YOUTUBE, DIGITAL MUSIC AND SHARING:
COMPETING BUSINESS AND CULTURAL MODELS IN THE DIGITAL ERA

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ABSTRACT

The transition to the digital era has been a difficult one for many copyright owners. The business fortunes of many copyright owners during the digital era have been shaped by several forces, including changes in the competitive business environment in which they operate and cultural changes that may reflect changing consumer preferences. Widely available digital era technologies have made the reproduction and dissemination of verbatim copies far easier. Use of such technologies has led to the widespread distribution of unauthorized copies of copyright protected works as well as the creation and dissemination of modified versions of one or more existing works, including through the creation of clips, mashups, vidding, other types of fan fiction works and other practices. In the digital video arena, YouTube has emerged as a dominant site that contains user generated content (UGC), which may include copyright protected works. The widespread nature of unauthorized uses in the digital era has significantly challenged copyright laws. Digital era disarray has been particularly evident in the case of the music industry, which has experienced a particularly messy encounter with the digital era. In the past, copyright owners typically ignored noncommercial uses. Content owners have tried a number of strategies to respond to the deluge of unauthorized uses, including educational efforts, digital rights management (DRM), and lawsuits against direct and indirect infringers. All such strategies have been to date largely unsuccessful in halting the unauthorized distribution of digital content; further, even those strategies that may have yielded some short term positive benefits, such as the RIAA litigation strategy against the consuming public with regard to digital music file sharing, have also led to significant negative publicity and potentially negative reputational effects. More recently, content owners in the music industry have proposed implementing an Internet Service Provider (ISP) levy to compensate musical content owners for losses from digital era piracy. This levy proposal mirrors existing levy schemes such as those in countries in the EU, which impose extra costs on all those who purchase media that might enable unauthorized uses. This article evaluates such levy schemes and in light of the nature of the losses asserted by content owners in the digital era. Although content owners have clearly experienced losses, any proposed compensation schemes should take account of potentially three sources of losses for content owners in the digital era. Although piracy is one possible reason for content owner losses, changes in business models and changing cultural practices are two significant factors in the adverse business outcomes in recent years for many content owners, particularly in the music industry. This article discusses potential policy solutions to current copyright conflicts in light of the shifting landscape of

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creation and distribution in the digital era.

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INTRODUCTION

YouTube, MySpace, and other websites that contain user-generated content (UGC) have become key reference points in broader debates about the role of copyright in the digital era. YouTube is a phenomenal success in terms of web traffic generated: YouTube had 51 million users in June 2007 according to Nielsen/NetRating,[1] has more than 205 million visitors per month,[2] and currently attracts a larger audience than its three nearest competitors (MySpace, AOL and Yahoo) combined.[3] YouTube's owner, Google Inc., has a stock market capitalization that has in recent times been greater than IBM's.[4]

The experience of YouTube in the digital video arena follows events in the music arena. The music industry was the first of the cultural industries to confront the digital era.[5] The music industry has by many measures not fared well during the digital era. In response to the adverse business climate of the digital era, some music industry players have recently proposed the adoption of an Internet Service Provider (ISP) levy system that would charge all consumers a nominal sum to compensate content owners for losses that they attribute to digital era piracy,[6] particularly through consumer use of peer-to-peer (P2P) file sharing technologies.[7] Although P2P file sharing is likely a reason for negative business outcomes in the digital era, the business fortunes of content owners during the digital era have been shaped by several forces, including changes in the competitive business environment in which they operate and cultural changes that may reflect changing consumer preferences. Consequently, any proposed

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[1] Miguel Helft, *Google Aims to Make YouTube Profitable With Ads,* N.Y. TIMES, Aug. 22, 2007, at http://www.nytimes.com/2007/08/22/technology/22google.html.
[2] Brad Stone & Matt Richtel, *Silicon Valley Start-Ups Awash in Dollars, Again*, N.Y. TIMES, Oct. 17, 2007, http://www.nytimes.com/2007/10/17/business/media/17bubble.html?em&ex=1192852800&en=ef73d6181b92c6e8&ei=5087%0A ("More than 205 million people visit YouTube each month, according to the research firm comScore.").
[3] Helft, *supra* note 1.
[4] Stone & Richtel, *supra* note 2 (noting that Google's stock price in 2007 surged beyond $600 per share, making it worth more than IBM, which has 8 times Google's revenues).
[5] Simon Frith & Lee Marshall, *Making Sense of Copyright*, *in* MUSIC AND COPYRIGHT 1, 3 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (noting that the music business was "the first sector of the entertainment industry to experience the 'threat' of digital technology").
[6] Bill Rosenblatt, *Warner Music Group Pursues ISP Levies*, DRMWatch.com, Apr. 3, 2008, at www.drmwatch.com/ocr/article.php/3738481.
[7] Levies are common outside of the U.S., including in most European countries, Japan and Canada, where levies have been implemented to compensate intellectual property rights holders for uncompensated personal copies. ROBERT J. DAMUTH, ECONOMIC IMPACT STUDY: PRIVATE COPYING LEVIES ON DIGITAL EQUIPMENT AND MEDIA, NATHAN ASSOCIATES INC., May 4, 2006, at 1.

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levy scheme must take account of factors relating to piracy, cultural factors and business factors, as well as the broader context of the goals and operation of copyright law frameworks.

YouTube users, file sharers and others are often accused violating copyright laws as a result of their sharing of copyrighted content through unauthorized uploading and downloading of such content. Uses of existing content on YouTube and similar websites are, at least in some instances, more complex than might at first appear.[8] The range of user behaviors in the digital era through file sharing and on YouTube and other websites containing UGC encompasses a wide spectrum of practices ranging from verbatim copying to forms of sharing, borrowing and other collaborative practices that involve reuse and in some instances transformation of existing copyrighted works.[9] The uses of existing content on YouTube and other sites also demonstrate both continuities and significant changes in the landscape of cultural production and dissemination.

Assertions of copyright infringement with respect to content on YouTube and other websites occur in a broader context where significant uncertainty exists about the application of copyright law in an era of rapidly changing technology and business models and changing behavior among creators, consumers, and users of copyright protected works. The breadth of the scope of copyright today means that copyright infringement is something that many engage in with startling regularity. Consequently, as Tim Wu has recently noted, a "giant 'grey zone'" currently exists in copyright, including "millions of usages that do not fall into a clear category but are often infringing."[10]

The lack of clarity in the application of copyright today in part reflects the fact that assertions of infringement are based on copyright laws that may be over inclusive as currently applied to a broad range of activities today, including at least some material posted on sites such as YouTube.[11] At the same time,

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[8] Law Professor Edward Lee's YouTube blog gives a good overview of the myriad of materials posted on YouTube. *See* The Utube Blog: An Unofficial Blog of YouTube + The Video File Sharing Industry, http://theutubeblog.com/.

[9] Michael Driscoll, Note: *Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?* 6 J. MARSHALL REV. INTELL. PROP. L. 550 (2007) (discussing YouTube and copyright).

[10] Tim Wu, *Tolerated Use*, Working Paper No. 333, Center for Law and Economic Studies, Columbia University School of Law, http://papers.ssrn.com/paper.taf?abstract_id=1132247 (May 2008), at 1.

[11] Tim Wu, *Tolerated Use: The Copyright Problem*, Slate.com, Oct. 16, 2007, http://www.slate.com/id/2175730/entry/2175731/ ("Every week, in various ways, you probably violate the copyright law. How? When, say, you check out old MTV videos on YouTube. Or if you, bored at work, decide to research the surprising origins of the character Grimace. Or if you

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copyright may be potentially under inclusive in other respects, including in relation to traditional knowledge.[12] The potentially simultaneous over inclusiveness and under inclusiveness of copyright and intellectual property frameworks more generally pose a significant challenge for copyright doctrine in the digital era.

This Article will focus on specific ways in which copyright may be over inclusive in the digital era. It will concentrate more specifically on what the digital era reveals about the incentives and behaviors of business actors and consumers in the copyright arena. As a result of one dominant model of intellectual property protection, which focuses on propertization narratives that emphasize strong copyright property rights,[13] current copyright frameworks fail to take sufficient account of norms of sharing, borrowing and collaboration. Competing cultural models exist and have become increasingly evident, in part as a response to dominant propertization narratives. This failure to sufficiently acknowledge sharing and borrowing is exacerbated in the digital era, where changing technology and uses of such technology significantly challenge existing copyright frameworks in many ways. One result is that copyright has become increasingly contested in the digital era on both cultural and business grounds. Current discourse may also obscure the availability of other cultural models and business practices that have the potential to enrich copyright discourse, particularly in relation to questions of sociocultural value and impact.

This paper will focus on ways to better incorporate understanding the implications of the cultural and business landscape of the digital era into copyright doctrine. This paper will also consider the ways in which particular visions of culture and creation shape legal frameworks and their application in the digital era. Understanding the vision of culture underlying copyright law is an important step in creating legal frameworks that truly encompass nuanced and complex conceptions of culture and processes of creation.

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make a mix CD for a friend or play DVDs at a house party. Each will lead you into a facial violation of the copyright law, and in today's world, it's almost unavoidable.”).

[12] The under inclusiveness of existing intellectual property frameworks, including copyright, has been pointed out in discussions of treatment of traditional knowledge, for example. *See* Thomas Cottier & Marion Panizzon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protections*, 7 J. INT'L ECON. L. 371, 372 (2004) (“[C]arefully designed IPRs in traditional knowledge could help developing countries become full players in global agricultural markets while equitably rewarding indigenous peoples for their contributions to international well-being.”).

[13] NEIL NETANEL, COPYRIGHT'S PARADOX 7 (2008) (“Property rhetoric, whether invoked reflexively or strategically, has tended to support a vision of copyright as a foundational entitlement, a broad ‘sole and despotic dominion’ over each and every possible use of a work rather than a limited government grant narrowly tailored to serve a public purpose.”).

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I. COPYRIGHT AND "PIRACY"

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

The scope of copyright has long been shaped by technology. The ways in which copyright interfaces with technology are particularly evident in the digital era, but were apparent even in the early days of the twentieth century. In the 1908 *White-Smith v. Apollo* case,[14] for example, the Supreme Court considered whether piano roll technology created copies within the meaning of the applicable copyright statute. The *White-Smith* case was one of a number of cases and laws intended to address the extent to which new technologies that enable or facilitate reproduction should be permitted.[15] The progressive development and deployment of technologies in the twentieth century made copying far easier. Such technologies include various audiovisual media and file formats, as well as devices to enable the use of such media and file formats. A list of such technologies might include the Xerox machine, VCR, various tape player technology ranging from 8-track tape cartridges to DAT, 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.

The story of copyright, particularly beginning in the twentieth century, is thus inherently at tension with unfolding technologies that have made copying far easier. The effects of these unfolding technologies were greatly magnified at the end of the twentieth century by the convergence of technological developments. The creation of digital file formats enhanced the ability of nonprofessionals to create verbatim copies with little or no degradation in quality.[16] The effects of digital file formats were seriously exacerbated by the presence of the Internet, which offered an inexpensive way to distribute copies.

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[14] 209 U.S. 1, 1 (1908) (finding that piano rolls are not copies within the meaning of the applicable copyright statute).

[15] *See, e.g.,* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984); Recording Industry Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

[16] Although some file formats, such as MPEG-4 ALS, permit lossless coding of media files, many of the commonly used audio and video digital file formats, such as MP3, AAC, and most MPEG-4 formats, are lossy file formats that typically result in some diminution in quality as a result of compression. *See* MPEG-4 Audio Lossless Coding, ISO/IEC JT1/SC29 WG 11, Jan. 25, 2008, at http://www.nue.tu-berlin.de/forschung/projekte/lossless/mp4als.html (describing MPEG-4 ALS, which extends the MPEG-4 format to permit lossless coding of audio files, and noting that "lossless audio coding enables the compression of digital audio data without any loss in quality due to a perfect reconstruction of the original signal"); KEN C. POHLMANN, PRINCIPLES OF DIGITAL AUDIO (5th ed. 2005) (describing and discussing audio file formats generally); KEITH JACK, VIDEO DEMYSTIFIED: A HANDBOOK FOR THE DIGITAL ENGINEER (5th ed. 2007) (describing and discussing analog and digital video file formats).

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Although reproduction was fairly easy prior to the digital era, the ability to create and distribute perfect (or close to perfect) copies changed the copyright balance by creating an easy path for at least some degree of disintermediation of existing intermediaries.[17] Any remaining equilibrium in the operation of copyright essentially ceased to exist in the digital era. New technologies led to changing cultural practices and increased visibility of existing practices that involved reproduction and dissemination. Perhaps more importantly, existing industry players did not in most cases have adequate business plans for addressing the reality of the shifting cultural, business and technological landscapes of the digital era. Industry players have also been slow to act to embrace new technologies for fear of cannibalizing existing sources of revenue.

