choose legal policies and practices, the balancing act that must be made when choosing, and the implications of legal choices are all threads that run throughout this paper, and that together constitute its most forceful recommendation for tailoring strategic solutions that lead to long-term success.

Here, a more streamlined approach to assessing legal issues is offered, to provide creative content industries with the essential outline of what to consider when approaching the analytic challenge. First, creative content industries should ask whether they have IP content, or whether they are a negative space in which IP-based solutions are limited, either historically or by choice, or close to non-existent. In cases where industries rely on IP, they should ask whether it is
properly calibrated to maximize protection, particularly against other measures (such as revised business practices, enhanced technological protections, or renewed commitment to normative codes). Establishing a carefully weighted IP portfolio is especially important when disruptive innovation has transformed the industry’s landscape, as it serves as one of the most effective bulwarks against erosion of creative property values. On the other hand, however, IP protection may not be appropriate for all industries that generate content. Those creative content industries that are constituted as negative spaces, and that are high-functioning despite a relative lack of IP protections, should ask what kind of model best suits their practices and needs. That is, industries that are negative spaces should ask: Is enhanced IP good for your industry? Is a certain amount of room for appropriation or copying beneficial to your industry or is a hybridized model, in which some IP is counterbalanced with a certain amount of leeway for copying, most appropriate for your industry?

**B. How Do You Maximize IP Protection?**

A majority of creative content industries retain IP rights in their valuable properties as a means of securing returns in existing works and ensuring ongoing generation of new works. In some industries, a portfolio of IP rights will best serve to maximize protection and ensure positive returns. Creative content industries should ask if their original works should be protected by copyright, licensing rights, and contractual terms and conditions that retain such rights to creative content owners accordingly. They should also consider trademark rights that may be useful strategically, for various reasons including: to protect the integrity of brands; to prevent dilution that might otherwise occur through consumer confusion; to thwart inferior goods that competitors and/or counterfeiters may be trying to pass off as originals; to allow vigorous pursuit of, and enforcement against, such counterfeiting; and so on. Lastly, some creative content industries should consider seeking patent rights in creative or innovative patentable work, notably when the work is completed and made commercially viable.

In all of these cases, creative content industries should consider the various parties involved in the production and dissemination of creative properties, and should recognize that the allocation of IP rights will necessarily be a significant concern. External third-parties and contractually
obligated partners will naturally require the explication of rights allocations, but other interested parties, such as employees, contractors, and others are also likely to be found at the bargaining table. Moreover, the industries should also consider the rights of the user community, as satisfying users, encouraging their creativity, and assuring users that their rights are as expansive as possible, while still staying fair to the creative originators, are key goals that the creative content industries recognize and embrace.

The myriad considerations that assessing IP rights necessitates must be made in the context of business directives and goals, so that IP control becomes part of an overall strategic plan of attack, rather than serving as a single weapon that is loosely deployed. The most effective IP portfolio should bolster the productivity of a company, industry, and the creative community. Moreover, IP rights should be adjusted to fit the needs and demands of a given time. Thus, for instance, in creative markets that are becoming dominated by licensing rights, rather than outright ownership via purchase and sale, creative content industries should also consider how IP rights will be deployed through licensing and cross-licensing arrangements. These private ordering arrangements will be paramount to the success of creative content industries, and therefore should be carefully conceived, negotiated and secured.

C. If You Are a Negative Space: Is IP Good for Your Industry, Is Copying Good for Your Industry, or Is a Hybridized Model Good for Your Industry?

Negative space creative content companies, particularly those that have been well-established without historically relying upon complex or multi-layered propertization, should likewise consider the importance of revisiting the question of IP rights in their current landscape. In cases of fully fledged industries, as earlier illustrated by the fashion industry, creative turnover, commercial appeal of transitory goods and services, and similar other industry-specific factors should play a large role in determining the IP makeup of a creative content industry and its participants. At the same time, the cultural touchstones of a creative industry should play just as significant a role in helping to set the parameters of propertization and control of creative content. In the Cultural section, below, these factors will be examined in further detail. Negative space industries should recognize that a deeply rooted culture, coupled with wide-scale industry
practices that have proven successful over time, can create a highly efficient system that is not readily subject to change via the imposition of a new layer of IP rights or other such recalibrations of IP properties. Creative content industries that are contemplating new IP measures should recognize, therefore, that their culture itself is at stake, and its diminution or loss may in the long run prove to be equal to or greater than the costs that disruptive innovation can impose on even the most productive and profitable of industries.

**D. If You Are Seeking to Implement or Enhance Your IP Protection, How Much Transaction Costs Would Change Incur?**

Creative content industries contemplating restructuring their IP rights should carefully scrutinize the transaction costs associated with any such changes. Perhaps the clearest transaction costs are raised by the prospect of formulating, implementing, organizing, and maintaining a system for the management of rights, whether within a given company, among various strategically allied partners, or within an entire industry. The negotiation of IP rights among interested parties, including employees, contributing users, third-party providers or contractors, and others, also raises the likelihood that transaction costs will be non-negligible. Further, industry-wide solutions, such as establishing collective rights management organizations, not only requires significant start-up costs and maintenance costs, but also may require legislative change and approval, the costs of which are likely to be passed on, at least in part, to industry stakeholders and participants. These costs are at least foreseeable; what may not be as clear are the costs arising from industry-wide adjustments to a new landscape and new business imperatives and practices that will necessarily ensue. Hardest to ascertain will be which entities will be winners or losers in a landscape arising from significantly altered IP rights and protections. Creative content industry participants should consider their position vis-a-vis their competitors and other stakeholders; and creative content industries should recognize that because creating a coalition among these participants and stakeholders is itself likely to be costly and challenging, it must therefore be shown to be sufficiently rewarding to undertake at all.

**1. Questions for Analysis**
Creative industries are centered on the production of content, and therefore are strongly inclined to protect their core content with at least some measure of formal protection. In some cases, this may entail a complex portfolio of IP rights, including copyright, trademark, patent, and trade secret protection. In other cases, this may entail practices that appear to eschew the more obvious blanket forms of IP protection, such as copyright, but yet harbor certain specific kinds of coverage, such as trademark or trade secret protection. In any case, creative industries need to consider the nature and scope of their IP rights, and should ask a series of questions that will help ascertain the proper balance that they strike, to allow IP rights to protect precisely the work that needs to be protected, while at the same time affording business practices the room to thrive and expand to maximize revenue realization.

First, creative content industries should ask whether they typically have and rely on IP rights, and whether they would benefit from having single or multiple layers of IP protection. An important facet of this question is whether, and how, a content industry uses IP strategically. There are several instances in which this might be the case: for instance, IP may be used to protect an entire area of work (such as a set of commercial goods, processes, and output which may be vertically or horizontally integrated); to enable the best possible balance of propertization and publication; to create strategic advantages vis-à-vis competitors; to promote interoperability; and so on. Second, some creative content industries should ask an opposing question, that is, whether they eschew IP rights, and whether they are benefited by having virtually no IP protection, or by retaining only limited protection in specifically designated areas. This may equally entail the strategic use, or rather non-use, of IP, to achieve key commercial goals. In this scenario, restraint in the use of IP may be profitable in several cases: for instance, maintaining an IP-free or low-IP environment may be used to promote informal practices such as collaboration and creative exchange; to create ample space for creative appropriation, thereby enriching production across the industry; to provide creators with alternatives to formal arrangements for the release of material, such as creative commons-type licenses; to support norms-based practices; to foster communal sensibilities; to promote long-established tenets such as academic freedom, open exchange, community-based production; and so on. Lastly, the curtailment of formalized IP rights may offer creative industries greater freedom in exploring and engaging in a wide range of business arrangements and alliances, particularly in cases in which rights-clearing,
cross-licensing, and other issues involving the management of IP rights may otherwise prove onerous, cumbersome, costly, or challenging to negotiate and settle.

In all cases evaluating IP, or lack thereof, creative content industries should recognize that IP as a strategic tool must be wielded both in concert with other useful tools, such as business practices (for instance, the use of loss leaders, discriminatory pricing, and so on) and norms-based approaches (for instance, the use of social sanctions, communally-determined behaviors, and so on), as well as in the context of an overarching creative environment. From this perspective, the use or lack of recourse to IP should be considered part of a larger vision for creative industries to prepare and undertake.

2. Business and IP Solutions

First, content industries should regard IP as a strategic tool, whether used as a portfolio of IP holdings (such as multiple properties), a single area of coverage (such as the use of trademark alone), or a restraint of protection (such as an low-IP or no-IP practice). As such, IP should be wielded strategically and precisely, to ensure that it protects productive and profitable output without choking off other important features of production, including collaboration and creative alliances, incremental development and/or improvement through a broadly-derived range of inputs and tweaks, the ability to partner and cross-license, publication rights, and so on.92

Second, content industries should consider the role that IP rights play in their respective markets. In cases where IP rights help control transactions, stabilize and reinforce prices, and incentivize creativity, as well as supporting price discrimination and clarifying pricing signals, industry participants should consider amassing IP rights to be an important part of their strategic arsenal. Further, the accrual of IP rights should be wielded to strengthen the ability of content companies to dictate certain key terms in the market: for instance, a powerful IP strategy may allow a

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company to price discriminate; to set the terms of interoperability or, conversely, to create an entirely closed ecosystem; to meter rights and royalties (possibly through the mechanism of a collective rights management system); to add DRM and other anti-theft technologies to vital but vulnerable products and devices; to secure a first mover advantage and marketplace position; to prevent the appropriability of key ideas, know-how, products, work product, and so on; to corner a market (which may have the potential downside of creating monopoly-seeking behavior that could raise red flags among competitors and regulators); to increase the amount that may be extracted from protected material (possibly generating supra rents); to reinforce and clarify price signals; and so on.