B. *Piracy and Unauthorized Uses*

The content industries, including the cultural industries and software industries, have long played a role in seeking to shape copyright law to benefit their interests and maximize their economic returns.[18] The drafting of the 1976 Copyright Act reflects the role of such interests.[19] As a number of commentators have noted, industry-written copyright frameworks had at best questionable theories of users and consumers that did not adequately accommodate the varied range of interests and parties that might be stakeholders from a copyright perspective. The expansion of copyright law during the twentieth century was paralleled by important shifts in language that led to any unauthorized use of a copyrighted work being characterized as "piracy."[20] This shift in language use has been the foundation of legal strategies by businesses and business interests that have sought to encourage the adoption of legal frameworks that are favorable to business interests. The threat of "piracy," for example, was used by interest groups that lobbied for the adoption of the Agreement on Trade-Related Intellectual Property Rights ("TRIPS").[21]

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[17] Such disintermediation is by no means limited to the traditional media arena but reflects broader societal trends concerning access to and dissemination of information. *See, e.g.,* Lawrence Solum, *Download It While Its Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841 (2006) (discussing the shift in legal scholarship from law reviews to open access legal blogs and noting that existing intermediaries are being supplemented by disintermediated forms).
[18] Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, *in* NEW DIRECTIONS IN COPYRIGHT LAW, VOL. 6, (Fiona Macmillan, ed., 2008) (discussing the multiple causes for copyright's expansion).
[19] JESSICA LITMAN, DIGITAL COPYRIGHT 61-63 (2001) (noting the prominent role of copyright stakeholders in drafting copyright legislation).
[20] LITMAN, supra note 19, at 85 (noting expansion in uses of term piracy, which in past was applied to those who made and sold large numbers of counterfeit copies but which today is used to describe "any unlicensed activity").
[21] Susan K. Sell, *Post-Trips Developments: The Tension Between Commercial and Social Agendas in the Context of Intellectual Property*, 14 FLA. J. INT'L L. 193, 194-95 (2002)

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The tendency to characterize unauthorized uses as piracy is connected to copyright business models that seek to treat copyrighted protected works as valuable assets whose exploitation should be at least substantially controlled by copyright owners.[22] This business model of intellectual property is consistent with a pay-per-use model that maximizes the value of content by eliminating uncompensated uses of materials that they own.[23] This type of business model may in significant instances be considerably at odds with the reality of the business and cultural landscape evident in the transition to the digital era.[24]

C. *Copying and Creation*

The advent of the digital era has thus magnified existing fault lines in copyright doctrine. As such, the transition to the digital era raises similar concerns, at least in some respects, to those that arose in connection with the transition to the industrial economy in earlier historical periods. Discussions of YouTube and UGC underscore a discontinuity between cultural models of expected behaviors in the digital era. Although the behavior of consumers or the "misbehaving masses" is often a focus in the digital era, the story of behaviors in the copyright arena in the digital era is as much one related to changing business behaviors. Rather than focusing on the misbehaving masses, this Article seeks to understand the changing context of business behaviors in the digital era and thus discuss the extent to which characteristic business behaviors in the digital era have contributed to current circumstances.

Copyright theory does not adequately encompass the discontinuity between expected and actual behaviors of either consumers or businesses. Such theory also does not sufficiently attend to the widening gulf between many behaviors of consumers and businesses in the digital era. The discontinuity between actual and expected behaviors highlights significant differences of opinion about behavioral norms evident today in the copyright context. This discontinuity also reflects a significant divergence between the norms of behavior thought to be incentivized by copyright and the range of actual behaviors that may exist in the copyright arena across a wide range of actors, including businesses, consumers and users.

(discussing American intellectual property industry lobbying groups that "played a major role in drafting and insuring adoption of TRIPs").

[22] Olufunmilayo B. Arewa, *All Work and No Play: Intellectual Property as Serious Business* (2008) (manuscript on file with author).

[23] LITMAN, supra note 19, at 27 (noting that the DMCA facilitates a pay-per-use system).

[24] *See* John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 3 UTAH L. REV. 537, ___ (2007) (noting that the U.S. increasingly reflects a nation of copyright infringers as copyright becomes increasingly relevant in everyday life).

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A limited copyright cultural vision is often evident in discourse about YouTube and websites containing UGC. The vision of cultural production evident in copyright is highly influenced by hierarchy and conceptions of high culture production. Some copyright discussions, however, consider transmissions characterized as "amateur to amateur."[25] These discussions shed needed light on alternative patterns of transmission and dissemination, but do not always contextualize the long tradition of varied transmissions in the cultural context.[26] Viewing YouTube and UGC using the insights of cultural practices such as fan fiction, viding, and folklore may, however, lend greater understanding to the collaborative ways in which new works have and will likely continue to be created.

Although the discontinuities between YouTube and other UGC websites as digital era phenomena and previous manners of creation prior to the digital era are often emphasized, greater attention to potential continuities is important for contextualizing YouTube and similar websites within the broader landscape of cultural production. The continuities between UGC websites and pre-digital forms of cultural production such as vidding and even oral folklore forms of cultural production are not always recognized. Vidding, a form of fan fiction that emerged in the mid-1970s, has been characterized as an early example of remix culture and involves largely female creators who create music videos from existing footage.[27] Folklore has long been an important aspect of culture in two ways of significance to considerations of YouTube. Folklore is shaped collaboratively by cultural participant and often reflects decentralized forms of transmission said to characterize Web 2.0.

Folklore forms such as proverbs, riddles, folk narratives, ballads, urban legends, and urban office folklore are core aspects of culture.[28] Although folklorists often speak in terms of folklore genres, many aspects of culture may

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[25] *See, e.g.,* Dan Hunter & Greg Lastowka, *Amateur-to-Amateur*, 46 WM & MARY L. REV. ___ (2004).

[26] Understanding the context of YouTube as part of a range of potential cultural practices can also avoid potentially limiting cultural production in that YouTube is seen by some as a force limiting creativity by virtue of its widespread nature and popularity. *See* Nick Douglas, *YouTube's Dark Side: How the Video Sharing Site Stifles Creativity*, Slate.com, July 18, 2007, at http://www.slate.com/id/2170651.

[27] Francesca Coppa, *Celebrating Kandy Fong: Founder of Fannish Music Video*, In Media Res, at http://mediacommons.futureofthebook.org/videos/2007/11/19/celebrating-kandy-fong-founder-of-fannish-music-video ("Remix culture didn't start with the Internet. Women have been vidding, or making music videos with found footage, since at least 1975, when Kandy Fong made her first slideshows."); Logan Hill, *The Vidder*, N.Y. MAG. Nov. 12, 2007, at http://www.nymag.com/movies/features/videos/40622/index.html (interviewing prominent vidder Luminosity, who did not use her name in the interview for fear that producers would sue her).

[28] Elliott Oring, *On the Concepts of Folklore*, *in* FOLK GROUPS AND FOLKLORE GENRES (1986).

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derive from, contain or include folkloristic elements.[29] In addition, for more than two centuries, folklore has served a powerful role in shaping ideology about culture and cultural production.[30] Visions of folklore, high culture and popular culture are embedded within hierarchical assumptions about cultural production in both the legal and cultural studies arenas. Understanding these cultural production hierarchies can help us better comprehend the assumptions implicitly made in copyright doctrine about how users should use cultural material.

The digital era challenges many of these distinctions and assumptions made about particular cultural forms, in part by virtue of the widespread dispersion of the technological means by which cultural goods may be both produced and widely disseminated. The dispersion of such technological tools has significantly influenced both the creation and dissemination of cultural works. YouTube and UGC thus reflect a shifting landscape of cultural creation and distribution that fundamentally challenges both copyright doctrine and its underlying assumptions. The generation and broad distribution of content by users also interface with contested cultural space in which various parties may claim rights to control or use cultural works. The generation and distribution of such content also raise fundamental questions about structures of control within copyright law that have thus far been a principal means by which content owners have controlled access to and distribution of their works. Structures of control and the ways in which intellectual property frameworks may serve to delimit access to cultural works and may also have broader cultural implications. These broader implications should inform digital era copyright legal debates. Such broader implications are particularly relevant to considerations of mechanisms by which new works are created and the role of creators in varied contexts.

Legal commentary often pays homage to idealized conceptions about cultural production and creators. Because the production of many works is assumed to be autonomous, the images of creators and users in copyright remain simple yet at the same time quite distorted in many respects. A number of legal commentators have noted the lack of coherent theories about users and consumers in copyright law.[31] Copyright discourse also generally fails to incorporate a nuanced understanding of the ways in which overlapping categories such as creators, users and consumers relate to and use cultural material. Such misunderstandings are rooted in assumptions about how culture is created and

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[29] Folklore has been defined as a compound term encompassing both folk, or any group of people that share at least one common factor, as well as lore, which is often taken to mean particular genres or types of folklore production. *See* Alan Dundes, *What is Folklore?*, *in* THE STUDY OF FOLKLORE 2 (1965); Oring, *supra* note 28, at 1-22 (noting some limitations of the conception of the folk outlined by Alan Dundes).
[30] JOHN STOREY, INVENTING POPULAR CULTURE 1-2 (2003).
[31] Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 402 (2003); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 374 (2005).

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reinvented in varied social contexts and myriad ways in which creators, users and others may seek to manipulate cultural material.

Although many acknowledge that copying is involved in the creation of new works, far fewer analyze the broader implications of this recognition. This results in an effective denial of the importance of borrowing and collaboration in creation that remains a dominant feature of copyright doctrine. This dominant view of copyright that effectively denies borrowing and collaboration in the creation means that copyright law disfavors new creations that also reveal their trail of consumption.[32] This reflects the operation of copyright largely as a default property rule, which assumes that uses of existing works should require a copyright owner's consent. The current operation of copyright is mismatched in that this vision of creation and permission in many instances does not reflect the ways in which new works are actually created.[33]

The consequences of this mismatch are relevant for all types of creation, not just those types of creation that are generally thought of as collaborative in the popular cultural realm such as UGC and fan fiction.[34] In the music arena, for example, borrowing is pervasive and endemic in all musical genres and time periods, including among classical composers such as Bach, Beethoven and Mozart.[35] Such borrowing is not limited to music.[36] Historically, borrowings from folklore have been an important element of cultural production categorized as high culture and popular culture.

Folklore forms are typically collaborative and exist in multiple forms or variants.[37] Acknowledging the folkloristic influences in cultural production

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[32] Peter Jaszi, *Contemporary Copyright and Collective Creativity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29, 48 (Martha Woodmansee & Peter Jaszi eds., 1994).

[33] Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, ___ (2006).

[34] Significant legal discussion does existing concerning fan fiction, which reflect patterns similar to UGC of users/creators who use existing copyrighted works in the creation of new works based on the existing works or using characters and other elements of the existing works. *See, e.g.* Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129 (2001); Francesca Coppa, *A Brief History of Media Fandom*, *in* FROM FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS 41-59 (Karen Hellekson & Kristina Busse, ed. 2006); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROB. 135 (2007).

[35] Arewa, *supra* note 33, at ___; *see infra* note 68 and accompanying text.

[36] Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation and Context*, 41 U.C. DAVIS L. REV. 477 (2007) (discussing the importance of copying in musical and literary creation).

[37] WOLFGANG MIEDER, TRADITION AND INNOVATION IN FOLK LITERATURE xi (1987) ("Such traditional texts, certainly oral texts, exist by repletion and therefore in numerous variants.");

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would aid in recognition of the fact that multiplicities of meaning and diversity of usage are not at all atypical in the cultural arena.[38] The influence of folklore in the production of other cultural texts remains today often an unacknowledged factor, particularly in legal discussions of cultural production. For example, as Lawrence Lessig notes in his discussion of the origins of Disney films, some Disney films came from sources like the Brothers Grimm, while others came from works of fiction.[39] Lessig's point is that Disney took existing cultural elements and used them to form new cultural texts, which is an example of what he terms "rip, mix and burn."[40]

Lessig's Disney example highlights the ways in which culture is recycled in myriad ways, not only by Disney, but also by the sources from which Disney derived its creations. The Brothers Grimm tales were themselves taken from variants of fairy tales (Märchen) long in common circulation. The Brothers Grimm collected the tales they published from informants. Although the Grimms modified the tales, the tales were communal cultural texts that the Brothers Grimm used for their own purposes.[41] The Brothers Grimm example reflects the fact that access to communal cultural texts has potential to become a one-way avenue flowing from being part of a collectivity to being attached to a proprietary right held by an individual or commercial entity. The flows within this process depend in large part on the legal configurations that may be used to shape questions of rights and access. Legal configurations that recognize access to cultural texts as a valued goal of copyright would tend to give greater emphasis to

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ALAN DUNDES & CARL R. PAGTER, WHEN YOU'RE UP TO YOUR ASS IN ALLIGATORS: MORE URBAN FOLKLORE FROM THE PAPERWORK EMPIRE 14 (1987) (discussing the collaborative nature of urban office folklore, which exists in multiple versions and variants).

[38] Tolagbe Ogunleye, *African American Folklore: Its Role in Reconstructing African American History*, 27 J. BLACK STUDIES 435, 436 (1997) ("Folklore represents a line to a vast, interconnected network of meanings, values, and cognitions.").

[39] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 23 (2004) (noting that the Brothers Grimm modified their stories significantly to make them more palatable for children); Kay Stone, *Things Walt Disney Never Told Us,* 88 J. AM. FOLKLORE 42, 44 (1975) (noting that three Disney films are based on Märchen: "Sleeping Beauty" and "Snow White" from the Grimms and "Cinderella" from Perrault).

[40] LESSIG, *supra* note 39, at 23-24; Stone, *supra* note 39, at 44 (noting that the heroines selected by Disney from the Brothers Grimm compilation reflects a bias toward heroines who are passive, patient, obedient, and industrious, as compared with the full spectrum of Brothers Grimm heroines from which Disney might have chosen).