To the contrary, however, many content industries flourish when private ordering arrangements abound (and are considered preferable to externally-imposed arrangements, such as publicly or governmentally mandated solutions). The creative industries that most highly value the freedom to make private arrangements (between and among companies, employees, contractors, and other parties) should see payoffs to keeping IP rights cabined in contractual and transactional arrangements. Many creative industry firms may prefer private ordering solutions on an array of grounds, including because they are more flexible, industry-specific and entity-specific; they entail fewer transaction costs; they do not require legislative intervention; they can be readjusted, renegotiated, and renewed; and they can be made privately (or even secretly) among private entities. Creative content industries that consider intellectual property rights in this light should consider that a strategy restraining IP rights may serve various interconnected goals, such as promoting interoperability, enhancing the availability of open source solutions, encouraging secondary production (such as knock-offs and generics), opening up follow-on innovation, and contributing to the stability of a constructed commons. Most of all, restricting IP rights to those strictly necessary may afford creative industries the flexibility and latitude to explore strategic alliances on the spur of the moment, responding to market demands and changes with the swiftness that new technologies and disrupted landscapes often demand. This freedom should be weighed against the utility of IP-based rights and solutions, but it cannot be undervalued considering the vicissitudes of the creative markets and their ever-evolving nature.

93 Jennifer E. Rothman, Copyright’s Private Ordering and the ‘Next Great Copyright Act,’ 29 BERKELEY TECH. L.J. 1595, 1598 (2014). (“In some instances, the best option is for [copyright] law to get out of the way and leave room for a variety of private approaches to flourish.”).
Third, content industries should consider the rights, responsibilities and rewards of employees to determine how best to balance and allocate their IP rights. Employees should be afforded a good measure of job mobility and knowledge portability, both to support their position within a company and to ensure their standing in the market. While this may seem contrary to a firm’s retention of its employees, in the long run having employees that are recognized and compensated by a healthy mix of rewards—possibly including returns in their original output—will strengthen a company’s position and build an industry’s competitiveness across the board. Employees’ rights should be considered paramount, but naturally should not be made at the expense of a firm’s competitive advantage; nor should it compromise trade secrets, investment in high-cost projects, or other costly build-outs.\(^94\) The judicious allocation of IP rights and/or rewards to employees should also help content industries to generate positive network effects and spillover effects, which are particularly vital in the case of knowledge-rich economies (such as technology, biotech, and education sectors).

Content industries that are especially constructed around the retention (and conversely the free flow) of highly skilled employees should consider ceding some IP rights and/or returns to their employees. This may include a non-exclusive license in their creative output,\(^95\) which may be limited over time so that the firm can recoup its initial investment costs; this may potentially allow for employees to exert fuller control over rights in their output over time, or it may carve out certain other rights and privileges, such as the ability of employees to retain publication rights.\(^96\) Alternatively, firms should consider offering employees the option of a Creative Commons-type license that is open and usable by all, but requires attribution and restricts access to output to strictly non-commercial uses and purposes.\(^97\)

\(^{94}\) For instance, in the case of education, the cost of creating online education providers, support systems, MOOCs, and so on should not be compromised by giving full IP rights in courses to academic faculty without ensuring that the institution retain some ability to earn revenue offsetting the initial start-up costs.

\(^{95}\) As in the case of education, as noted supra Chapter 2, Sections IV.C-D.

\(^{96}\) As in the case of scientific research, as noted earlier. Again, as in the case of education, publication rights may be explicitly retained. See e.g., Policies and Procedures, HARVARD OFFICE OF TECH. DEV., http://otd.harvard.edu/faculty-inventors/resources/policies-and-procedures/statement-of-policy-in-regard-to-intellectual-property/.

\(^{97}\) CREATIVE COMMONS, http://creativecommons.org.
The allocation of IP rights and/or rewards to employees requires a careful balancing act. On the one hand, creative content industries are typically eager to create an environment that fosters spillover effects and positive externalities. At the same time, content firms are highly motivated to protect their business model, retain a strategic IP portfolio, and carefully manage their IP rights and returns. On the other hand, creative industries are aware that their competitors will avail themselves of every means possible to retain and reward high-performing employees, which may entail offering key employees IP-based rights and rewards. To remain competitive, therefore, content firms unwilling to cede IP rights or rewards to employees should recognize that they may be at a strategic disadvantage by appearing to offer less desirable employment terms, and may thereby potentially jeopardize their actual or potential workforce. To some extent, this may depend upon the leverage and bargaining power employees bring to the table when negotiating their compensation. But it may also depend upon the competitors’ hiring and recruiting strategies, including extending IP rights or rewards as part of a compensation package. In this vein, creative industries must evaluate whether to extend such rights and returns, even if it may to a certain extent compromise their net flexibility and control over their creative properties and output.

Finally, in certain creative content industries, IP rights and/or rewards may not customarily be ceded, but they may be restrained in order to permit employees to exercise publication rights in their work. Again, in this regard offering the right to publish to key employees should be considered a strategic measure that will help build and sustain an optimal workforce. Creative industries should recognize the competitive value of publication rights, and should consider them part of their IP-based arsenal. At the same time, they should take into consideration other vital interests that may be served by publication among their employees, such as supporting scholarship, rewarding collaboration, receiving peer recognition for significant intellectual contributions to the field, rewarding creative and innovative output, encouraging originality, contributing to a rich scholarly and public domain, and reinforcing a host of shared values, norms-based practices, and communal exchange. The value of publication may to a certain extent stand in the way of amassing and wielding IP rights and garnering IP-based returns. However, a heavy-handed emphasis on IP properties can stifle innovation, throw up impediments to creative exchange (such as patent thickets), and in the long run reduce the reputational capital
that is often integral to creative content industries. \(^9\) Therefore, content industries should not only consider sharing their IP-based rights and/or rewards with productive employees, but should also consider when those rights and rewards should be restrained in order to further other equally important goals, such as fostering research and development, scholarship, and exchange.

3. Examples

Content industries whose profitability springs from the ongoing generation, monetization and exploitation of innovative and/or creative products are most likely to have significant IP portfolios. Technology companies, biotech firms, the computer industry (both hardware and software), and the pharmaceutical industry offer a few major examples of IP-rich sectors that have a long history of building multilayered IP holdings and wielding them strategically. \(^9\) In these sectors, IP rights are held for a variety of purposes, including bolstering cross-licensing potential, protecting possible areas of development (for instance, patenting basic research that may lead to new discoveries), positioning strategically against competitors, preserving (or in some cases thwarting) interoperability, or incentivizing employee productivity. But it is not only the technical sectors that value and emphasize the propertization of output. The entertainment industry, including music, film, television, and cable broadcasting, also ensure that their core creations are IP-protected, and moreover consider their ownership of IP properties as central to their productivity, profit model, and net worth. \(^1\) Similarly, the education sector protects at least

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some of its properties and creations for various reasons that may also be tied to motives of providing incentives, protecting licensing and exploitation rights, and maintaining competitiveness in an increasingly global marketplace.\footnote{See Sheldon E. Steinbach & Bruce T. Wieder, \textit{Protect Your Patent Portfolio}, INSIDE HIGHER ED (Apr. 24, 2008), https://www.insidehighered.com/views/2008/04/24/steinbach.}

Other creative content industries find that not protecting core properties, or only protecting them in certain strategic cases (such as the use by of trademark in anti-counterfeiting situations that arise in the fashion industry) can serve their purposes more aptly than large-scale propertization. As in the case of fashion, which demonstrates a singular economic structure predicated upon high turnover of goods, creative appropriation, and consumer-driven commerce, certain creative industries find that their particular make-up is less prone to seek recourse in IP protection and more interested in maintaining openness and pursuing profitability through other means. In the case of creative industries such as cuisine, comedy, some of the performing arts such as ballet and dance, yoga, certain sports activities and maneuvers such as football game plans, and so on, refraining from propertizing certain creative acts, routines, moves, and other output is a strategic choice that can allow monetization of creation while still providing room for future innovation, exchange and collaboration, artistic appropriation, and creative flexibility. This is not to imply that a draconian solution removing all IP from the landscape is the sole option available to content industries. Rather, only certain creations may be considered ripe for propertization, while others may be considered valuable without requiring the formalities of IP protection to be undertaken.