[41] The story of the Brothers Grimm and their tales is an interesting one involving a significant amount of deception on their part with respect to, among other things, the sources of their tales and nature of modifications they made in the tales. *See* JOHN M. ELLIS, ONE FAIRY STORY TOO MANY: THE BROTHERS GRIMM AND THEIR TALES (1985); Simon J. Bronner, *The Americanization of the Brothers Grimm*, *in* FOLLOWING TRADITION 184-236 (1998).

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maintaining processes of transmission such that flows of cultural texts are a two-way process.[42]

II. NARRATIVES, INCENTIVES, AND CHANGING DIGITAL ERA CONTEXTS

The cultural assumptions that often underlie copyright theory reflect beliefs about copying and creation that do not adequately take account of the myriad ways in which new works are created. As a result, assumptions about incentives typically made in copyright discourse are often incomplete. Many contexts of the operation of copyright in the digital era highlight ways in which this incomplete copyright vision may have significant real world consequences.

A. *Copyright Incentives and Sociocultural Value: An Incomplete Narrative*

Copyright doctrine in the U.S. is typically grounded in utilitarian rationales. This utilitarian focus derives in part from the Intellectual Property Clause of the U.S. Constitution.[43] Although other rationales may be apparent in the copyright arena, including Lockean, Romantic author and moral rights conceptions, utilitarian rationales for copyright remain dominant.[44] Utilitarian rationales for copyright focus on the need for copyright prohibitions on unauthorized copying to give incentive to creators to create works that might otherwise be underproduced.[45] Utilitarian rationales point out that the public goods nature of copyright, including the inability of creators to exclude others from using their creations and the need for copyright as a mechanism for creators

[42] Arewa, *supra* note ___, at ___ (noting that a focus on an intellectual property right as protecting transmission may help provide balance and ensure continued access to cultural texts even after proprietary claims are attached as intellectual property rights).
[43] U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To 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."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); COMMITTEE FOR ECONOMIC DEVELOPMENT, PROMOTING INNOVATION AND ECONOMIC GROWTH 7 (2004) (noting that "incentives provided by copyright protection are designed to encourage innovation by creators."); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993 (1997) (noting that intellectual property is about incentives to invent and create).
[44] William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 168 (Stephen R. Munzer ed., 2001); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).
[45] Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421, 425-26 (1966); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 190-91 (1934).

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to appropriate returns and receive compensation for their creations.[46] This appropriation of returns thus permits creators to profit from their creations notwithstanding the public goods characteristics of knowledge.[47] The right to exclude is the principal means by which creators appropriate returns and are thought to give such creators the incentive to create new works.[48] The control rights given to copyright owners reflected in Section 106 of the Copyright Act are the principal mechanisms by which such owners exclude.[49]

However, narratives about copyright, including those grounded in utilitarian rationales,[50] remain incomplete and often unsatisfactory for several reasons, including due to incomplete data, incomplete conceptions of creation, incomplete conceptualizations of human actors and human agency, incomplete consideration of the costs of intellectual property, and insufficient attention of the structure of copyright itself. Although these missing factors could be applied in many legal arenas, they are particularly striking in the copyright context in part as a result of the increased importance of copyright in the digital era.

The increasing importance of copyright is one outgrowth of the rising economic and business significance of the information and entertainment industries. In 1998, Americans spent some 120 billion hours and $150 billion on legal forms of entertainment.[51] In 1999, "core" copyright industries, including motion pictures, sound recordings, music publishing, print publishing, computer software, theater, advertising, radio, television and cable, accounted for 6% of U.S. Gross Domestic Product, or some $626 billion.[52] As a result of the increasing economic importance of such industries, the development of copyright doctrine in recent times reflects a public choice story of industries seeking to shape copyright law to benefit their interests and maximize their economic returns. The extent to which the copyright structures advanced by industry parties fails to take account of other interests and may conflict with other goals of the copyright system has become a significant theme in copyright scholarship.[53]

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[46] Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software*, 24 J. LEGAL STUD. 321, 333 (1995) ("The fundamental justification for creating property rights in the results of innovation is to deal with the appropriability problem.").
[47] Mark Lemley, *Property, Intellectual Property and Free-Riding*, 83 TEX. L. REV. 1031 (2004) ("Congress, the courts and commentators increasingly treat intellectual property as simply a species of real property rather than as a unique form of legal protection designed to deal with public goods problems.").
[48] Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 44-52 (2004) (discussing three dangers created by the right to exclude in intellectual property law: monopoly loss, innovation bottlenecks and the impoverishment of the public domain, speech and democracy).
[49] 17 U.S.C. §106 (2005).
[50] Arewa, *supra* note 36, at ___.
[51] HAROLD F. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS xvii (1998).
[52] JULIE COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY ___ (2d ed. 2006).
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The current centrality of copyright from a broader societal perspective is a clear contrast to copyright in prior eras. In the past, copyright was less important and more limited in scope. Similarly, copyright scholarship was largely devoted to issues related to copyright doctrine.[54] With the increasing importance of copyright in society more generally has come greater attention to broader questions of the relationship between copyright and the broader sociocultural context of its operation.

Issues of broader sociocultural context thus remain relatively underexamined in copyright.[55] Further, as recent scholarship about copyright and creativity highlights,[56] even fundamental issues central to copyright such as the models of creativity on which copyright rests have not received significant consideration in copyright doctrine and theory. Consideration of issues of broader sociocultural context in copyright is limited in many respects as a result of the narrow focus of dominant utilitarian rationales for copyright.

[As Professor Martha Nussbaum has outlined in relation to utilitarian analysis more generally, utilitarianism may be based on incomplete if not at times misguided conceptions of human agency, particularly in contexts in which power asymmetries exist.[57] The existence of pervasive hierarchies of culture and power in copyright significant influences the creation and implementation of copyright doctrine.[58] In the copyright context, discussing the implications of copyright for sociocultural value more generally is one way in which to address the concerns raised by Nussbaum and others with respect to utilitarian analyses.] Sociocultural value is intended to take account of the broader goals of copyright and assess the actual operation of copyright in light of such goals. Considerations of sociocultural value should begin with an assessment of the ways in which copyright doctrine is incomplete.

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[54] [Peter Jaszi]
[55] Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151, 1152 (2007).
[56] *Id*. (discussing lack of consideration of creativity in dominant theories of copyright); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1946 (2006) (noting incomplete understanding of creativity evident in law governing authors' rights in United States).
[57] MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH ___ (2000).
[58] Arewa, *supra* note ___, at ___.

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1. Incomplete Data: Lack of Empirical Understanding of Copyright Incentives

Little empirical understanding exists concerning copyright incentives.[59] Consequently, we know startlingly little about whether and how copyright actually increases creative output.[60] The lack of empirical data in the copyright arena contrasts significantly with patent, where a number of empirical studies have been conducted.[61] The lack of data in the copyright context and existing data from the patent context suggest that expansion in the scope and duration of copyright protection should be undertaken with great care.[62] Further, the lack of data in the copyright context, combined with other aspects where current assumption about copyright remain incomplete, suggests that discussions of copyright incentives may not appropriately take account of broader questions of sociocultural value.[63] Such lack of data also makes difficult the assessment of costs and benefits in contexts such as YouTube where many assertions are made concerning relative benefits and harms.

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[59] RUTH TOWSE, CREATIVITY, INCENTIVE AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE 21 (2001) ("[W]e still cannot say with any conviction that intellectual property law in general, and copyright law in particular, stimulates creativity. That is no argument for not having it but it should sound loud notes of caution about increasing it. And we still know very little about its empirical effects."); Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 505 n.160 (1998) (noting that the role of copyright in inducing the production of cultural texts remains an "unanswered empirical question")

[60] Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 789 (2004) (noting that economic justifications for copyright prohibitions against unauthorized copying may not be necessary to stimulate an optimal level of new creations and, in fact, appears to have a net negative effect on creative output).

[61] WESLEY M. COHEN, RICHARD R. NELSON & JOHN P. WALSH, PROTECTING THEIR INTELLECTUAL ASSETS: APPROPRIABILITY CONDITIONS AND WHY U.S. MANUFACTURING FIRMS PATENT (OR NOT) (Nat'l Bureau of Econ. Research, Working Paper No. 7552, 2000); Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT SCI. 173 (1986); Richard C. Levin, Alvin K. Klevorick, Richard R. Nelson, Sidney G. Winger, Richard Gilbert & Zvi Griliches, *Appropriating the Returns from Industrial Research and Development*, 1987 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 783 (1987); C.T. TAYLOR & Z.A. SILBERSTON, THE ECONOMIC IMPACT OF THE PATENT SYSTEM (1973).

[62] TOWSE, *supra* note 59, at 21.

[63] William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475 (2003) (arguing that indefinitely renewable copyright "need not starve the public domain"); Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Best Seller*, ___ MINN. L. REV. ___ (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955954 (testing the assumptions made by Landes and Posner concerning indefinitely renewable copyright and demonstrating that the assumptions of Landes and Posner are not empirically supported).

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In addition to a lack of empirical understanding, the full range of incentives in the copyright context remains under explored.[64] Although copyright may clearly in some instances give incentives to create, the extent to which such incentives may or may not operate more generally is not sufficiently evaluated in copyright doctrine. Further, little assessment is typically made of the extent to which copyright gives incentives in aggregate or the extent to which copyright may actually provide a negative incentive for new creations.

2. Incomplete Picture of Creation: Lack of Consideration of Borrowing, Collaboration and Sharing

In considering copyright incentives, many commentators make assumptions about the manners in which creation should occur. These views about creation are at least implicitly rooted in many instances in incomplete assumptions about how works of high culture are created.[65] Such views of creation represent a cultural vision of creative processes that emphasizes the autonomous creation of new works. As this vision of copyright is typically constructed, those deemed authors deserve copyright protection on account of their acts of creation.[66]

The incentive based vision of copyright is typically incomplete in not taking sufficient account of the importance of sharing, borrowing and collaboration in the creation of new works. Such practices represent a norm of creation in many contexts. In the music arena, for example, borrowing and other forms of copying have been norms of creation in all genres and time periods.[67] Recognition of sequential and cumulative innovation as a norm in the creation of new works highlights the generally insufficient attention paid to incentives of creators who use existing works in their creations.[68]

Further, recognition of sharing, borrowing and collaboration in creation suggests that greater consideration be given to the ways in which current

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[64] Stan Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects* 20 (Dec. 2003), *available at* http://ssrn.com/abstract=488085 (noting lack of consideration of "the responsiveness of creative efforts to marginal incentives and the function of ownership of intellectual property beyond the incentive to create").

[65] Arewa, *supra* note ___ (discussing assumptions made about the creation of new works that disregard the importance of borrowing and collaboration in creation).

[66] *Id*.

[67] J. Peter Burkholder, *Borrowing*, *in* 4 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 1-33 (Stanley Sadie ed., 2d ed. 2001) (noting the pervasive nature of musical borrowing in all musical genres and time periods), *available at* http://www.grovemusic.com; J. Peter Burkholder, *The Uses of Existing Music: Musical Borrowing as a Field*, 50 NOTES 851, 852 (1994) (giving an overview of musical borrowing as a field).

[68] Jaszi, *supra* note ___, at 40 (noting that copyright has lost sight of the creation of works that entail serial collaboration).

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structures may hinder desirable creative activity.[69] Borrowing, collaboration, and other uses of existing works also underscore the importance of diffusion or spillovers in the intellectual property context.[70] Spillovers have always been an important aspect of the operation of intellectual property frameworks and may be seen as constituting an "uncompensated benefit that one person's activity provides to another."[71] Recognition of the importance of borrowing and collaboration underscores the sociocultural value that may rest in new creations that use existing works. Consequently, the creation of such works in many instances not only promote the underlying goals of copyright but also create broader sociocultural value that could be better incorporated in analyses of copyright incentives. The creation of such works is facilitated when copyright doctrine creates feasible avenues for encouraging such borrowing and collaborative activities. Recognition of borrowing and collaboration should be incorporated in copyright doctrine through development of more nuanced conceptions of borrowing and copying.[72] In the context of UGC, YouTube, and digital era copying more generally, such typologies of copying would enable better delineation of what constitute acceptable and unacceptable uses of existing works.

3. Incomplete Actors: Insufficient Attention to Human Actors and Human Agency

Although evident in copyright since its inception,[73] propertization narratives of copyright have in recent years become a critical force in the adoption of stronger intellectual property frameworks.[74] The increasing importance of

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[69] Rufus Pollock, *Cumulative Innovation, Sampling and the Hold-Up Problem* 18-19, Oct. 2006, DRUID, Copenhagen Business School Working Paper (manuscript on file with author), available at: http://ssrn.com/abstract=961351 (discussing how asymmetric information about the value of follow-on innovation can lead to holdup problems and noting that technological change such as that evident in the digital era that reduces the costs of sampling new ideas should imply "a reduction in the socially optimal level of intellectual property rights")

[70] H.I. DUTTON, THE PATENT SYSTEM AND INVENTIVE ACTIVITY DURING THE INDUSTRIAL REVOLUTION 1750-1852 204 (1984) (noting that the imperfect nature of early patent system in nineteenth century Britain was key to successful economic development because it made diffusion possible).

[71] Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 100 COLUM. L. REV. ___ (2007).

[72] Arewa, *supra* note 50, at ___.

[73] Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1008-42 (2006) (discussing history of conceptions of "property" in intellectual property discourse); Meredith L. McGill, *The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law*, 9 AM. LITERARY HIST. 21, 24 (1997) (discussing the literary property debate in the U.S. in the context of broader socioeconomic transitions, including the shift from a patronage system to a market for books in the transition to a market economy); Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 75 (2003) (discussing conceptions of literary property and the origins of such ideas).