In the case of cuisine, for instance, propertizing cookbooks, particularly those with valuable annotations and notes, may be deemed to add value to a chef’s creative output, while the performative acts of cooking in front of a live audience, creating meals in a restaurant, teaching

apprentices a master’s cooking secrets, and the creation of new recipes may all be deemed worth bringing to the market without property rights necessarily attached. Likewise, in the case of comedy, performative routines tend not to be IP protected, in part due to the singular and personalized nature of jokes and routines, as well as the drive to produce fresh material that is rife among comics, the reputational benefits that accrue to creative comics (which outweighs the cost of possible appropriation without attribution), and the interest in gaining exposure to wide audiences without needing to clear the barriers of propertization (such as seeking permission, licensing, and so on) in advance. In these cases, as in the case of certain other creative industries, restraint on IP protection becomes a strategic tool for maximizing profitability, retaining a successful creative environment, and incentivizing future production.

III. TECHNOLOGICAL

A. Is Technological Protection Good for Your Industry?—Introduction to Technological Issues

Creative content industries are well aware that technological protection offers a powerful barrier to thwart appropriation of valuable content, thereby not only protecting a key incentive to create and reap the profits of creation, but also ensuring that creative ecosystems can be grown without unfairly requiring their originators to assume undue risks. Yet many such industries overlook the often complex and subtle tradeoffs that adding technological protection to content may entail, and the long-term effects of content lock-up that may affect a company, industry, or entire creative ecosystem. The questions that must be asked begin with the effectiveness of technological protections adopted by an industry, but then expand to ask how much the industry values interoperability, as well as the extent to which protective technologies enhance, curtail, or otherwise affect positive externalities that may be intrinsic to a given creative industry. As the overarching questions regarding technological protections are closely entwined, their challenges and proposed solutions are addressed together.
B. What Technological Protection Do You Have in Place and How Effective Is It

Bearing in mind that technology is fundamentally a means of securing an optimal balance between business and IP solutions that ideally lead to industries thriving even in the face of disruption and change, creative content industries should appraise their technology solutions and needs with careful deliberation. First, content industries should ask whether their technology is effective, flexible, adaptive, and cost-effective. Second, they should ask whether it achieves its intended purpose, but also whether it is properly cabined rather than exceeding the appropriate range of reach. Third, they should ask whether the technology is accepted by the user community. This is often overlooked or given short shrift, but it is an important consideration, as the user community is not only the consumer base but can also serve many important purposes, such as spotting real issues and trouble-shooting (particularly in cases where open source development is encouraged by industry participants); seeking out and rewarding the strongest innovators (which conversely can be problematic for companies that are not wielding their technology effectively or lagging behind in the technological arm’s race); and embracing companies and products that have the best balance of technology and openness in the marketplace. Finding the proper technological balance is admittedly likely to a challenge. On the one hand, technological protection, such as anti-counterfeiting technology, may be required to protect core properties and returns. On the other hand, however, technological openness may contribute to new forms of creativity, new revenue sources, and renewed participation in the creative community. The determination of technological adoption, therefore, must not only be

102 A useful case in point is the music industry: technological protection has not worked particularly well in preventing piracy; nor has it proved a panacea against the loss of content value that has ensued upon industry-wide changes to the music business model, product pricing, and delivery systems. See supra Chapter 3, Section I.E.
103 In the fashion industry, anti-counterfeiting technology has proven at least somewhat effective in curtailing rampant copying of high-end branded goods (although fashion industry participants are still forced to play catch-up with counterfeiters, to an extent that is often described as “whack-a-mole”). Examples of anti-counterfeiting technology in fashion include special paper, watermarks, intaglio printing, geometric lathe works, holograms, and microprinting.
104 In the case of music, some artists such as jam-bands allow and encourage copying, restraining themselves from using any anti-copying technology or practices; this enables at least a subset of musicians to make a living almost exclusively from live performances & merchandise rather than from recording revenues. It also enables fans to appropriate music creatively, making, recording, and disseminating their own versions of songs, crafting new works that respectfully reference the originals but creating imaginative versions that are wholly new. This is a tradition that would have been lauded by
industry-specific but also company-specific. Overall, however, content industries should recognize that technology is only a tool, and should not be allowed to comprise the major mechanisms that support and protect an industry’s vitality.

C. How Much Do You Value Interoperability?

Technological protection may be a valuable tool for creative content industries, but it also may entail costs that should be assessed and weighed in the balance. The greatest of these costs may be interoperability that, as has been discussed, can be a dual-edged sword. On the one hand, locking users into a single ecosystem may lead to supra-normal rents, as users are compelled to consume products, services, and resources using one set of devices that are offered by a single manufacturer or closed group of manufacturers. This may lead to consumer loyalty and satisfaction with a given ecosystem, which may include its providers, creators, and delivery systems. But it may also generate consumer dissatisfaction with the restrictions, perceived or real, of a closed system, such as a lack of access to other distributors, a limitation of content to that which is on offer (presumably offered by strategic partners who have agreed upon the terms of content release), a possible curtailment of user rights due to IP protections (for instance, limited copying even for personal use, limited rights to re-create or build upon creative output, and so on). The returns that interoperability can generate, therefore, may weigh in the balance against the potential costs that it can impose across an industry.105

There are other tradeoffs to interoperability as well. A closed system may also allow content creators, as well as manufacturers of technology carrying content, to exert considerable control over third-party providers who want to join the ecosystem, such as offering third-party applications.106 In the closed and non-interoperable system, then, creative content industries should recognize that they may be able to leverage their centrality by capturing a significant

Mozart and Haydn, as well as a host of classical composers and musicians, not to mention traditional American roots, R&B, blues, jazz, and rock artists.


106 See id. at 10.
market share, not only compelling users to consume their content on the terms that they are able to set, but also compelling other participants such as third-party manufacturers or strategic partners to accede to the terms that an ecosystem may establish and control.\textsuperscript{107} While this may seem attractive to creative content industries, there is again a cost: namely, the loss of flexibility that a closed system may entail. By establishing a closed ecosystem, creative content industries may commit themselves to a relatively locked structure that is resistant to sweeping outside changes in technology, user preference, competitive costs and pricing, and so on.\textsuperscript{108} As disruptive innovation so often entails technological change, and as technological change can be swift, seismic, and inexorable, creative content companies must be wary of being trapped by a well-enclosed ecosystem into a position that cannot respond to innovation with the same speed and adaptability that smaller, more agile market competitors can marshal.\textsuperscript{109} Creative content industries that have already been challenged by disruptive innovation are especially well-positioned to recognize that such flexibility is paramount in an ever-changing world, and thus should assess the value they place on interoperability accordingly.

\textbf{D. What Kind of Positive Externalities Do You Have?}

Creative content industries should be aware that paired with interoperability questions are considerations of positive externalities, such as the ability to grow or scale growth as users are added to the system, which can generate massive potential for creative content industries to build out and grow profits in the long run. Thus, for instance, nascent industries are likely to build their user bases from scratch, and may require a period of time to achieve a certain mass and stability. Over time, however, the user base can reach a tipping point that leads to a much more rapid and exponential phase of growth, in which users are multiplied due to such factors as inclusion from other user bases (for instance, users of a technological device will be compounded by users of other linked devices, third-party apps, or related products and services), exclusion from other

\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.} at 17.
\textsuperscript{109} For instance, size, complacency, and a lack of agility when confronted with digitization are typically cited when describing the demise of the famous maker of camera film, Kodak. \textit{See e.g.,} John Kotter, \textit{Barriers to Change: The Real Reason Behind the Kodak Downfall}, FORBES (May 2, 2012), \url{http://www.forbes.com/sites/johnkotter/2012/05/02/barriers-to-change-the-real-reason-behind-the-kodak-downfall/}. 509
incompatible locales, and so on. In addition, passing a tipping point may also lead to a realization of economies of scale, at which point greater efficiencies are achieved than could otherwise be achieved at lesser magnitudes and among a smaller user base. These efficiencies of scale may include reduced operating costs, enhanced marginal returns, greater services provided at the same or lesser cost, and ultimately larger net profits. Further, the increase in users can actually enhance the utility and value of industry products and services to other users. These network effects, or positive externalities, will generate positive feedback loops that are immensely important to building creative content industries, supporting the growth of creative enterprises, and supporting both content creators and generators.\footnote{Creative content industries should consider whether or not technological protections advance or impede such positive externalities. In some instances, technological lock-in may enable an ecosystem to keep users loyal to one set of products and devices, achieving some of the same goals that lack of interoperability can offer.\footnote{See generally CAL SHAPIRO & HAL R. VARIAN, INFORMATION RULES (1999).} In other instances, however, technological lock-up may exclude users who might otherwise participate in an ecosystem but who do not want to be restricted in their freedom of access and use.\footnote{See generally Robert M. Metcalfe, All In Your Head, FORBES (Apr. 20, 2007), http://www.forbes.com/forbes/2007/0507/052.html. See also Josepah Farrell & Paul Klemperer, Coordination and Lock-in: Competition with Switching Costs and Network Effects, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1967 (M. Armstrong & R. Porter, eds. 2007).} This may present some of the same drawbacks associated with a lack of interoperability, such as reducing the ability to achieve significant scale or related economies of scale. The tradeoff for creative content industries is therefore crucial to their long-term plans for viability and growth, and technological protections should be viewed with the goal of advancing positive externalities kept foremost in sight.

1. Business Solutions

Creative content industries may differ widely in their technological needs, options, and solutions, as well as in the degree of sophistication they may require their technologies to offer (this may vary with cost effectiveness concerns, the challenges faced, knowledgeability, and adaptability of users, pace of innovation in the industry, the often-competing interests of industry stakeholders, and many other factors). In some instances, technological lock-in may enable an ecosystem to keep users loyal to one set of products and devices, achieving some of the same goals that lack of interoperability can offer.\footnote{Farrell & Klemperer, supra note 111, at 2055.} In other instances, however, technological lock-up may exclude users who might otherwise participate in an ecosystem but who do not want to be restricted in their freedom of access and use.\footnote{Robert M. Metcalfe, All In Your Head, FORBES (Apr. 20, 2007), http://www.forbes.com/forbes/2007/0507/052.html. See also Josepah Farrell & Paul Klemperer, Coordination and Lock-in: Competition with Switching Costs and Network Effects, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1967 (M. Armstrong & R. Porter, eds. 2007).} This may present some of the same drawbacks associated with a lack of interoperability, such as reducing the ability to achieve significant scale or related economies of scale. The tradeoff for creative content industries is therefore crucial to their long-term plans for viability and growth, and technological protections should be viewed with the goal of advancing positive externalities kept foremost in sight.

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and other factors both indigenous and exogenous to the industry). Notwithstanding such differences, however, there are certain business strategies and solutions that will be relevant to virtually all content industries. From the outset, technological change should be approached conservatively: technological solutions tend to be costly, and are not likely to be a cure-all for deeper industry issues that have been brought to the fore by disruptive innovation. Further, the pace of innovation is a dual-edged sword, bringing new solutions to the market but not always vetting such solutions for utility and effectiveness; and the necessity of vying in a crowded field does not always yield the best-fitting technological choices among the most popular ones.\textsuperscript{113}

Most importantly, technology is always a moving target, as has been amply demonstrated by the emergence of disruptive innovations—including, in the music and entertainment sectors, recording devices ranging from the cassette player, the CD, the DVD, and more recently to TiVo and Aereo\textsuperscript{114}—which argues for caution, rather than precipitate change. The reaction of creative industry markets to technology is equally a moving target, and may not be readily predicted or corrected. The optimal strategy, therefore, is to address the root causes and ramifications of disruption with solid business strategies and well-tailored IP solutions, rather than merely resorting to technological protections.

Despite this cautionary notice, many creative industry participants remain persuaded that they require technological protections to prevent theft, unwarranted use, revenue-reducing activities, or other threats to their valuable content, products, and creative incentive plans.\textsuperscript{115} It is vital that the creative industries recognize, however, that, while technological protections may be valuable,

\begin{footnotes}
\item[113] See \textit{supra} Chapter 3, Section IV.A. Many critics point to the entertainment industry as an example, in which dominance of the recording device market by VHS systems over BetaMax systems has been argued to be emblematic of the market choosing an inferior product to a better one. See \textit{supra} note 15 and accompanying text. Similarly, in the music industry, the emergence of Beats By Dre headphones, not especially renowned for sound quality (with what many argue to be a marked overemphasis of bass), may be an example of consumer appeal trumping quality measures. See \textit{Are Beats by Dr. Dre Headphones Worth the Money?}, CONSUMER REPORTS (May 14, 2013), http://www.consumerreports.org/cro/news/2013/05/are-beats-by-dr-dre-headphones-worth-the-money/index.htm.
\item[114] Note for e.g. Jack Valenti’s dramatic comment predicting that the DVD would spell the demise of the movie industry (which it most certainly did not, rather contributing handsomely to its growth). See \textit{supra} Chapter 3, Section II.B.
\item[115] See, e.g., Brian X. Chen, \textit{In a Bay Area Courtroom, Lawyers Hit Replay on Apple’s History}, N.Y. TIMES (Dec. 2, 2014), http://bitsblogs.nytimes.com/2014/12/02/in-a-bay-area-courtroom-lawyers-hit-replay-on-apples-history,
\end{footnotes}
they may also come at a steep cost, which must be weighed against their benefits and ultimately estimated to yield net positive results. Creative industries should recognize these myriad costs associated with the adoption of technological measures designed to protect creative properties, and should assess and act accordingly.\textsuperscript{116} Several technological measures illustrate the cost-benefit calculus that underlies this approach. For instance, anti-counterfeiting devices (such as watermarks and other identifiers) are useful, but work only until sophisticated counterfeiters devise new workarounds, copying methods, or other means of subverting or avoiding detection.\textsuperscript{117} Similarly, firewalls protect content from illicit access and use to a certain extent, but can be thwarted by third parties that post links to the protected content, or can otherwise be evaded (for instance, the use of multiple access accounts, and so on).

Equally dual-edged are anti-copying protections, devices, or measures (such as limiting access to paid content or forbidding reverse engineering of technological protective software and/or devices), which effectively cabin content but run the risk of alienating core consumers, thereby potentially jeopardizing key industry business models.\textsuperscript{118} This is particularly risky when consumers feel as though their rights to content they have purchased, licensed, or otherwise legitimately accessed are being unfairly curtailed, changed, or rescinded.\textsuperscript{119} Creative content


\textsuperscript{117} This is exemplified by the arms’ race in the fashion industry, with the added wrinkle that some of the counterfeiting may occur at the originator’s manufacturer when it is outsourced to countries that have high degrees of counterfeiting activities, such as China.

\textsuperscript{118} For example, the Apple FairPlay DRM technology has proven unpopular, which arguably only somewhat offsets its utility and value. See, e.g., Chen, supra note 115.

\textsuperscript{119} This happens particularly when their rights to content is established through prior practice or policy. In the music industry, for instance, recently imposed restrictions many commentators have argued have alienated consumers include restrictions on previously permissible uses, such as unlimited copying of content on one’s own personal music devices; restrictions on the ability to “rip” new CDs and share music
industries should strive to make their technological protections most effective, while yet bearing in mind users’ rights, consumers’ desire and demand for choice, and the reality of today’s innovative technologies that enable tech-savvy amateurs to copy, and even to distribute, content easily, cheaply or freely, and widely. These activities may seem counterintuitive to the protective aims of content industries, as well as to the incentive structure that are enshrined at the heart of intellectual property laws, practices, and policies, but they are innately creative activities that can serve highly positive purposes, such as increasing user engagement with content, spurring net creative output, and enriching the creative domain.

Overarching these concerns is the potential that technological measures have for restricting interoperability of content, devices and delivery systems, and supplementary content and materials developed by third-party providers (such as support platforms, apps, GPS systems, tracking devices, games, and so on). Interoperability offers an especially complex technological concern, as it may present the ability to lock up an entire market (particularly if the leading company has garnered significant market share), but at the same time may prove an obstacle to creating strategic alliances among content industry participants, third-party providers and other useful entities (such as rights management organizations, supporting institutions, and so on). Thus, creative content companies should understand that there may be unintended negative consequences that ensue from the overuse of protective technologies, as evinced when thwarted interaction or systemic lock-ups prevent industry participants from staying flexible and adaptive.

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120 Both creative content companies and their potential strategic allies can be made aware of these concerns and can address them with concerted and purposeful strategies. Many developers of applications that may be complementary to content acknowledge the challenges of interoperability and integration among content providers operating systems, and other interested parties. See, e.g., The Challenge of Cross-Platform Development, APP DEV. ALLIANCE, http://www.appdevelopersalliance.org/interoperability-the-challenge-of-cross-platform-development. Even the main operating systems are cognizant of these concerns as well. For an interesting comparison of Apple vs. Microsoft in this regard, see Fahad Al-Riyami, Interoperability: Pushing Towards a Unified Experience on Microsoft, Apple, and Google Platforms, WINBETA (Oct. 22, 2014), http://www.winbeta.org/news/interoperability-pushing-towards-unified-experience-microsoft-apple-and-google-platforms.
only to find that they are confined to an ecosystem that is rendered obsolete by technological innovation, consumer resistance, or other inexorable market forces.