[74] LITMAN, supra note 19, at ___.

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intellectual property value from an economic and business perspective is a crucial motivating force for many proponents of stronger intellectual property protection.[75] However, little consideration is given in copyright discourse to the operation of copyright other than with respect to incentives to create.[76] Further, little attention is given to how intellectual property rights are used in real world contexts, including with respect to strategic uses.[77] Consequently, the operation human actors and role of human agency frequently remain subject to unverified assumptions in much intellectual property discourse, if considered at all.[78]

This oversight is significant, particularly given the broader business, economic, and other contexts within which copyright operates, particularly in the digital era. The role of artists, businesses, consumers, users and others as conscious, motivated and self-interested actors needs greater consideration.[79] Such behaviors should then be evaluated in terms of copyright's core goals of promoting valued creations.

Consideration of human actors as agents in copyright means eschewing idealized notions of behavior and looking empirically at actual behaviors in contexts within which intellectual property rights may operate or be used. This consideration would also entail reconceptualizing actors involved in the intellectual property framework as knowledgeable actors and distinguishing between intellectual property rules (the "rules of the game") and the ways in which such rules may be applied or play out in varied contexts (the "manner of play").[80] This perspective also entails examining the ways in which holders of intellectual property rights actually wield intellectual property rights.

The behaviors of various actors within intellectual property frameworks have real world significance and effects. The current incomplete understanding of copyright incentives, operation and the behavior of human agents involved in

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[75] *See infra* notes ___ to ___ and accompanying text.

[76] Stan Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects* 20 (Dec. 2003) (noting general failure to consider "the responsiveness of creative efforts to marginal incentives and the function of ownership of intellectual property beyond the incentive to create"), available at http://ssrn.com/abstract=488085.

[77] Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1971 (2002) ("The interaction between IP and innovation is a complex one. That interaction isn't simply a function of the traditional theory of IP as a mechanism for maintaining market exclusivity. Rather, any study of IP and innovation must take account of how IP is used in the real world."); Olufunmilayo B. Arewa, *Intangibles and Intellectual Property: Value and Behavior in the Digital Era* (2007) (manuscript on file with author) (discussing strategic uses of intellectual property).

[78] Arewa, *supra* note 77, at ___.

[79] *Id.*; Liu, *supra* note 31, at 402 (noting that copyright law does not have a well-developed theory of the consumer and noting the need for a more complex image of the consumer).

[80] Arewa, *supra* note 77, at ___.

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copyright arena is even more problematic given that copyright exists in an environment where interest groups play a pervasive role in writing, promoting and implementing particular legal structures and interpretations.[81] This incomplete understanding of copyright and human actors reinforces the general lack of understanding of the actual operation and consequences of copyright in varied contexts, including in relation to questions connected to YouTube and UGC.

4. Incomplete Benefits and Costs: Creative Significance and Costs of Control

What constitute the actual costs and benefits of copyright are core questions in any consideration of copyright's operation.[82] Discussions of cost and benefit in the copyright arena are, however, far too often incomplete. This arises in part from an incomplete consideration of actual behaviors in the copyright context and is magnified by a lack of consideration of sharing, borrowing and collaboration. Consequently, the creative significance and sociocultural value of uses of existing works, such as in the context of hip hop music, is typically not adequately evaluated.[83]

The failure to take account of the creative significance of uses means that the provisions is often explicitly denied to works that sample, borrow, copy or otherwise involve sequential or cumulative invention. Copyright discourse does not sufficiently consider the operation of incentives in such contexts. Further, shifting rationales are often evident in the copyright context where commentators may use utilitarian cost-benefits analyses to assess whether "new" works should be permitted under copyright, but replace this utilitarian calculus with natural rights rationales with respect to control and blocking rights. As a result, new creations that seek to use existing works may be over deterred because the relative harms and benefits of such works are not truly assessed. The incentive rationales that are pervasive in copyright discourse in the American copyright system

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[81] Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (outlining the role of the copyright industries in the adoption of the 1976 Copyright Act); William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1645 (2004) (noting that asymmetric interest-group pressures by copyright owners and public-domain publishers weigh against legislative recognition of a generous fair use defense).

[82] Landes & Posner, *supra* note 44, at 326 ("Copyright protection . . . trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.").

[83] Paul Théberge, *Technology, Creative Practice and Copyright*, *in* MUSIC AND COPYRIGHT 139, 147 (Simon Frith & Lee Marshall, eds., 2d ed. 2004) (noting that current copyright frameworks "virtually ignore the significance of the creative uses to which [sampled sound fragments in hip hop music] are put.").

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consequently need to take better account of the implications of cumulative invention.

Further, the true costs of limiting access for the creation of new works are often not adequately considered in much copyright discourse, particularly since new creations based on borrowing, sharing and collaboration are discouraged under dominant copyright assumptions. The lost value of such works is an opportunity cost of current copyright frameworks. Incentives other than with respect to the incentive to create are similarly not sufficiently considered, which has significant implications in cases where intellectual property rights are used strategically, since strategic uses may impose costs also not typically considered. At the same time, the broader sociocultural costs of the control rights by which copyright owners actually limit access are rarely evaluated with sufficient specificity,[84] although significant dialogue exists with respect to the implications of such control with respect to free speech, for example.

The failure to fully recognize the costs and benefits of copyright is particularly significant in the current sociocultural context where intangibles such as intellectual property are increasingly important from a business and economic perspective. A substantial increase in the exploitation of intangible resources has come with the knowledge economy of the digital era, which has significant implications for intellectual property because greater intangibility makes intellectual property boundaries harder to delineate and thus more difficult for those who are not expert to navigate.[85] In the YouTube, UGC and other digital era contexts, greater consideration of costs and benefits would entail incorporating greater analysis of whether and how such uses should be permitted and the relative sociocultural benefits and costs of reuses of existing material.

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[84] Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing,* Porgy and Bess *and Unfair Use*, 37 RUTGERS L. J. 277 (2006) (discussing the implications of control rights in the instance of George Gershwin's opera *Porgy and Bess*).

[85] N. Stephan Kinsella, *Against Intellectual Property*, 15 J. LIBERTARIAN STUDIES 1, 2 (2001) (noting that matters become fuzzier in movement from tangible or corporeal toward the intangible); Frischmann & Lemley, *supra* note 71, at ___ (discussing greater difficulties in drawing boundaries with respect to intellectual property rights); Olufunmilayo B. Arewa, *Measuring and Representing the Knowledge Economy: Accounting for Economic Reality Under the Intangibles Paradigm*, 54 BUFF. L. REV. 1 (2006) (discussing the importance of intangibles in the knowledge economy) (hereinafter, "Arewa*, Accounting*"); Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1030 fn. 78 (1990) (Review of PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE (1989)) ("At issue here, however, is the chilling effect on artists, and artists are not usually copyright experts. Thus, the fact that a work could be a potential infringement is as important in practical terms as actual infringement.").

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5. Incomplete Conceptions of Copyright: Intangibility and the Structure of Copyright

Copyright theory also pays insufficient attention to the structure of copyright itself. Most importantly, copyright discussions often fail to distinguish between the intellectual property right itself and the knowledge underlying the right. Intellectual property may be conceptualized as a double intangible involving two levels of intangibility: the right itself (e.g., copyright), which can be conceptualized as a certificate of ownership of sorts, and the underlying knowledge over which the right gives some right of ownership.[86] This distinction is important because copyright is best conceptualized as an ownership certificate with respect to some underlying intangible knowledge.

Discussions of copyright often include both utilitarian and natural rights rationales. At times, as Wendy Gordon has highlighted in her discussion of the *Grokster* case, discussions of copyright may shift without notice between utilitarian (termed consequentialist by Professor Gordon) and natural rights (termed deontological by Professor Gordon) rationales.[87] This inclination toward shifting rationalizations reflects a tendency to conflate the two levels of the double intangible. Rationales used to justify the granting of copyrights in some cases address different aspects of the double intangible. Consequently, utilitarian rationales typically address the certificate of ownership level of intangibility, while natural rights rationales more often relate to issues connected to underlying knowledge.[88]

The tendency toward shifting rationales in copyright discourse is particularly problematic in the context of new creations that use existing works. Discussions of grants of copyright protection to new works (which are often conceptualized in such a way as to ignore the reality of borrowing) are often based on utilitarian rationales that focus on incentives and relative costs and benefits. Considerations of the interaction of copyright in instances of new works that clearly reflect borrowing of existing works have a different emphasis. In contrast to treatment of incentives in instances involving "new" works, discussions of copyright control rights, which typically permit copyright owners to prevent certain unauthorized uses of their copyrighted works by others, are steeped in natural rights based assumptions about right and ownership.[89]

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[86] Arewa, *supra* note 36, at ___.
[87] Wendy Gordon, *Computer Philosophy, Moral Philosophy and the Law: The Grokster Case*, *in* MORAL PHILOSOPHY AND INFORMATION TECHNOLOGY ___, ___ (Weckert & van den Hoven, eds., forthcoming).
[88] *Id*. at ___.
[89] Arewa, *supra* note 36, at ___ (discussing the significance of control rights in the copyright context).

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The double intangible and shifting rationales for copyright protection highlight the persistent tension between exclusive property rights reflected in the intellectual property certificate and the nonexclusivity of knowledge. In the digital economy era, this may result in less clarity about the boundaries of ownership rights, which, combined with the tendency toward shifting rationales, may have significant chilling implications for the creation of new works.

B. *Digital Era Copyright and Content: The Digital Music Mess*

The lack of clarity in the theoretical foundations and practical application of copyright law is an important factor in digital era copyright controversies. The music industry was the first of the culture industries to experience the digital era in full force. The collision between the music industry and the digital era illustrates some consequences of incomplete copyright. The encounter of the music industry with the digital era has been a difficult one. The introduction of compressed digital music files in MP3 and other formats has led to widespread dissemination of digital music files and a host of uncompensated unauthorized uses of digital music content. The digital music encounter was a harbinger of things to come in the digital video arena, albeit with certain important distinctions. The unauthorized distribution of digital music files was significantly facilitated by P2P file sharing technology, including technologies introduced by companies such as Napster and Grokster. Although significant attention has been given to the consequences of unauthorized file sharing in the music arena, the user behaviors apparent reflect a broad range of practices ranging from verbatim copying to transformative uses of existing works. The adjustment of copyright to the digital era should entail distinguishing between such uses and identifying and delineating the scope of acceptable uses in the digital context and recognizing that the topography of such acceptable uses may at least in some instances diverge from that evident prior to the digital era.

File sharing has received significant attention in part because it has become widespread during a time of declining music industry CD sales.[90] The recording industry has argued that file sharing has been the cause of sales declines.[91] This assumed causal connection has been an important basis for the legal responses and policy intervention promoted by the recording industry and its principal lobbying arm, the Recording Industry Association of America (RIAA). The proposed ISP levy is one aspect of the recording industry business response

[90] Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music* 50-60 (Nat'l Bureau of Econ. Research Working Paper No. 11282, 2005), available at http://www.irs.princeton.edu/pubs/pdfs/499.pdf (noting declining music industry CD sales)

[91] Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 2 (2007), *available at* http://www.journals.uchicago.edu/cgi-bin/resolve?JPE31618PDF (noting that the RIAA blames declining record sales on unauthorized file sharing).

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to file sharing. However, the assumption of causality on which recording industry responses have been based may not be accurate. Other analyses and empirical studies suggest other explanations for the decline in CD sales,[92] including CD market saturation and the decline in available physical retail locations where music may be purchased.[93]

The industry responses to P2P file sharing in the music context obscures two underlying issues of significance in relation to copyright. The uses of P2P technology may suggest fundamental changes in consumer behavior with respect to music consumption that would at least in some instances be better addressed by changes in industry business models rather than by changes in law or the imposition of levies. To some extent, technology companies such as Apple Inc., who now distribute content, may have been more responsive to changing consumer behaviors with respect to consumption of digital music.[94] Secondly, the practices to which many content owners object actually include a broad range of activities, some of which involve verbatim copying, others of which reflect familiar practices of collaboration and borrowing applied in new contexts. How copyright should distinguish among and treat such practices remains an issue of continuing debate. This debate is particularly marked in the digital video arena, where verbatim copying is likely proportionately less than in the digital music arena.

C. *Changing Contexts: YouTube, UGC and Web 2.0*

YouTube and other mechanisms for the viewing and distribution of digital video content became prominent after the advent of digital music. As was the case in the digital music arena, significant tension has emerged as is evident in behaviors that reflect an increasing dissonance between laws enacted in prior eras that now operate in the context of digital era norms and behaviors. YouTube and UGC should be considered within the context of this broader business, economic and societal transition.

YouTube exemplifies a fundamental paradox that has arisen in the digital era between pre-digital legal and business structures and digital era behaviors.

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[92] *Id*. at 3 (concluding through empirical analysis that file sharing has an effect on music sales that is statistically indistinguishable from zero); Connolly & Kruger, *supra* note 90, at 50-60.
[93] David Hesmondhalgh, *Digitalisation, Copyright and the Music Industries*, in UNPACKING DIGITAL DYNAMICS: PARTICIPATION, CONTROL AND EXCLUSION (Peter Golding, & Graham Murdock eds., 2006), at 3, available at http://www.cresc.ac.uk/publications/documents/wp30.pdf; Ethan Smith, *Sales of Music, Long in Decline, Plunge Sharply*, WALL ST. J., Mar. 21, 2007, at A1 (discussing factors underlying decreasing music sales, including the closing of many retail outlets where music could be purchased).
[94] Nicola F. Sharpe & Olufunmilayo B. Arewa, *Is Apple Playing Fair? Navigating the iPod DRM Controversy*, 5 NW. J. TECH. & INTELL. PROP. (2007).