2. Examples

Creative content industries offer diverse examples of how technology can be well-utilized, particularly when paired with strong business solutions; but they also offer other examples of technologies that are poorly executed, intrusive, or unbalanced, and have negative repercussions. In the case of protective firewalls, for instance, the computer industry presents several examples of highly functional firewalls, developed and refined over time, that serve to protect data, user privacy, know-how, and proprietary materials. But in the creative industries, the functionality of firewalls, or more commonly paywalls, often used to combat illicit or unpaid access or use of valuable content, has sometimes proven to be more problematic. The journalism industry, for instance, has not yet found an effective and viable use of paywalls coupled with business strategies. Reputable newspapers and magazines, such as the New York Times and the Economist, placed their key content behind paywall protection, seeking to compel longstanding readers to pay for content on a subscription basis for current news and/or a per-article basis for archived content. There are, however, relatively easy work-arounds that users have found allowing them to obviate the paywall protections, such as reading sites that aggregate

121 The only exception that seems to have succeeded in protecting journalistic content is the Wall Street Journal, in part because its target market is highly specific and targeted, and its news has proven invaluable to its readership. See Michael Nevradakis, Behind the Paywall: Lessons from US Newspapers, GUARDIAN (Mar. 27, 2013), http://www.theguardian.com/media-network/2013/mar/27/behind-paywall-us-newspaper-websites (noting that the Wall Street Journal implemented its paywall in 1997 and only registered a 15% decline in print circulation in the following fifteen years). The Wall Street Journal is an interesting exception, however, because while its content is valuable, it does not seem to be so unique that it is not somewhat fungible with its competitors’ news, such as that provided by Bloomberg News and others. Yet it thrives, and manages to attain subscription numbers that are the envy of its peers in the journalism industry. See The Wall Street Journal, NIEMAN J. LAB, http://www.niemanlab.org/encyclo/wall-street-journal/ (noting that the Wall Street Journal had 917,000 digital subscribers in 2013).
and post links to content, using multiple accounts to avoid article limits (typically, newspapers only allow users to access a limited number of articles per month without charge), accessing go-between sites that repost articles and links, and so on. Moreover, other content providers, such as online magazines, blogs, or group and political publications (such as Talking Points Memo or Politico) have joined the online sphere, adding to the competitive pressure on more traditional news sources. The turmoil that disruption in this industry has seen is well-documented, and has certainly not been quelled by technological means or other more drastic measures. The services and devices that effectively enable newspaper and magazine readers to make an end-run around technological protections, which are intended to keep content proprietary and to retain its commercial value, undermine the business model of the journalism industry. Most of the major newspapers and magazines in the industry are still wrestling with this conundrum, and continue to seek new ways to wield technological protections such as firewalls to support their at-risk business models.

Many similar issues have arisen in the creative industries that look to anti-copying devices to protect their content. Illustrative is the publishing industry, which is contending with the vulnerability of e-books to illicit copying and appropriation. Publishers have attempted to place anti-copying protections on e-books, somewhat analogous to anti-copying mechanisms on digital songs and musical content, as well as on film, media, games, and other entertainment and

123 “White knight” rescues, such as Jeff Bezos’ purchase of the Washington Post or Carlos Slim’s purchase of a large share of New York Times stock, do not seem to have panned out. See Janet Asteroft, Progress Report on Jeff Bezos Transforming the Washington Post, PBS (Jan. 14, 2015), http://www.pbs.org/mediashift/2015/01/a-progress-report-on-jeff-bezos-transforming-the-washington-post/. Infusions of cash appear to be stop-gaps, but only seem to be slowing, rather than reversing, the demise of even the best-established journalism outlets.


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cultural content. Many publishers are finding, however, that anti-copying measures are proving as unpopular to their readership as they are to music listeners, movie watchers, and game players. This supports the proposition that the public relations problems that Apple experienced with respect to their digital rights management (DRM) protection, FairPlay, was not an isolated incident, but instead is germane to a host of creative industries. In the publishing industry, a similar outcry arose when publishers not only protected e-books with anti-copying technology but also restricted the release of e-books to public libraries, schools, and other community-oriented venues. Eventually, the publishing industry was compelled by the response of its user community to relent, releasing its e-books to libraries and other such institutions with strict restrictions upon the use and circulation of their published content. The publishers’ dilemma—that is, trying to quell appropriation while needing to provide adequate access to its materials and satisfaction to its broad user community—vividly illustrates the importance of balancing technological protections of content and related revenue against the need to preserve access, satisfy consumers, and limit incursions on well-established and valid use of materials for educational and enrichment purposes.

The film and media entertainment industries have likewise faced dilemmas regarding the use of anti-copying technology to protect their properties and safeguard their revenue streams while striving to satisfy consumers, incentivize creativity, and enrich the cultural domain. In the case


129 The vast unpopularity of the Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified at scattered provisions in 17 U.S.C.), may also be regarded in this light as part of user resistance to both anti-copying measures and related policies, such as restrictions or bans on reverse engineering of such measures and devices, strict sanctions for attempts to circumvent anti-copying measures, and so on. For a discussion of the Act, see supra Chapter 3, subsection II.B.5.


132 The movie industry is cognizant of this issue, and has made attempts at solving it at various times. See Michael Arrington, Movie Labels to Launch New “Open Market” Play Anywhere Scheme as Last Ditch
of the film industry, technological protections create lock-ups particularly problematic for international consumers who may seek access to content released in various markets both at home and abroad. DRM protections that are placed on movies domestically usually render those movies incompatible with foreign devices, unavailable in original form in foreign markets, and sometimes inaccessible to foreign consumers. Particularly when films in high demand are released on a “worldwide” basis, global audiences eagerly await access to such products and are liable to be vociferous in their disappointment if they do not have immediate access to the works. At the same time, there is a domestic counterpart to the problem: films that are distributed for first release in movie theaters are in high demand, but large audiences will clamor for their early release in second release forms, such as in DVD and BluRay formats, on services such as Netflix and Blockbuster, through distributors such as Amazon Prime, and via online streaming sites. At the initial release of films, therefore, the combination of international demand for interoperable works and domestic demand for multiple release and formats of content render new films especially vulnerable to copying, appropriation, and illicit distribution. Sometimes, but not always, such copying is meant for commercial purposes; however, even when intended for private use, the copied content represents a revenue loss for film producers that they are unsurprisingly loathe to assume or forgive.

In responding to these concerns, the film industry has devised an ingenious solution: it makes films available in sequential “windows” of release, which are staggered to maximize viewership, revenue, and audience satisfaction. The first window of release is typically known as first-release in prime movie theaters, domestically and/or worldwide, in exclusive showings. At this juncture, films are fully armored with technological protection, and cannot yet be copied without

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134 Id.


137 Id.
some loss of quality, so that commercial appropriation is not viable. The second release of films is via other distribution services, providers, and devices, as discussed above, and while equally impregnable with respect to anti-copying protection, is perhaps somewhat more susceptible to personal copying, such as via “ripping” personal copies of DVDs, copying some streaming sessions online (if the user is sophisticated enough to know how to circumvent protections, which has proven to be the case on certain occasions), and so on. Further releases will occur in less significant venues, such as second-run movie theaters, release to libraries and other public resource institutions, and releases in smaller international venues. While not impervious to copying—for instance, the depredations of large-scale illicit copyists and distributors such as Pirate Bay still prove to be as vexing to the film industry as their counterparts continue to be to the music industry—these sequential windows of release remove some of the pressure to thwart copying felt by the industry, satisfy consumers with multiple opportunities to see and access their preferred content, and eventually allow content to make its way to more public resources such as libraries, teaching institutions, and so on.

Interestingly, some music streaming services, such as Rhapsody, are beginning to contemplate a similar model of staggered or “windowed” releases, in which music is released first to paying subscribers, when it is at the height of its popularity and thus commercial value, and only later to listeners who do not pay fees but support the service by listening to ad-supported online radio. Book publishers are also considering following suit by staggering digital release dates of e-

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138 Copying via hand-held devices such as camera recorders, iPhones, and so on, does not represent a significant threat, partially due to this loss of quality. But it is possible that technology in personal electronics will evolve to the point where this becomes a concern in the future.


140 Note that Spotify does not have the windows of release option, which may be part of the reason they are in disputes with the hugely popular artist Taylor Swift, who feels that releasing her music online does not adequately compensate her creativity or protect her revenue stream that, as she claims, represents her livelihood. See supra note 47.

books, a move which has met with mixed response. In both these cases, then, anti-copying technology is used to protect the product, but flexible business models reduce the negative impact of content lock-up, and at times provide the means for the creative industry to release the music at a later date, after the period of greatest commercial value has passed, to a wider audience that is not willing or able to pay full freight to gain access to the content. The value in leaving this latter option open lies in part in satisfying the widest possible band of audiences, but it also increases exposure to creative content, thereby ensuring that the content will gain the largest familiarity possible among actual and potential consumers. It also increases the likelihood that such content will provide a baseline resource for future creators, only some of whom may be able to pay to gain access to such content. By harnessing technological protection to business plans that maximize the monetization of content but leave room for user enrichment and exposure, the film and music industries are adopting a well-balanced strategy that bodes well for the long-term success of their creative endeavors and commercial viability.

Lastly, legal databases offer a different perspective on technological protection. The two main competitors in this field, Lexis/Nexis and Westlaw, have been battling for market share in the area of legal resources, information, services, and “content-enabled workflow solutions.” Both services have highly proprietary models that are, of course, technologically protected. Yet they offer a strikingly similar array of data, information, research, resources, and services. It is in the nature of their technological tools that they differ and aim to distinguish themselves among their user base. Each has proprietary search tools and capacities, formats, page delineation systems, organizational devices and aids (to assist legal researchers in managing data and findings), and so on. While technologically protected, the materials that Lexis and Westlaw most value are the means and methods that they offer to researchers, rather than any of the underlying

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146 Id.
information, data, or resources (most of which would, at any rate, be challenging to propertize).\textsuperscript{147} In relying on their technological innovations to vie for and secure market position, Lexis and Westlaw emphasize propertization and protection of their services and research tools as the fundamental value-add of their business model.\textsuperscript{148} In the case of these legal databases, technology is used in conjunction with IP rights to protect innovations in search methods, research tools, and organizational aids. These innovations are a form of creativity akin to creativity in the production of content; but the content itself, unlike in other creative industries, are not deemed creative works that merit protection. The legal databases, however, still serve to highlight the importance in content industries of determining where the valuable product and service inheres, and what precisely should be accordingly protected, propertized, and monetized.

IV. CULTURAL

A. Introduction to Cultural Issues

For virtually all creative content industries, the nature of their cultural ecosystem—bound to be highly individualized in its construction and particularized in its ramifications—should be considered at the very outset of shaping business and IP policies. A cultural ecosystem may comprise various commons-like aspects, institutional support structures, certain cultural features, room for open source or non-propertized production, and so on. When disruptive innovation occurs, its effects on the ecosystem should be still more closely examined, and responses should be crafted to accommodate vital cultural attributes that underpin creativity, productiveness, and commercial success.

A series of initial questions should be posed to frame cultural concerns; and the outcomes of this multi-pronged inquiry should be taken as the baseline for industry adaptation and adoption of any new changes in policy, practices and strategies for the future. These questions are deeply


interconnected—at times overlapping in certain respects—and thus should be considered systemically insofar as possible. The vital questions that creative cultural industries must ask are: (i) Do you have the critical features of a constructed commons/guild; and/or are you supported by an institutional edifice? (ii) Do you have important cultural features that substitute for some of the operations of a formalized legal IP system? That is, (a) Do reputation, attribution, and homage work? (b) Do prizes and rewards work?149 (c) Do your norms and practices inhibit stealing? (d) Are there sanctions within the community against stealing/plagiarism/outright copying? (iii) How much room is there for open source production? and (iv) How much spillover/network effects can your industry produce?150

**B. Do You Have The Critical Features of a Constructed Commons/Guild? And/Or Are You Supported by an Institutional Edifice?**

First, some creative content industries will have the hallmarks of constructed commons or guilds, featuring: strongly defined and united communities; internalized guidelines for behavior, such as a communal belief in collaboration, openness, sharing and interdisciplinary or cross-cultural efforts, outreach, and output; a sense of membership in the given community that may be either structurally defined or unspoken yet well-limned; self-governance rules, policies, practices, principles and norms; institutional support systems; and so on.151 In some cases, creative labor may be premised on, and supported by, established long-term institutional arrangements, some of which may be formalized in contracts and other concretized agreements, others of which may be more loosely arranged (such as short-term stays at institutions, affiliations, and so on).152 Further, some institutions in the creative content realm may establish normative policies and procedures able to assign rights and responsibilities, support key community-held principles, and achieve


150 See generally supra Section III.D.


152 In the case of education, for instance, long-term arrangements such as tenure-track and tenure positions, administrative roles, and so on tend to be highly formalized and managed within an institution’s organizational structure. There are looser affiliations, such as visiting faculty roles, adjuncts, and others, but these too are subject to contracts, albeit typically shorter-term and less binding on both sides.
other vital objectives, with or without attaching the propertization of content and/or the distribution of IP rights and rewards.\textsuperscript{153}

But the hallmarks of constructed creative commons may not always be so intangibly drawn. They may also include powerful institutionally granted financial supports designed to benefit legitimized members of the creative community.\textsuperscript{154} These supports may prove essential in times of disruption, for they can allow creative work to be ongoing without necessarily requiring immediate (or possibly even long-term) returns. Such support may include deep operating budgets earmarked to underwrite innovative projects, new ventures, and creative output that may not be readily marketable or monetizable.\textsuperscript{155} Support may also be extended in the form of non-monetary incentives and rewards, which can be equally gratifying to creative projects spearheaded by visionaries who have not yet determined the commercial value or viability of their output, but who believe that their work will lead the way to responding to, and overcoming disruptive innovation in their creative content industry.\textsuperscript{156} It behooves creative industries to take these elements into consideration, and to recognize the strength and utility of constructed commons in spurring and supporting new innovative endeavors and creative output.

\textsuperscript{153} In education, some of these rights and responsibilities include tenure rights, publication rights, academic freedom, and professional autonomy.


\textsuperscript{155} In education, this may include institutional support, including financial backing, reducing teaching loads, and coverage of expenses, for the development of MOOCs, online teaching platforms, and so on. This kind of institutional support is particularly helpful when such innovations need not be monetized immediately, so that experimental efforts, adjustments, new creative and pedagogical projects, and other output may be generated without the immediate to justify or recuperate costs. At the same time, however, this may encourage work that is not likely to be self-sustaining in the long term. Educators must, therefore, consider whether or not they consider such work to be compatible with their budgets, time management plans, and priorities.

\textsuperscript{156} Penn Online Contract (on file with author).
C. Do You Have Important Cultural Features at Work that Substitute for Some of the Operations of a Formalized Legal IP System? That Is, (A) Do Reputation, Attribution, and Homage Work? (B) Do Prizes and Rewards Work? (C) Do Your Norms and Practices Inhibit Stealing? (D) Are There Sanctions Within the Community against Stealing/Plagiarism/Outright Copying?

Second, the cultural space creative content industries inscribe is also likely to have key features that drive behaviors and practices, underlie norms and value-based guidelines, and incentivize creativity. Some industries will find that these cultural features substitute for some or all of the operations of a formalized legal IP system, while others will find that they are entwined with IP rights and rewards, and serve as a buttress that is difficult to quantify yet essential to success. The cultural features that prevail in creative industries are richly varied, and may dominate an industry’s practices or lie more subtly below its surface operations. In both cases, however, they may be harnessed by creators, producers, and other industry stakeholders to shape practices, policies, and strategies that will lead to commercially valuable output and creative churn. These features may include: a culture in which homage and attribution are the norm; a culture in which norms and practices inhibit and/or sanction stealing; a culture requiring due attribution among creators; a culture rewarding reputation (which may include securing a reputation, protecting it, and preventing others from sullying it); a culture that leaves room for community disapproval, in which pointing out and shaming appropriation without attribution, outright stealing, and other practices or acts that violate the communal ethos; a culture that rewards creativity and productivity with prizes and rewards, which may be valued and useful for promoting careers, building resumes, etc.; a culture that accommodates the strategic use of prizes and rewards for other purposes, such as increasing institutional exposure, building or expanding consumer awareness, familiarity, and appreciation; and so on.

In some cases, these cultural features may seem at tension with practices and directives that are expressed in an industry’s statement of purpose and operations. For instance, some creative content industries will express a commitment to sanctioning appropriation, but at the same time will tacitly condone a certain amount of creative appropriation in order to promote new output, satisfy consumer demand, and generate an economic and/or creative churn that is commercially
helpful and ultimately profitable. Creative content industries should, therefore, consider how central their cultural features and tenets are to their practices, how they mesh with industry policies and directives, and how they are to be reconciled with business strategies and goals.

**D. How Much Room is There for Open Source Production? Do You Benefit from Open Source Production?**

Third, creative content industries should consider the value that they place on the generation of work that is unpropertized, uncommercialized, and likely to occur among a wide base of creators, users, and other industry participants. In certain cases, the potential for open source production may be a crucial element that a creative industry considers central to its business strategies for growth, development, exploration, R&D, and generation of new revenue sources; in other cases, open source production may be a peripheral area of production that holds the possibility of opening new directions, but that is something of a wild card in the industry’s estimation. Creative industries must ascertain how much they value open-source production and whether they choose to centralize it in their organizational planning and practices. They should, therefore, ask a series of questions that will contribute to making such a determination. At the outset, creative content industries should ask what the advantages to open source production are. Among the possibilities are: its ability to promote basic/fundamental research; its potential to stimulate innovation and creativity to emerge and develop in different directions, thereby allowing the best practices and best solutions to rise to the fore without being stifled by competitive forces (this may usefully counterbalance the fact that the first mover advantage gives the early entrant, and not necessarily the best innovator, an early advantage); its availability to a great many users who are able to crowdsource solutions (that is, to allow open input from as many interested and able participants as possible, not drawn just from within the community but from an array of talent pools); its avoidance of hierarchies that may stifle talent (due to peer envy, bureaucracy, and other potentially negative features of organizational and institutional

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157 As in the case of fashion, some industries require such churn to keep generating products and satisfying rapid, voluminous and ever-changing consumer demand.

structures); and potentially its ability to democratize innovation, promote reputational norms and keep peer collaboration, influence, respect, and sharing alive and well.\textsuperscript{159}

Creative content industries should further consider the practical demands that open source production is likely to mandate. Not only do they need to prioritize keeping open source values in place,\textsuperscript{160} but they also need to have mechanisms in place that will allow open source to thrive and prevent it from being copied (this may include proprietary barriers, oversight, norms, contractual agreements and/or Creative Commons-type licenses, as well as possible technological measures, such as firewalls). Moreover, creative content industries should ask whether the open source work that they support or privilege may eventually be captured both fairly and within reasonable parameters, so that new innovators are able to capitalize on parts of open source creation while leaving other parts open and accessible (for instance, the Adobe software makers use, generate, and make available a blend of proprietary and non-proprietary output). Creative industries should ask whether the long-term prospects of such open source production point in the direction of openness or propertization, and should shape their plans, mandates and priorities accordingly.