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YouTube, which was bought by Google in 2006 for $1.65 billion,[95] has established itself at the forefront of what is often called Web 2.0.[96] Web 2.0 is a term typically used to refer to the "explosion of blogs, social networks and video-sharing sites [that] has allowed any Internet user to become a journalist or filmmaker or music star."[97] Since its inception, YouTube has been a leading moving force and has exemplified the trends associated with Web 2.0.[98] Unlike traditional content owners, whose business models rely to a significant extent on licensing revenues from content, YouTube has an advertising based revenue model, which means that YouTube revenues tend to increase as traffic to its website increases.[99] Despite the success of this model in generating website traffic, YouTube has yet to generate a profit.[100]

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[95] Google Inc., *Google To Acquire YouTube for $1.65 Billion in Stock*, Oct. 9, 2006, at http://www.google.com/intl/en/press/pressrel/google_youtube.html.

[96] Driscoll, *supra* note 9, at 552 ("YouTube, a free video sharing website, ranks number one worldwide in video and movie website visitors with twice the number of viewers as the next ranked site ."); Full Text: *Keen vs. Weinberger*, WALL ST. J. ONLINE, July 18, 2007, at http://online.wsj.com/article/SB118460229729267677.html; Reply All, *The Good, the Bad, And the 'Web 2.0'*, WALL ST. J. ONLINE, July 18, 2007, at http://online.wsj.com/article/SB118461274162567845.html?mod=Technology

[97] Reply All, *supra* note 96; *see also* Jeannine M. Marques, Note: *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 22 BERKELEY TECH. L.J. 331, 331 (2007) ("YouTube, MySpace, Blogspot, and countless other websites offer amateur creators (and even professional content companies like CBS) the opportunity to produce innovative content and to post it immediately and freely to a worldwide audience.").

[98] Paul Boutin, *A Grand Unified Theory of YouTube and MySpace*, Slate.com, Apr. 28, 2006, http://www.slate.com/id/2140635/ (noting that YouTube and MySpace "fit the textbook definition of Web 2.0, that hypothetical next-generation Internet where people contribute as easily as they consume."); *YouTube Serves up 100 Million Videos a Day Online*, USA TODAY, July 18, 2006, at http://www.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm? ("YouTube, the leader in Internet video search, said Sunday viewers are now watching more than 100 million videos per day on its site, marking the surge in demand for its "snack-sized" video fare. Since springing from out of nowhere late last year, YouTube has come to hold the leading position in online video with 29% of the U.S. multimedia entertainment market, according to the latest weekly data from Web measurement site Hitwise."); Andrew Kantor, *YouTube's Success Proves Content, Not Slick Production Is King*, USA TODAY, Sept. 21, 2006, at http://www.usatoday.com/tech/columnist/andrewkantor/2006-09-21-youtube_x.htm ("[T]he three most popular series on YouTube are done by amateurs with cheap webcams and cheap technology, and people are flocking to 'em").

[99] Driscoll, *supra* note 9, at 553 ("YouTube receives revenue by offering various types of advertising space. Thus, the more visitors YouTube at-tracts, the more revenue received from advertisers. Despite the large number of visitors, this business model has failed to generate substantial revenue [sic] because of high operating costs.") (citations omitted).

[100] *Id.*; *YouTube: Waiting for a Profit*, BusinessWeek.com, Sept. 18, 2006, at http://www.businessweek.com/magazine/content/06_38/b4001074.htm?chan=tc&campaign_id=bier_tcs.g3a.rss090806b (noting that YouTube had yet to make a profit by September 2006); Helft, *supra* note 2 (noting that Google has developed a strategy to make YouTube profitable by delivering user controlled advertisements with YouTube content).

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YouTube has also had a significant social and cultural impact in a number of spheres. In the political arena, for example, YouTube has changed the dynamics of the political process in the U.S.,[101] where videos uploaded to YouTube are thought to have significantly influenced the outcome in at least one recent senate race.[102] Videos uploaded to YouTube have been instrumental in uncovering instances of police brutality.[103] YouTube has also been used by law enforcement officials to assist in crime fighting.[104] YouTube's reach is by no means restricted to the U.S.; YouTube has become a truly global force.[105]

In the entertainment and broader content arena, YouTube has created innovative functionality and uses that have been rapidly adopted by consumers and contributed to YouTube's viral growth.[106] At the same time, however, the operation of both Google and YouTube has presented significant challenges to existing business and legal frameworks. Many of the copyright concerns with

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[101] The 2008 'YouTube' Election? The Role And Influence of 21st Century Media, 2008 Symposium, Catholic University of America Columbus School of Law, Mar. 13, 2008, Webcast, at http://commlaw.cua.edu/symposia/symposia_index.cfm (discussing the role of media such as YouTube and MySpace in the 2008 election); James Wolcott, *The YouTube Election*, VANITY FAIR, June 2007, http://www.vanityfair.com/ontheweb/features/2007/06/wolcott200706; Amy Schatz, *Snowman Video In YouTube Debate Chills Some Politicos*, WALL ST. J., July 31, 2007, at A1, http://online.wsj.com/article/SB118582060979882460.html, (discussing the role of a talking Snowman Video in the YouTube debate among the democratic presidential candidates).

[102] Andrew Sullivan, *Video Power: The Potent New Political Force*, TimesOnline, Feb. 4, 2007, http://www.timesonline.co.uk/tol/comment/columnists/andrew_sullivan/article1321781.ece (noting the power of video and the role of YouTube in causing the campaign of Senator George Allen to "hit a brick wall"); Frank Rich, *2006: The Year of the 'Macaca'*, N.Y. TIMES, Nov. 12, 2006, http://select.nytimes.com/search/restricted/article?res=F60F11F7345B0C718DDDA80994DE404482# (discussing the role of the YouTube "macaca" video in George Allen's defeat).

[103] Alex Veiga, *YouTube.com Prompts Probe of LAPD*, Associated Press, Nov. 11, 2006, http://abcnews.go.com/US/wireStory?id=2645350&CMP=OTC-RSSFeeds0312; LA Police in YouTube Beating Film, BBCNews, Nov. 10, 2006, http://news.bbc.co.uk/2/hi/americas/6136046.stm.

[104] Ian Austen, *Fighting Crime Using Videos on YouTube*, N.Y. TIMES, Dec. 18, 2006, http://www.nytimes.com/2006/12/18/technology/18hamilton.html?ex=1324098000&en=c09b67c65aec7f21&ei=5090&partner=rssuserland&emc=rss.

[105] David Sarno, *A Global YouTube*, L.A. TIMES, July 1, 2007, http://www.latimes.com/business/la-ca-webscout1jul01,1,2327178.story?coll=la-mininav-business (discussing the launch of nine new YouTube country websites, including sites for Brazil, the Netherlands, Poland, and Japan); *Mexico Drug Gangs 'in Web taunts'*, BBCNews Online, Feb. 14, 2007, http://news.bbc.co.uk/2/hi/americas/6361899.stm (noting that rival Mexican drug gangs are using YouTube videos to exchange bloody and graphic taunts); Thomas Fuller, *Thailand Bans YouTube*, N.Y. TIMES, Apr. 5, 2007, http://www.nytimes.com/2007/04/05/business/worldbusiness/05tube.html?ex=1333425600&en=d4c3824714b7b322&ei=5088&partner=rssnyt&emc=rss (noting that Thailand banned YouTube as a result of a video posted of the King of Thailand that was deemed denigrating).

[106] Driscoll, *supra* note 9, at 553 ("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.").

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respect to YouTube and Google relate to the ways in which they and their users make use of existing copyrighted material.

In Google's case, controversy has arisen concerning the Google Library Project. The Google Library Project, which is part of Google Book Search,[107] enables users to search within scanned books to find relevant material in such books that might otherwise be difficult to find.[108] The Google Library Project has led to lawsuits filed against Google in 2005 by the Authors Guild and the Association of American Publishers alleging copyright infringement.[109] YouTube has similarly encountered significant legal controversy on account of the ways in which YouTube users make use of existing content on YouTube.[110]

YouTube and Google illustrate some ways in which technological changes continue to challenge existing legal frameworks, particularly intellectual property laws. Many of these debates center around the ways in which existing copyright frameworks should operate in the digital era. These issues are significantly disputed and form the basis for legal actions from varied constituencies. Much attention has been devoted in legal discussions to the increasingly aggressive behaviors and legal activities of content owners and their representatives, particularly the principal recording industry lobbying arm, the RIAA, which has followed an aggressive litigation strategy that targets its customers in recent years.[111] This litigation strategy in many instances has focused on using

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[107] As part of the Google Library Project, Google has created Google Book Search, which involves arrangements with a number of libraries to scan the works in their collections into digital format at Google's expense. Google currently has agreements with a number of universities, including Harvard, Michigan, Cornell, Bavarian State Library, New York Public Library, National Library of Catalonia, Stanford, Princeton, University of California and others. Google offers differing levels of access to such scanned books on the Internet, depending on whether the books are protected by copyright and whether the copyright owner has requested that its content not be made available through the Google Library. The Google Library Project permits users to search within scanned books to find relevant material within such books that might otherwise be difficult to find. *See* Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 833-34 (2006); Google Library Partners, http://books.google.com/googlebooks/partners.html.

[108] Arewa, *supra* note 107, at 834.

[109] McGraw Hill Companies v. Google Inc. (05-CV881) (S.D.N.Y. Oct. 19, 2005); The Author's Guild v. Google Inc. (05-CV8136) (S.D.N.Y. Sept. 20, 2005); Peter Givler, *Google and the Book Publishers: Testing the Limits of Fair Use in the Digital Environment*, 14 BRIGHT IDEAS (2005), http://aaupnet.org/aboutup/issues/pgbrightideas.pdf; Elisabeth Hanratty, *Google Library: Beyond Fair Use?*, 10 DUKE L. & TECH. REV. (2005), http://www.law.duke.edu/journals/dltr/articles/PDF/2005DLTR0010.pdf.

[110] *See infra* notes ___ to ___ and accompanying text.

[111] Sharpe & Arewa, *supra* note 94, at ___ (discussing the lack of a recording industry business strategy in the digital era and the current RIAA litigation strategy that targets its consumers); Electronic Frontier Foundation, RIAA v. The People: Four Years Later Report, Aug. 2007, http://w2.eff.org/IP/P2P/riaa_at_four.pdf (discussing the RIAA litigation strategy) (last visited

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copyright law to block unauthorized or unlicensed uses that not uncoincidentally also might present a competitive business threat to the recording industry's business models.[112] This litigation strategy has led the RIAA to garner settlements averaging $4,000 from legal actions against some 30,000 alleged infringers.[113] The first RIAA infringement case verdict in October 2007 was a victory for the recording industry.[114] The jury awarded $222,000 or $9,250 in damages for each of the 24 songs involved in the trial.[115]

In the current copyright context, however, all sides attempt to use existing legal frameworks to reinforce particular interpretations of the law, as well as creates norms of behavior that reflect such interpretations.[116] Those in favor of strong property rights tend to describe all unlicensed uses as "piracy" and seek to instill copyright norms that prohibit any unauthorized or unlicensed uses.[117] Further, clearance culture in the movie and recording industries means that all or most uses must receive prior authorization, irregardless of whether the actions being cleared are permitted by copyright or might constitute fair use.[118] One trend with respect to online content today is to use mechanical filtering to automatically prevent copyrighted material from being posted on websites such as YouTube. Google, for example, has developed a filtering tool for YouTube.[119] Similarly, a group of Internet, media, and technology companies have recently

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October 18, 2007).

[112] STEVEN LEVY, THE PERFECT THING: HOW THE IPOD SHUFFLES COMMERCE, CULTURE, AND COOLNESS 27-31 (2006) (describing digital era music lawsuits by the RIAA in response to different technologies).

[113] Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, Oct. 5, 2007, http://www.nytimes.com/2007/10/05/business/media/05music.html.

[114] *Id*.

[115] *Id*.; Section 504 of 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 infringement and up to $150,000 per infringement in cases involving willful infringement. 17 U.S.C. §504 (2006).

[116] L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 10-11 (1991) (noting that copyright owners and others with vested interests have influenced and promulgated "guidelines that purport to implement the law but instead often constitute self-aggrandizement at the expense of the public interest.").

[117] LITMAN, *supra* note 74, at 85 (noting that the term piracy was applied in the past to those who made and sold large numbers of counterfeit copies but is used today to describe "*any* unlicensed activity").

[118] SHIVA VAIDHYANATHAN, COPYRIGHTS AND COPYRWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY ___ (2001) (discussing clearance culture).

[119] David King, *Latest Content ID Tool for YouTube*, The Official Google Blog, Oct. 15, 2007, http://googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html (announcing the launch of Google Video Identification, which Google describes the "next step in a long list of content policies and tools that we have provided copyright owners so that they can more easily identify their content and manage how it is made available on YouTube").

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proposed guidelines intended to protect copyright online.[120] The forces countering those who seek stronger copyright norms include organizations such as the Electronic Frontier Foundation.[121] Industry groups at times also play a role in countering overly aggressive interpretations of copyright. For example, the Computer and Communications Industry Association (CCIA), a group that represents Google, Microsoft, and other technology companies, announced that it planned to file a complaint with the Federal Trade Commission (FTC) alleging that several content companies have overstepped their bounds with respect to copyright warnings.[122]

Underlying legal debates concerning YouTube and its users rests significant yet often not discussed assumptions about creation, consumption, and the ways in which varied users and producers can and should use existing content. In addition, culture is a necessary but at times omitted element whose role should be explored in any attempt to evaluate the YouTube and UGC legal controversy. Such considerations of culture relate at least in part to the sociocultural contexts within which content may be used. The behavior of businesses within this broader context is a critical element of the operation of copyright and intellectual property more generally that deserves further scrutiny. Although the behavior of the misbehaving masses are often given credit for the contested nature of copyright today, as, if not more important, have been discernible changes in the ways in which businesses use and extract value from copyright.

III. DIGITAL COPYRIGHT DISEQUILIBRIUM I: CHANGING BUSINESS MODELS

A. *The Monetization of Content: Increasing Value of Intellectual Property Assets*

The increasing prominence of what might be termed valuable asset models of culture in intellectual property is closely connected to the emergence of the digital era. Valuable asset models treat content as a valuable asset to be

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[120] Kevin J. Delaney, *Group of Net, Media Companies Agree on Copyright Guidelines*, WALL ST. J. ONLINE, Oct. 18, 2007, at http://online.wsj.com/article/SB119269788721663302.html?mod=hpp_us_whats_news (noting that the consortium guidelines would ask copyright holders not to file copyright infringement cases against Internet companies as long as such companies follow certain agreed upon principles, which include "using technology to eliminate copyright-infringing content uploaded by users to Web sites, and blocking any infringing material before it is publicly accessible").

[121] Electronic Frontier Foundation, http://www.eff.org.

[122] Sarah McBride & Adam Thompson, *Google, Others Contest Copyright Warnings*, WALL ST. J., Aug. 1, 2007, at B3, http://online.wsj.com/public/article/SB118593806790484425.html (citing the CCIA complaint as stating that many copyright warnings "'materially misrepresent U.S. copyright law, particularly the fundamental built-in First Amendment accommodations which serve to safeguard the public interest.'").

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monetized through extraction of maximum amounts of revenues. The business, social and economic landscape of the twentieth century heralded a fundamental shift in sources of value to a broad range of businesses. During this digital era, intangible resources have become a core source of economic growth and business value on a global scale. Intellectual property frameworks thus operate today in a business context in which intangibles such as intellectual property rights have become increasingly predominant. As a result, businesses today derive significant value from the creation and utilization of such resources. Although the use of such resources is certainly not new, their exploitation in the digital era is remarkable both in scope and intensity. The increasing economic and business utility of intellectual property and other intangible resources is amplified by the value that markets increasingly attribute to the creation and exploitation of such resources.

Markets for intellectual property and market responses to uses of intellectual property resources underpin and reinforce the dynamics created by valuable asset models. The increasing business and economic importance of intellectual property flows over into the political arena as business interests continue to play a prominent role in shaping intellectual property discourse and doctrine. Although this role is by no means new, the stakes have in many respects never been higher. These increased stakes are largely a consequence of the increasing centrality of intellectual property resources as core economic resources in the United States and globally. The cultural industries in the copyright arena and the growing strategic intellectual property management industry, particularly in the patent area, exemplify ways in which valuable asset models play out in real world contexts today.

1. The Cultural Industries: Cultural Content as Valuable Asset

Companies from the cultural industries, which include players from film, music, publishing and other areas, have long played a role in shaping copyright law.[123] The increasing global policy importance of copyright today is one outgrowth of the greater economic and business significance of the information and entertainment industries. In recent years, cultural industry companies have become among "the most highly valued and discussed businesses in the world."[124] Such companies have also become less specialized and broadened to form cultural

[123] LITMAN, supra note 19, 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.").
[124] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 1 (2007).

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industry conglomerates that encompass multiple cultural areas, including film, publishing, television, cable, and music, for example.[125]

The economic heft of the cultural industries is reflected in the tendency for copyright doctrine and policy to reflect a public choice story of industries seeking to shape copyright law to benefit their interests and maximize their economic returns.[126] The interests of the cultural and other core copyright industries have not surprisingly generally been accommodated in the 1976 Act and more recent copyright legislation such as the Copyright Term Extension Act ("CTEA").[127] Such industry-influenced legal initiatives reflect valuable asset approaches to culture. Legal avenues such as fair use that potentially provide avenues for greater access to existing cultural materials remain uncertain and fundamentally unable to properly accommodate the reality of culture as a vibrant and living force.[128]

The cultural industries produce content, which might also be described as cultural products and cultural texts. Such material is increasingly consumed on a multinational or even global basis.[129] Valuable asset business models entail the exploitation of cultural material from a value maximization perspective. Valuable asset approaches rely heavily on intellectual property, which enables content owners to maximize value by controlling uses of cultural material that they own. Valuable asset approaches typically advocate control and extraction of profit from all actual and potential uses of cultural material. This perspective contrasts significantly with prior eras when copyright was leakier and gave greater space for

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[125] *Id*. at 1-2 (noting emergence of industry conglomerates in the cultural industries); VIACOM INC., 2006 ANNUAL REPORT ON FORM 10-K, at 1-3 (2007) (identifying Viacom's multiple business lines and describing Viacom as a "leading global entertainment content company").

[126] NETANEL, *supra* note 13, at 54-80 (discussing the expansion of copyright).

[127] Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 518 (1999) ("Congress has repeatedly extended the breadth and scope of copyright protection, straining the meaning of the phrase 'for limited times' well beyond any historical recognition."); *see also* Copyright Term Extension Act of 1998, 17 U.S.C. §§ 302, 304 (2000) (amending 17 U.S.C. §§ 302, 304 (1976)).

[128] Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1495 (2004) (noting that fair use does not take account of traditional practices such as musical borrowing); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1693 (1988) (noting that disarray in fair use doctrine); MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 8 (2005), http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf; Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1576-77 (2004) (noting that case-by-case character of fair use adjudication makes fair use doctrine useless as a predictive device for copyright owners, copyright consumers, and for courts").

[129] HESMONDHALGH, *supra* note 124, at 2.

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noncommercial uses such as private personal use.[130] As valuable asset approaches have become more pervasive, many businesses in the cultural industries have attempted to institute a pay-per-use model that maximizes the value of content by eliminating uncompensated uses of materials that they own.[131] To accomplish this goal, businesses in the cultural industries, among other actions, have successfully devised legal mechanisms to exercise greater control over uses of their cultural assets and thus eliminate uncompensated uses. Although valuable asset approaches that seek to wring all possible profit from cultural assets may benefit the owners of such assets, they may have cultural consequences that must be scrutinized. The cultural material protected by intellectual property is often far more than a valuable asset, may serve important cultural functions and may play a role in vibrant living cultural traditions.

Valuable asset models and changing technologies of creation and dissemination have facilitated the exploitation of cultural material as assets. At least three parallel forces in the digital era have contributed to the appeal of value maximization models that intensely exploit cultural content as assets. First of all, the potential consumer markets for such assets are expanding, and intangibles have become both increasingly used in the production of goods and services and increasingly consumed by a broad range of consumers, creators and others.[132]

Secondly, investment markets are increasingly recognizing the market value of intellectual property assets, and markets for intellectual property have emerged and continue to develop. Consequently, investors and markets value intangibles such as content and other entertainment assets that have become core assets for many companies in the digital era.[133] As General Electric, owner of NBC-Universal Studios states in a recent annual report: "[e] ntertainment assets are highly valued by investors."[134] Similarly, Viacom notes: "our digital assets are becoming an increasingly important aspect of our business."[135] An important part of the creation of market value for intellectual property assets is the

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[130] Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1872-73 (2007) (noting that the lawful personal use zone is indeterminate and shrinking and that "[f]ifty years ago, copyright law rarely concerned itself with uses that were not both commercial and public").
[131] LITMAN, *supra* note 19, at 27 (noting that the DMCA facilitates a pay-per-use system).
[132] Arewa, *Knowledge Economy*, *supra* note 85, at ___ ("In addition to increased use of intangibles in the production of goods and services, an expansion has also occurred in the consumption of goods that are themselves nonphysical, such as digital products, services, and entertainment.") (citations omitted).
[133] *Id*. at ___ (discussing evidence demonstrating the rapidly increasing value of intangibles in many economies generally as well as with respect to specific companies); Ocean Tomo, Ocean Tomo Indexes ("The transformation of the global economy to a knowledge economy has placed an unprecedented focus on companies' intangible assets, including intellectual property assets: patents, trademarks and copyrights."), at http://www.oceantomo.com/indexes.html.
[134] GE 2006 ANNUAL REPORT 6 (2007).
[135] VIACOM 2006 ANNUAL REPORT, *supra* note 125, at 4.

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emergence of players that specifically focus on creating liquid markets for intellectual property assets; one industry player Ocean Tomo, for example, describes itself as "the leading Intellectual Capital Merchant Banc firm that specializes in understanding and leveraging Intellectual Property assets" and is "developing a suite of patent-based indexes and investable securities thereupon that provide investors, asset managers and financial advisors with compelling investment options and viable benchmarks."[136] The creation of markets for intellectual property assets has intensified existing pressures to make intellectual rights stronger. Stronger intellectual property rights are thought to provide greater predictability that may be beneficial in the creation of markets for intellectual property rights and other intangibles.[137]

Finally, although the Internet and technology as connected to freedom have become enduring memes in the digital era, technological changes during the digital era have era have in many respects enhanced opportunities for the control of content.[138] Mechanisms for control of content include digital rights management,[139] which potentially offers content owners the ability to control uses of content to a degree not possible prior to the advent of digital content. The combination of increased value attributed to intangibles such as entertainment assets and technological mechanisms of control explain why some industry players characterize recent technology shifts as the "prelude to a new golden age of media."[140] As a recent News Corporation Annual Report notes, "[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."[141]

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[136] Ocean Tomo, Ocean Tomo Indexes (describing the intellectual property indexes of Ocean Tomo, which describes itself as Intellectual Capital Merchant Banc Firm), at http://www.oceantomo.com/indexes.html.

[137] MARGARET M. BLAIR & STEVEN M.H. WALLMAN, UNSEEN WEALTH: REPORT OF THE BROOKINGS TASK FORCE ON INTANGIBLES 73-83 (2001) (discussing legal changes that might be required to provide greater certainty about rights in intangibles).

[138] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999) (noting with respect to cyberspace that the "invisible hand, though commerce is constructing an architecture that perfects control"); LESSIG, supra note 39, at 8 ("for the first time in our tradition, the ordinary ways in which individuals create and share culture fall within the reach of the regulation of the law, which has expanded to draw within its control a vast amount of culture and creativity that it never reached before."); LITMAN, *supra* note 19, at 27 ("copyright owners were able to persuade Congress to pass the Digital Millennium Copyright Act, which encourages the use of technological protections to facilitate a pay-per-view, pay-per-use system using some sort of automatic debit payment before anyone can have access to anything.") (citations omitted).

[139] Ian Kerr, *If Left to Their Own Devices…How DRM and Anti-Circumvention Laws Can Be Used to Hack Privacy*, in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 167, 167-71 (Michael Geist ed. 2005), at http://iankerr.ca/content/view/22/70/ (noting that laws enabling DRM facilitate its implementation as a primary means of enforcing digital copyright).

[140] NEWS CORPORATION 2006 ANNUAL REPORT 9 (2007).

[141] *Id*.

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The approach of many players in the cultural industries during the digital era has focused on using technology and other mechanisms of control to maintain and enhance the value of content. Although value maximization approaches and valuable asset models with respect to intangibles such as intellectual property have become increasingly pervasive during the digital era,[142] the use of control mechanisms in the content arena is by no means a digital era novelty.[143]

In the context of the cultural industries, even prior to the digital era, standard business practices have entailed increasing the value of content by exercising greater control on both the creation and distribution side. This is evident, for example, in the music industry, which maximized the value of the musical content through control mechanisms on both the creation and distribution side with respect to artists and consumers.[144] During the digital era, dominant industry players in cultural industries sectors such as the music industry have experienced at least some degree of digital era disintermediation, which has been in part rooted in the development digital content and alternative technologies of dissemination of such content, both authorized and unauthorized, such as those available through the Internet.[145] The availability of such alternatives on both the creation and distribution side have led to significant and deleterious business consequences in the music industry.

Events in the music industry have likely reinforced valuable asset tendencies among cultural industry firms. The messy situation in the digital music sphere may suggest to players in other areas such as digital video that greater control might be the best strategy for maximizing the asset value of content in the digital era.[146] Firms within the cultural industries, not surprising, use various means to increase the value of content assets by creating broader and stronger boundaries that enable greater extraction of revenues from cultural assets. Consequently, players in the cultural industries advocate ever stronger intellectual property laws to protect against the threat of piracy. As Viacom notes in a recent annual report, "[u]nauthorized distribution of copyrighted material over the Internet such as through video sharing and other file sharing services that either ignore or interfere with the security features of digital content is a threat to copyright owners' to protect and exploit their property."[147] As a number of authors have noted, however, content owners' discussion of piracy typically reveal

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[142] LESSIG, FREE CULTURE, *supra* note 138, at ___.
[143] Arewa, *supra* note ___, at ___.
[144] Sharpe & Arewa, *supra* note ___, at ___ (discussing music industry control mechanisms on the creation and distribution side).
[145] *Id*.
[146] Arewa, *supra* note ___, at ___.
[147] VIACOM 2006 ANNUAL REPORT, *supra* note 135, at 14.