Creative content industries should also consider the impact of open-source production on their employees and laborers. One significant concern is how and where an industry’s vital laborers are paid: for instance, some salaried workers may be paid to perform professionally at their place of employment, and their salaries then support the open source work that they do, effectively underwriting their unpaid efforts. In this case, creative industries should consider the extent to which they are either supporting such efforts or being supported by other institutions. They should also consider the extent to which the creative industry’s market structure supports widespread open-source production, thereby effectively amortizing the costs of unremunerated production across a market, and reducing the burden on any one industry participant. Lastly, creative content industries should also consider the extent to which laborers choose to participate

\textsuperscript{159} See id.; see also Katherine Noyes, \textit{10 Reasons Open Source Is Good for Business}, PCWORLD (Nov. 5, 2010), http://www.pcworld.com/article/209891/10_reasons_open_source_is_good_for_business.html.

\textsuperscript{160} In the case of education, for instance, openness, a commitment to educating the populace, a belief in open access to creation, production, and resources, and other such values are commensurate with open source ethos, norms and values.
in open source and the extent to which they feel rewarded by open source work, for a variety of possible reasons, including: satisfying curiosity, interest, or desire to explore in ways that are not directly in line with one’s primary employment; obtaining peer approval and recognition; participating in creative experimentation; seeking to add to the greater good and/or the greater public domain; and so on.

**E. How Much Spillover/Network Effects Can Your Industry Produce?**

Fourth, creative content industries should recognize that cultural openness may be sustained not only by open-source production but also by other factors such as job mobility among skilled and creative workers, strong institutional settings (such as major universities, civic organizations, educational resources, and so on), and a host of favorable environmental conditions. These features often contribute greatly to establishing a setting that affords creative industries a talented and secure workforce, a desirable and attractive locale, and a powerful draw to outside talent. Together, these features are likely to create spillover and network effects that enhance and encourage creative production. Tapping into these spillover and network effects is paramount for creative industries, but the approach to maximizing their utility should be closely studied and carefully mapped out. In some creative industries, widespread open source production, as discussed above, may be the best means to fostering network effects. In other creative industries, a certain amount of propertization, balanced with a certain amount of “leakiness”, or lack of propertization, may prepare the groundwork for wide-scale creative and innovative growth. Similarly, treating talented employees as valuable, while recognizing their prospects for mobility, propensity to seek due compensation, and the possibility that in some cases know-how will be inextricably linked to a given individual or team, is an important undertaking that creative content industries must assume while seeking to benefit from industry-wide spillover and network effects.

1. **Business Solutions and Normative Approaches**

Establishing a constructed commons may be challenging to creative content industries, but putting into place some of its features should be manageable, in part because many creative
industries are already founded on normative principles and values, such as openness and collaboration, professional autonomy, or publication rights. These norms may be supported by formalized policies that clarify the terms of creative work and its rewards, but they may also be sustained by expressions of commitment that are made at all levels of the industry. Where possible, financial support should be extended as well, which will ensure that industry participants continue to engage in experimentation, cross-pollination, interactive projects, and other efforts that may not be immediately valuable commercially but that have good long-term prospects. Institutional support should offer creative talent the incentive to expand horizons within a circumscribed setting and with well-drawn incentives, backing, and rewards. At the same time, however, creative industries should ensure that they will eventually benefit from creative efforts resulting in propertizable and/or commercially valuable output, which will entail reserving the right to secure intellectual property rights in fully realized creative work.

Creative content industries should also allow normative self-monitoring and self-sanctioning where appropriate. For instance, practices that encourage attribution, sanction appropriation (particularly without attribution), confer reputational benefits, and reward a high level of creativity should be allowed to flourish, whether or not alongside formalized procedures or stated policies. Some creative industries should establish prizes, rewards, and incentive schemes that further support emerging and established talent (possibly without going so far as to award IP rights in the creative output). By harnessing normative approaches to business practices, creative industries will be able to sustain and reap the benefits of strong a cultural system that is not solely dependent on IP rights to promote and reward creative production.

With respect to open source production, creative content industries should seek to accommodate broadening outreach to as wide a range as possible of creators while again reserving the right to seek intellectual property rights in some creative output. These initiatives must begin with a consideration of the nature of an industry’s production, by asking at the outset what materials should be protected (that is, commercializable R&D, finalized creative output, propertized work, and so forth) and what should be kept open (that is, basic research, creative experimentation, non-commercial work, and so on). Only after such a determination has been made should creative content industries establish the means and terms of open source production within their
purview. This may include restricting commercialization of early-stage work in various ways: for instance, establishing shared open databases (for instance, in the case of scientific research, gene/SNP databases) or pools of information and/or data; limiting the extent to which creators, researchers, institutions, partners (whether or not corporate or institutional), the user community, and other interested parties can seek IP rights in early-stage work; encouraging publication (in some cases, as opposed to patenting); rewarding openness, collaboration, sharing and exchange; establishing prizes, incentives (for instance, academic positions such as named chairs), and rewards; and informing the user community that open source production is valued but may not be remunerated by the normal means (such as salary, IP rights, or share of returns).

In sum, creative content industries should recognize the extent to which creativity and innovation, as well as the labor that goes into such creative efforts, are supported by institutional edifices, external funding sources, or other safety valves that reduce financial pressures to monetize work. They should further recognize that such support is likely to enhance the prospects for open source production to thrive, since the drive to propertize, commercialize, and monetize will be proportionately reduced by a well-supported and long-term perspective on commercial viability. Creative content industries should understand that it is unrealistic to expect open source to thrive in an environment starved of financial support: after all, labor needs to be remunerated (that is, employees need to earn their livelihood). But with proper institutional support, where possible, creative industries should recognize that open source production is bound to be an avenue that is not particularly costly but may be ultimately promising, and is therefore worth supporting, pursuing, and encouraging.

Creative content industries should also consider the spillover and network effects that may arise from a cultural ecosystem that promotes industry-wide vitality and growth. While efforts may be made across an industry to promote such effects—for instance establishing locales for growth (such as Silicon Valley in CA, Kendall Square and the Route 128 corridor in Boston, and so on), as well as tax benefits for such locales—individual efforts on the part of creative industry participants are equally important to creating the conditions for spillover and network effects to flow. Industry participants should consider joint problem-solving, interdisciplinary solutions (such as collaborative projects, cross-pollination across institutions, and so on), multi-tiered
grants that support start-ups, spin-offs, and incubators on various levels, industry-wide conferences that address state-of-the-art issues in the creative landscape, and various efforts aimed at encouraging creators to interact and engage (such as shared office spaces or media labs). These features will help secure skilled and talented workers, who will be drawn to creative sectors and are likely to settle in these areas. Industry participants should build upon such incentives by making certain that reputational benefits such as peer approval, recognition, and other rewards remain high for motivational purposes and reinforce a shared understanding of the value of creative talent. At the same time, creative content industries should leverage the advantages that their locale may offer, such as established universities and libraries, which offer cultural resources that are perfectly suited to fortify and further creative production. Lastly, creative content industries should secure and nurture close ties with user communities, many of whose members hunger not only to consume but also to generate creative content.

2. IP Solutions

Implicit in the cultural efforts that creative content industries should undertake is the mandate to reserve propertization, including IP rights, to the areas of output in which it is most necessary and useful. Incentivizing, rewarding, encouraging, and nurturing creative production, whether undertaken by employees for remuneration or by open source producers for other rewards, should be the first priority of creative content industries. Establishing and wielding IP rights should not be the first order of the day, but instead should ensue upon the determination of where they are to be ascribed and how they are to be valued. In principle, creative content industries should strive to minimize IP grants in early-stage work, such as basic research and exploration, as well as stand-alone units of work that are more effective when non-propertized (such as online courses), software programs, databases of information and/or data, and other endeavors that may be well-suited to open source production, adaptation, and improvement. Creative content industries should bear in mind that open source production seems to work best when it is embraced by a community that is eager to participate, innovate, and create, and when it is least subject to regulation, formalized parameters, and hierarchies. It does not follow that IP rights may not be superimposed upon a fairly open ecosystem that has been shaped to encourage open source production: when valuable creative output is generated, propertization is both essential
and inevitable if an industry is to remain workable and profitable. But by recognizing the cultural elements that undergird a vast amount of creative activity, and integrating IP rights into the greater culture, creative content industries are best able to harness their particular strengths to the power of propertized rights and IP-based solutions.

3. Examples

When creative content industries exhibit the attributes of a constructed commons, they often function as a highly complex ecosystem in which institutional, individual and communal norms and practices are both prioritized in theory and exercised in practice. The case of the software industry, for instance, is built around tenets such as professional autonomy, collaborative outreach and efforts, attribution, peer recognition and reputational capital, a certain degree of self-governance including normative sanctions against appropriation of ideas and output, and other key features that are characteristic of commons-like approaches to creation and its related rewards. Software industry participants generally agree that these features are not only valuable in promoting positive behaviors but also constitutive of the strategies that brought the industry long-lasting security and success. One way to consider the open source movement in the software industry is to see it as an extension of this recognition: normative commitments to openness, peer production, and communal participation in the growth and development of creativity and innovation laid the groundwork for the rise of open source production and its rapidly expanding acceptance among commercial entities, funders, stakeholders, and the greater user and creator community.