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a sleight of hand whereby all unauthorized uses are equated with piracy.[148] The tendency to equate unauthorized uses with piracy has become a foundational argument for many who advocate stronger copyright laws.[149] Such perspectives are problematic from a legal perspective in that they expand the range of control of content owners beyond those traditionally encompassed within copyright law, and often ignore existing balancing mechanisms such as fair use.[150] Further, the portrayal of unauthorized uses as constituting piracy reflects an ideology of cultural production that is significantly at odds with the reality of cultural production, [151] but which nonetheless has a significant impact on people's perceptions of cultural production.[152]

Control of cultural knowledge in the intellectual property context is often linked to questions of incentives.[153] As is the case with respect to cultural production, questions of incentives are often shaped by perceptions that may significantly diverge from the reality of actual business practices. Intellectual property rights are often justified as providing incentives to creators to create new works.[154] The importance of creators and creativity and the need to provide incentives to create are often highlighted in public policy discussions of copyright and were used effectively by proponents of the CTEA as a justification for the extension of copyright duration.[155] However, the incentive story in the copyright context is tenuous for a number of reasons.[156] In addition to a lack of empirical evidence in support of typical incentive rationales, treatment of actual creators under statutory provisions such as work for hire and typical contractual business terms suggests that the reward side of the incentive equation is highly attenuated

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[148] LESSIG, *supra* note 39, at 53 ("If 'piracy' means using the creative property of others without their permission . . . then the history of the content industry is a history of piracy.").
[149] LITMAN, supra note 19, at 85 (noting expansion in uses of term piracy, which in past was applied to those who made and sold large numbers of counterfeit copies but which today is used to describe "any unlicensed activity").
[150] *See infra* notes ___ to ___ and accompanying text.
[151] Arewa, *supra* note 33 (discussing the pervasive nature of musical borrowing and its implications for conceptions of creation processes).
[152] Netanel, *supra* note 18, at 12 ("The metaphors used to describe social practices and legal rules have a powerful impact on people's perception of them. For that reason, the copyright industry has assiduously promoted the notion that copyright is 'property' and that all who make unlicensed use of copyrighted material are 'pirates' or 'thieves'.") (citations omitted).
[153] *See infra* notes ___ to ____ and accompanying text.
[154] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright*, J. LEGAL STUD. 325, 326 (1989) (1989) ("Copyright protection . . . trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.").
[155] Christina N. Gifford, Note, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 390 (2000) (noting that "[t]he final rationale cited by supporters of the CTEA is that a longer term of protection would serve as a greater incentive for creation of artistic and literary works").
[156] *See supra* notes ___ to ___ and accompanying text.

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for many creators.[157] Copyright unfolds in the business arena significantly in the shadow of contract. The contractual terms granted creators in such contracts suggest that the value of creation and need for rewards to incentive new creations expressed in copyright policy debates is not always reflected in the business terms to which many creators are actually subject. Contractual terms in the recording industry, for example, reveal significant power asymmetries both in the allocation of intellectual property rights and relative economic benefits.[158] As a result, most successful popular musicians earn far more from concert ticket sales than from royalties from record sales,[159] despite the fact that aggregate revenue from records far exceeds aggregate revenue from concert performances.[160] The treatment of many creators in current cultural industry business structures to some extent belies the incentive story of copyright and reveals the extent to which perception diverges from reality in the context of valuable asset models as currently deployed.[161] In the case of the recording industry, control on the creative side has in the past been a core element in industry business models and profitability.[162]

Although often not as readily acknowledged, valuable asset models and value maximization approaches to cultural texts that emphasize the use of control mechanisms to ensure compensation to owners of such content also have significant cultural implications that should not be ignored. The cultural implications of value maximization approaches merit greater attention in legal discussions of intellectual property because they serve as a potential counterweight that suggests that intellectual property frameworks should take

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[157] Nancy S. Kim, *Martha Graham, Professor Miller and the Work for Hire Doctrine: Undoing the Judicial Bind Created by the Legislature*. 13 J. INTELL. PROP. L. 337 (2006) (discussing the implications of work for hire as default doctrine in employment contexts).

[158] 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) (noting that the major issue in contractual negotiations is the leverage of the artists and that "[a]n artist in a strong position when contracts are negotiated . . . may be able to remove" certain contractual clauses, but that the "mantra of 'take it or leave it' on the part of the music industry potentially puts them in a very strong bargaining position . . . while the ideology of copyright law might be to protect the rights of the artists, the reality of the music business is that such rights are, in effect, exercised by their publishers and record companies.").

[159] Connolly & Krueger, *supra* note 90, at 4 (noting that for the top 35 artists in 2004, income from concert tours exceeded income from record sales by a 7.5 to 1 ratio).

[160] *Id*. at 6 (noting that the total value of record sales in 2004 was $11.8 billion, contrasted with $2.1 billion in concert ticket sales).

[161] Keith Negus, *Cultural Production and the Corporation: Musical Genres and the Strategic Management of Creativity in the US Recording Industry*, 20 MEDIA, CULT & SOC'Y 359, 361 (1998) (discussing how the recording industry has shaped the conditions within which genre practices and creative techniques have been deployed).

[162] Jason Toynbee, *Musicians*, *in* MUSIC AND COPYRIGHT 123, 124 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (noting that industry "control 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).

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better account of cultural value. Such values are inherent yet often insufficiently noted in discussions that otherwise focus on economic and business value.

B. *Business Models and Spam Litigation: Digital Economy Business Practices*

1. Competing Digital Era Business Models

Much attention is focused on the misbehaving masses in the digital era and the widespread acts of copyright infringement in which such masses engage. Less noticed but also important are changes in business behaviors and business norms with respect to intellectual property in the digital era. Intellectual property assets have never been more valuable. Behaviors that seek to monetize intellectual property resources are widespread today and have significant implications for intellectual property.[163] A focus on monetization tends to be associated with arguments that connect value with right in the copyright context.[164]

The controversy surrounding YouTube reflects fundamental disagreements about the appropriate scope of copyright in the digital era that arise in part from the increasing divergence between the behaviors of many consumers and businesses. On the one hand, content owners frequently accuse YouTube and its users of copyright infringement on account of the copyrighted material posted to YouTube.[165] The legal issues confronting YouTube are evident in the legal cases that have been filed against YouTube that assert claims of copyright infringement on account of the material that users uploaded, viewed, and disseminated via YouTube.[166] The stakes in this ongoing battle are potentially quite high. The recent suit filed against YouTube and Google by Viacom, for example, claims $1 billion in damages.[167]

The struggle over YouTube in part reflects attempts by video content owners to avoid the messy situation that currently exists in the digital music sphere.[168] The creation and dissemination of content in digital form has significantly challenged existing content owner business models. For the most

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[163] Arewa, *supra* note 77, at ___.
[164] For a discussion of similar concerns in the trademark context, see Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990).
[165] Driscoll, *supra* note 9, at 551.
[166] Tur v. YouTube, 2007 U.S. Dist. LEXIS 50254 (C.D. Ca. June 20, 2007) (denying defendant's motion for summary judgment in case involving suit against YouTube by a photographer claiming copyright infringement and unfair competition by YouTube on account of clips uploaded and viewed and/or distributed to the public without consent).
[167] Viacom Int'l Inc. v. Google Inc. and YouTube (07-CV2103) (S.D.N.Y. Mar. 13, 2007).
[168] Sharpe & Arewa, *supra* note 111, at ___.

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part, the success stories with respect to digital era content have been associated with technology companies such as Apple Inc., which has become a significant force in the music industry by virtue of its domination of the digital music sphere.[169]

The success of Apple in the digital content arena reflects the competitive business models in the digital content space that have been developed by technology companies. This fact that this is a competition is evident in the continuing tussle between Apple and its content providers. During the initial negotiations for the iTunes store, which initially contained only music, but which has since expanded to a broad range of content including television programs, movies, podcasts, audiobooks and games,[170] a clear divergence in worldview existed between technology centered Apple and the major recording labels whose consent it needed to launch the iTunes store.[171] In contrast to Apple's iTunes Music Store, content owner digital music business initiatives have thus far been largely failures.[172] The recent decision by NBC Universal to cease selling content through iTunes and instead offer content via a free download service on its own website represents the most recent conflict in the ongoing struggle between competing players and business models in the digital video content arena.[173]

In the digital music area, content owners have increasingly turned to litigation and the threat of litigation to alter digital era infringing behaviors. The damages asserted in digital era infringement cases highlight the extent to which copyright damage structures are out of line in the digital era context. UGC sites such as YouTube and MySpace also highlight the broad range of activities that are asserted by content owners to constitute copyright infringement. Legal actions in the UGC and other digital era contexts underscore the power struggle currently occurring between technology titans such as Google and Apple, and content owners such as Viacom and NBC.[174] Legal salvos in this battle also highlight the relative nimbleness of technology companies thus far in the digital era as compared with traditional media companies and content owners whose

[169] *Id*. at ___.
[170] *Id*. at ___.
[171] LEVY, *supra* note 112, at 27-51 (describing the gulf between technology industry players in the Silicon Valley and music industry players in Hollywood in the digital music era).
[172] *Id*. at 31-32 (describing music industry digital music services, including Pressplay and MusicNet as "pathetic, half-hearted efforts"); Connolly & Krueger, *supra* note 90, at 60-61 (noting the efficiency of P2P distribution networks).
[173] Bill Carter, *NBC to Offer a Free Video Download Service*, N.Y. TIMES, Sept. 19, 2007, http://www.nytimes.com/2007/09/19/business/20nbc-web.html (noting that NBC Universal announced a free download service from its website just three weeks after severing relations with the Apple iTunes Music Store).
[174] Sharpe & Arewa, *supra* note 111.

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current business models have left them far behind, particularly in the digital music space.[175]

Although YouTube clearly contains copyright protected content, debates between content owners and YouTube underscore the lack of clarity of the place of users and certain types of creators under existing copyright doctrine.[176] Similarly, the parameters of copyright doctrine, including the scope of fair use and permitted personal uses, remains uncertain.[177] This uncertainty is magnified in the digital context where the scope of fair use and personal use also remain unclear but where technological measures can be used to effectively nullify the application of fair use, for example.[178] The Digital Millennium Copyright Act (DMCA)[179] does provide a potential safe harbor from liability for copyright infringement for Internet Service Providers.[180] The DMCA takedown process has, however, been characterized as highly problematic in application, partly due to the aggressive activities of copyright owners in their use of Section 512 in ways that some assert create a chilling effect that hinders the creation of new works.[181]

2. Creation, Consumption and Copyright

The appropriate scope of copyright in the digital era thus often remains hazy in both theory and practice and a subject of significant contention. Fundamentally divergent perspectives on culture and users underlie current legal

[175] *Id.*
[176] A number of scholars have pointed to the lack of an appropriate conception of the place of users as a core issue of concern in copyright. *See* Cohen, *supra* note 31, at 374 (“Copyright should recognize the situated, context-dependent character of both consumption and creativity”); PATTERSON & LINDBERG, *supra* note 116.
[177] Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007) (placing readers, listeners, viewers and the general public in copyright through the lens of personal use).
[178] *Id.*
[179] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified at 17 U.S.C. §1201 et seq.) (hereinafter, “DMCA”).
[180] DMCA §512 (providing that ISPs shall not be liable for infringing content if certain statutory requirements are met); Marjorie Heins & Tricia Beckles, Will Fair Use Survive? Free Expression in the Age of Copyright Control, Free Expression Policy Project, Brennan Center for Justice, New York University Law School 4-5 (2005), at http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf (“The Digital Millennium Copyright Act or “DMCA,” passed by Congress in 1998, is a far-reaching law that controls the public’s ability to access and copy materials in digital form. Section 512 of the law provides a “safe harbor” from possible copyright liability for Internet service providers (ISPs) – including search engines – that “expeditiously” remove any material on their servers that a copyright owner tells them in “good faith” is infringing. No legal proceedings are needed.”).
[181] Heins & Beckles, *supra* note 180, at 5 (noting that Section 512 “provides an insufficient check on overreaching, and creates an un provides an insufficient check on overreaching, and creates an unacceptable shortcut around the procedures that are needed to decide whether speech is actually infringing”).

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debates on copyright's scope. This lack of clarity in the copyright legal arena is magnified by widely held assumptions about culture, creation, and consumption frequently made in copyright discourse.[182] Of particular note is the dichotomy between creation and consumption that is often at least implicitly assumed in copyright discourse.[183] Such a dichotomy involves insufficient attention to questions of sharing and borrowing. The reality of endemic borrowing in the creation of new works means that acts of creation often necessarily involve consumption. Similarly, notions of creation in copyright discourse do not take sufficient account of the myriad ways in which new works may actually be created.[184] Consequently, the implicit vision of culture and cultural production present in copyright discourse is in many respects quite limiting.[185] This limited vision is in turn reflected in copyright legal frameworks.[186]

This limited cultural vision in copyright has several significant implications.[187] Under such a vision, creation, particularly creation deemed to hold value, is often conceptualized as the result of autonomous creation processes.[188] Although such notions of autonomous creation, particularly in the case of high culture works, are not limited to the legal sphere, the incomplete nature of legal conceptions of creative processes and lack of a nuanced legal vocabulary with respect to creative processes gives such notions greater power in the law.[189]

3. One-Way Borrowing

Patterns of persistent behavior by businesses that seek to maximize intellectual property value and the failure to take adequate account of collaboration and borrowing mean that copyright frameworks may encourage what might be termed one-way borrowing.[190] As borrowing is an endemic aspect of cultural production, most new creations in some way use or borrow from existing works.[191] Although fair use is intended to address the scope of permissible uses of existing works, fair use does not reflect and incorporate

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[182] Arewa, *supra* note 50, at ___ (discussing assumptions made about copyright, creation and content in copyright discourse and doctrine).
[183] Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OREGON L. REV. 257, 265 (1996) ("The binary structure of copyright law, dependent as it is upon a strict division between author and reader, or original artist and copyist, is being corroded by networked digital information.").
[184] Arewa, *supra* note 50, at___.
[185] *Id.*
[186] *Id.*
[187] Arewa, *supra* note ___, at ___.
[188] *Id.*
[189] Arewa, *supra* note 50, at ___.
[190] Arewa, *supra* note 84 (discussing one-way borrowing by George Gershwin).
[191] Arewa, *supra* note 50, at ___.