Widespread recognition of the success of the open source production movement in the software industry has in turn spread to a range of other creative and innovative industries, including various technology sector industries such as Internet-based systems and services, online privacy and security providers, and so on. Further, the fundamental properties of open source production

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have been adopted by, and adapted to, the practices, norms, and strategies of many technology-based industries seeking the kind of success the software industry has enjoyed in recent years.\footnote{See, e.g., LASERSAUR, http://www.lasersaur.com/ (presenting an open-source laser-cutter); Open Source Malaria: The Story So Far, OPENWETWARE, http://openwetware.org/wiki/OSDDMalaria:GSK_Arylpyrrole_Series:Story_so_far (discussing open source development of a malaria drug); Soft Drink Formula, ALFREDO OCTAVIO, http://alfredo.octavio.net/soft_drink_formula.pdf (providing the formula for an “open source soft drink”).}

In the tech sector, the development of Internet-oriented products and services, such as Facebook, Wikipedia, DropBox, and SoundCloud, as well as crowd-sourced sites and resources, offer ample evidence that many facets of the computer industry’s approach to creativity and innovation have been embraced and used to build an array of entities, services, and products enabling collaboration in the ever-expanding and rapidly globalizing user community.

In the case of journalism, some joint websites and blogs are created with the free and voluntary contribution of authors, some of whom are employed elsewhere, in a kind of open source production that is greatly enriching the blogosphere. Examples of these include SCOTUSblog, Politico, Talking Points Memo, Crooked Timber, First Monday, and others. One more illustration of the widespread effect that the open source movement has had on creative content production is in the areas of online teaching and learning. Universities and other well-established institutions were not the only ones affected; jointly-led ventures among teachers, educators, instructors, and those simply interested in the exchange of knowledge led to the creation of online language learning blogs, artistic instruction blogs (for instance, teaching music via Skype), and other instructional websites created, supported and developed by various online communities. In many of these cases, a resistance to propertization may or may not be due to a reluctance to monetize, and thereby commoditize, the output of the creative community. Rather, it may be a recognition that by harnessing open source production to important areas of creativity—some of which are nascent and emerging, others of which are fundamental to growth, and many of which are beneficial to the public good—the cultural ecosystem of creative production may best foster and promote vital missions that would otherwise not be so widely accessible.

CONCLUSION

For creative content industries undergoing disruptive innovation and searching for the most effective tactical plan for managing change, promoting growth and fostering longevity, the


\(^{171}\) Huffington Post prior to its acquisition by AOL in 2011 is a good example of such business model. See Nate Silver, The Economics of Blogging and the Huffington Post, N.Y. TIMES (Feb. 12, 2011), http://fivethirtyeight.blogs.nytimes.com/2011/02/12/the-economics-of-blogging-and-the-huffington-post/?_r=0 (comparing the business model to “a galley rowed by slaves and commanded by pirates”).

extraction, analysis and application of the salient factors presented here should prove a useful framework that is readily adaptable to their needs. There are a host of creative content industries that share a fundamental commitment to spurring creativity that will fall into this rubric, including entertainment and media, publishing and journalism, sporting activities, cuisine and comedy, as well as others that are united in pursuit of innovative research, discovery, and production, such as scientific research and commercial sciences such as biotech, software development, computers and electronics, games (electronic, console-based, video, online, and others) and, increasingly, new entrants such as health care, K-12 education, and so forth. As can be discerned from the broad range of these industries, there is no one-size-fits-all solution, and thus the process of tailoring business and IP solutions remains absolutely vital to the survival and success of commercialized creativity and industrialized innovation. The balance of salient factors must accordingly be developed on a case-by-case basis.

It is also critical, however, that creative content industries and their ilk recognize that it is not merely the salient factors that matter but also the interplay among factors that is paramount to assess and consider. That is, changing one part of the equation is likely to have repercussions on other parts of the equation, and may lead to profound shifts in the industry’s landscape and climate. Adding layers of IP, for instance, may cause an industry to place less trust in cultural and normative principles and practices, so that IP enforcement comes to substitute for, if not wholly replace, an ethos of conduct that is primarily self-governed and self-sustained. This not only has the potential to transform an industry’s entire ecosystem but also has the potential to mutate its communally shared values, norms, and mission. Moreover, it has the potential to affect the community itself, which can lead to further upheaval as longstanding members of the creative community struggle to come to terms with the newly emerging culture in which they find themselves embedded.

In the case of education, for instance, much ink has been spilled over the central idea of the university, its core commitments, its shared values and norms, and its very sense of self. Many agree that the recent onslaught of self-examination (and at times self-excoriation) may not be new, but does seem to have a new urgency (and at times poignancy) to it, spurred by a sense that commercialization and commodification are coming to push aside deeper commitments to
educational goals, the public good, and learning for its own sake. It is not possible to lay the onus for these concerns squarely on increased propertization, newly created IP rights (such as patent rights in scientific research and copyright in courses and course materials) and IP managers (such as technology transfer offices and administrators of online learning and MOOCs), or a newfound drive to monetize intellectual, scholarly and/or pedagogical output. But the many disruptions that the educational sector has faced in recent years, including technological changes and adoption of new technologies across academic communities (both faculty and administrators and students), has ushered in these increasingly important features and given them a newfound prioritization in the academic ecosystem. This in turn has contributed to a profound shift in the culture and climate of higher education and, as many commentators have contended, may be central to an identity crisis that will surely be as far-reaching in its impact as the commercial practices themselves are proving to be. What does this signify for education and other creative content industries? Simply that the decision to create large-scale responses to disruptive innovation are likely to be truly transformative, in ways that may not be wholly foreseeable, but to an extent that may be even greater than initially imagined. For this reason, the analysis that has been laid out in this paper, and the recommendations that it urges upon creative content industries, are offered as a means of understanding the issues, output, and values at stake for industries, as well as a basis for conceptualizing the impact that may be felt by industry stakeholders across the community. This, then, is both the strength and the vulnerability of the creative ecosystem: it has the potential to rise to meet the challenges of disruptive innovation, but it must meet those challenges wisely, carefully, and with solutions, directives, and cultural and normative practices and principles that are optimally tailored to foster creativity, spur productivity, benefit the user community and, as much as possible, contribute to the public good.

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173 See generally BILL READINGS, THE UNIVERSITY IN RUINS (1997)
CONCLUSION

In his seminal works, which presciently mapped the copyright debates of the last several decades despite predating the countless technological upheavals, Justice Stephen Breyer articulated his persisting concern with the expansion of copyright as a means of fostering the production and dissemination of knowledge and information.\(^1\) Analyzing the book publishing industry, Breyer argued that the overall benefits of an expanded copyright could not be well-justified. This “unease” with copyright has persisted among many legal commentators to date, and indeed has only been heightened by a series of expansions to copyright law that seem not to be curtailed even by the restraints inscribed in the statutory grant itself.\(^2\)

Outlining an economic approach to copyright law (which would eventually become standard practice among intellectual property scholars), Justice Breyer began by pointedly noting that the justification for granting copyright rights cannot solely be that copiers have an economic advantage over initial producers, because the copiers do not bear the costs of creating the work.\(^3\) Rather, he argued, the inquiry must be begin with a series of questions: (i) what market-based advantages do creators have that will allow them to recuperate the costs of creation; (ii) to what extent does the government subsidize the costs of creation; and (iii) are consumers able to direct funds to the creator that finance or underwrite the costs of creation.\(^4\) Only upon analysis of these inquiries, he argued, can one ascertain the marginal benefits that any grant of copyright entitlements might yield. Moreover, he maintained, even when such entitlements were to be found to yield marginal benefits, policymakers should take heed of the costs imposed by copyright, such as decreases in the dissemination, utilization, and access to knowledge and information.\(^5\)

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\(^2\) For instance, a grant is to be made only insofar as it is “useful” to “promote progress in the Sciences and Useful Arts”, and the term of copyright may not be indefinite. U.S. CONST. Art. 1, Sec. 8 Clause 8.

\(^3\) See Breyer, *Rejoinder, supra* note 1 at 75.

\(^4\) See Breyer, *Rejoinder, supra* note 1 at 75-76.

\(^5\) See Breyer, *Rejoinder, supra* note 1 at 76.
Justice Breyer’s analytic schema continues to offer a cogent and insightful starting point from which to launch an in-depth exploration of tailored copyright in creative content industries. It also urgently calls for empirical studies to be made that can substantiate claims that copyright will extend much-needed tools to industries being transformed by disruptive innovation. This Paper has built upon Justice Breyer’s early road map to offer new avenues for relief and new vistas that bring a host of important, yet sometimes overlooked, considerations into the picture. Effects on end-users who are also presumptive creators, repercussions on cultural environments and norms that are foundational to creative endeavors, and effects on the public domain are but a few factors that can and should be considered, both under Justice Breyer’s rubric and in light of the exegesis offered here. Much work remains to be done, as each creative content industry must chart a course that is best tailored to accommodate the demands, interests, aims and aspirations of its stakeholders. But the swift and relentless pace of disruptive innovation, and the challenges its technologies pose to creative production, mandate the construction of tailored solutions that balance commercial, legal, technological and cultural priorities, choices and practices. The “uneasy” case for copyright that I propose resembles Justice Breyer’s in this regard: it should be deemed appropriate when it is marginally beneficial, but also, I would argue, when it balances the advancement of commercial interests, the retention of cultural and normative preferences and priorities, and the encouragement of creative expression.