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borrowing as a norm in creation. Consequently, fair use does not adequately reflect the reality of the extent and manners of borrowing in the creation of many works, particularly in the music context.[192] Further, because copyright frameworks do not assume that borrowing and other uses of existing works are the norm, copyright doctrine is based on an assumption that copyright holders should significantly control access to and uses of their works over the entire duration of the every expanding copyright term.[193]

As a result, copyright owners, particularly large, commercial users, may have the ability to borrow freely to create works but may then attempt to restrict borrowings from their works. This is the case in the creations of George Gershwin, who borrowed liberally from existing works, but whose estate vigilantly maintains control over borrowings from and uses of his works.[194] This one-way borrowing is problematic on many levels. It also tends to potentially privilege first users of particular material who may create works that borrow from others but who may in turn restrict borrowing from their works.[195]

Under current assumptions about creation in copyright such creators may even be able to restrict borrowings from their original sources, potentially even including the public domain, from which they derived their works. In addition, one-way borrowing may reinforce existing hierarchies in the copyright arena by giving more powerful creators effectively greater latitude and scope in their exercise of copyright, at least partly through their ability to use the threat of legal action to in some instances reshape relevant norms of creation. Better accommodation of borrowing as a norm of creation through greater application of liability rules is one way in which to ameliorate such potential inequalities in the operation of copyright.[196]

IV. DIGITAL ERA DISEQUILIBRIUM II: CHANGING CONSUMER BEHAVIORS

A. *Digital Era Behaviors: The Meaning and Significance of Unauthorized Uses*

Much deserved attention has been given to behaviors of consumers in the digital era. Users of copyrighted material have, in many instances, infringed the exclusive rights of copyright owners to reproduce and/or distribute their copyright protected works. Such unauthorized uses are ones for which copyright owners

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[192] *Id.*
[193] Arewa, *supra* note 84, at ___.
[194] *Id.*
[195] *Id.*
[196] Mark A. Lemley & Phil Weiser, *Should Property or Liability Rules Govern Information?,* 85 TEX. L. REV. 783, ___ (2007).

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could have received compensation. Whether and how much compensation copyright owners should receive compensation for such uses remains a topic of significant contention today. Determinations of compensation in part hinge on the meaning and bottom line implications of unauthorized uses today.

Although content owners generally assume that unauthorized uses mean less compensation for them, the effects of unauthorized uses depend on the extent to which unauthorized uses actually displace purchases. In the music arena, empirical studies to date suggest that the topography of unauthorized uses is more complex than industry assumptions depict. One study by Oberholzer and Strumpf suggests that the impact of digital music downloads on record sales is statistically indistinguishable from zero.[197] The results of this empirical study are consistent with a digital music story that sees decreasing record sales as connected to broader business and economic trends but not necessarily caused by P2P downloads. A study by Birgitte Andersen and Marion Frenz commissioned by Industry Canada suggests that the extent to which digital downloads negatively impact record sales depends on the extent to which the substitution effect trumps the sampling effect.[198] The Andersen and Frenz study suggests that Canadian consumers who download actually purchase more music because downloaders download music as part of the purchasing process to sample potential music that they wish to buy.[199] In this sense, the sampling effect is greater than the substitution effect, which would be evident when purchasers download music as a substitute for a purchase.[200]

These and other studies suggest that content owner interpretations of the impact of the digital era should not be accepted uncritically.[201] Rather, we must assess the business and economic impact of the digital era and digital era behaviors as a part of the copyright policymaking process.

B. *Hierarchies and Agency: The Recurrent Problem of the Misbehaving Masses*

In the content arena, hierarchies serve to define the application of copyright in important ways. These hierarchies also provide a basis for rationalizing copyright public policy choices. The assumed high culture model

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[197] Oberholzer-Gee & Strumpf, *supra* note 91, at 3.
[198] Birgitte Andersen & Marion Frenz, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada*, May 4, 2007, at http://www.ic.gc.ca/epic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/$FILE/IndustryCanadaPaperMay4_2007_en.pdf.
[199] *Id*. at ___.
[200] *Id*.
[201] *See also* Shelley Stein-Sacks, [*Canadian Heritage Study*], at http://www.pch.gc.ca/pc-ch/pubs/music_industry/tdm_e.cfm

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upon which copyright typically rests provides an inexact fit for a wide range of cultural production, particularly creations that acknowledge or evidence their derivation from existing works. The regulation of aesthetics of cultural production is thus an integral aspect of copyright frameworks as presently applied today. As such, copyright to some extent functions as an arbiter of sociocultural value.

Cultural arbiters have long sought to address questions related to appropriate uses and demonstrations of culture. Folklore collectors of the past, for example, sought to protect the idealized rural peasant heritage of the urban folk who partook of dance halls and dance hall music rather than more suitable (at least in the minds of folklore collectors) forms of expression such as folk dance.[202] Similar assumptions are evident in current discussion of YouTube and UGC, which are typically condemned as constituting unauthorized and by some assessments degraded uses of copyrighted works. In addition to making highly subjective assessments of cultural worth, such views do not sufficiently address the comparative costs and benefits of such uses. Further, consideration of YouTube and UGC is best judged within its broader economic and business milieu.

Although not uniformly negative, the constellation of interests that played a prominent role in shaping intellectual property law and policy in the pre-digital era has not adapted to the reality of business configurations and consumer practices in the digital era. As a result, changing patterns in user behaviors and contexts evident on YouTube and other UGC websites is often at tension with intellectual property laws established in a different era. This shifting landscape of cultural and behavioral norms requires reassessment of both legal institutions and existing business models.[203] The problem of the misbehaving masses is thus actually reflective to some extent of a lack of legitimacy of existing copyright laws. Rather than reforming the masses, copyright law should at least in some instances be modified or interpreted in such was as to better accommodate the personal uses reflected in behavioral norms today.

C. *The Internet and Sharing: Digital Era Behaviors*

The digital era defined both by the possibility of access and potential for control. Consequently, users and consumers have unparalleled access to cultural resources, largely as a consequence of the Internet, which, particularly in

[202] *See supra* notes ___ to ___ and accompanying text.

[203] David Kohler, *This Town Ain't Big Enough For The Both Of Us--Or Is It? Reflections on Copyright, The First Amendment And Google's Use of Others' Content*, 2007 DUKE L. & TECH. REV. 5 ("Using a variety of technological innovations, Google became a multi-billion dollar content-delivery business without owning or licensing much of the content that it uses.") (citations omitted).

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conjunction with P2P technology, provides a decentralized mechanism for broad dissemination of cultural, business, economic and other information. The flipside, of course, is that copyright owners now have more tools by which to control such uses, including personal uses that have long been accepted as a behavioral norm despite the lack of consonance between such uses and copyright doctrine. Changes in both access and control have been driven by technological transformations. As a result, behaviors that were commonplace in earlier eras, such as personal private copying, are increasingly demonized and characterized as impermissible, illegal or even constituting piracy.

The digital era has given both consumers and creators a broader range of choices.[204] In the music arena, for example, the recording industry has to some extent been disintermediated by virtue of the ability of consumers to exercise choice concerning their CD purchases.[205] Prior to the digital era, as a result of music industry bundling, consumers were typically required to purchase entire CDs, even if they wished only to purchase one song.[206] By the same token, music creators are potentially less dependent on music industry distribution to disseminate works, which at least in theory gives creators greater power.[207]

The Internet has created alternative ways to disseminate works that have potentially empowered consumers, other users and creators. Thus far, content owners have not really developed many business models that reflect an understanding of this new landscape of cultural production, although this may be changing. The music industry, for example, recognizing the power of such alternative means of distribution, is now itself seeking to take advantage of the Internet in order to generate word-of-mouth buzz for the artists it represents.[208]

The Internet offers a mechanism for users and creators to access existing content with ease. The type of access and uses that create sociocultural value should be a desired goal of copyright as public policy.[209] Significant debate, however, exists as to whether such uses are appropriate or desirable.[210] Such debates are certainly not new and in some instances incorporate hierarchical and

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[204] Sharpe & Arewa, *supra* note 94.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] Ethan Smith & Peter Lattman, *Download This: YouTube Phenom Has a Big Secret*, WALL ST. J., Sept. 6, 2007, at A1 (noting that YouTube sensation Marié Digby, is signed by Hollywood Records, who helped her devise her Internet strategy).
[209] NUSSBAUM, *supra* note 57, at 77-79 (2000) (discussing the importance of self-expression as a fundamental and central aspect of human capabilities).
[210] ANDREW KEEN, THE CULT OF THE AMATEUR: HOW TODAY'S INTERNET IS KILLING OUR CULTURE (2007) (discussing the implications of Web 2.0 and the potential chaos that may ensue as a consequence).

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unitary visions of culture that reflect longstanding debates about culture and the appropriate users of culture.[211]

Technological tools enable users and creators to manipulate this content once accessed and disseminate the content in an original or transformed fashion. Although the technological means and specific techniques used to create UGC are new, the use and manipulation of existing material is not. Rather, UGC reflects the types of uses that users have always made of existing material as has been evident in the folklore realm, albeit in a different context with new technological tools. Current debates reflect a recurring pattern in which cultural arbiters attempt to define appropriate uses of culture. Given that the goal of copyright is to stimulate creation, an important measure by which creations such as UGC could and perhaps should be judged is within the same utilitarian calculus of incentives that is otherwise used in copyright.

V. Reconfiguring Copyright: Dealing with Digital Era Copying

A. *Copying and Norms in the Digital Era*

Dominant intellectual property narratives that focus on propertization often fail to recognize the ways in which copyright may give incentive to creators who use varied techniques and manners of creation and who create sociocultural value. Consequently, recognition of borrowing and collaboration brings attention to the importance of creating copyright frameworks that promote the creation of works that are beneficial to society. This brings attention to questions of sociocultural value in copyright analysis.

The goals of copyright are multifaceted. In addition to giving incentives to create, copyright is intended to promote the undertaking of activities that create sociocultural value. The widespread nature of borrowing, collaboration and sharing generally means that sequential innovation is a norm in the creation of copyrightable works. In order to accommodate such activities, copyright law must better assess the value of all works, including those that clearly reflect sequential or cumulative innovation. The circumstance of such sequential innovation means that it is often optimal to permit some type of sampling, particularly since a lack of certainty may exist as to the value of the follow-on innovation.[212]

Consideration of copyright within its broader sociocultural context draws attention to the roles of norms in copyright. Such norms can effectively change

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[211] *See e.g.,* Matthew Arnold, Culture and Anarchy (1960); Storey, *supra* note 30, at 16-23 (discussing Matthew Arnold's view of culture).
[212] Pollock, *supra* note 69.

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the operation of copyright law.[213] Discussions of copyright and UGC must thus take account of existing and emergent norms that inform the behaviors of human actors. By failing to accommodate doctrines that ameliorate the consequences of copyright owner control, such as fair use, technological measures now proposed to prevent uploading of copyrighted content impose a norm of greater control than actually permitted under copyright law.

B. *Law and Legitimacy: Accommodation in Copyright Doctrine*

Law is a core social institution. Consequently, how legal structures exist and are modified in the face of changing circumstances can be critically important, particularly since the relevance of legal institutions is a fundamental aspect of societal participants' compliance with legal rules. When conformity with legal institutions diminishes significantly or disappears, a crisis in the application of legal rules may be one outcome.

People often do not obey laws in which they do not believe or that they feel are not legitimate.[214] The widespread lack of compliance with Prohibition in the twentieth century offers clear lessons concerning the extent to which widespread noncompliance can be eradicated.[215] Copyright law is a notable example from this century. Lack of compliance with copyright law is not new.[216] However, changes in technology that facilitate UGC essentially allow individual users to assume a role formerly available primarily to publishers. Such uses underscore the continuing tension in copyright between balancing the rights of copyright owners while promoting future creations, which often incorporate and use existing works. Maintaining the creative commons and leaving a sufficient public domain to provide the basis for future creations are also important considerations.[217] Although noncompliance alone should not be a basis for

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[213] Mark F. Schultz, *Copynorms: Copyright and Social Norms*, Sept. 27, 2006, http://ssrn.com/abstract=933656.

[214] LITMAN, *supra* note 74, at 112; TOM TYLER, WHY PEOPLE OBEY THE LAW (2006) (noting that people obey laws that they feel are legitimate).

[215] EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 161-73 (1996) (discussing the lack of compliance with the Volstead Act, which brought Prohibition into being in 1920); JOHN KOBLER, ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION 223, 241-44 (1973) (noting wide-ranging failure to comply with Prohibition laws, including steep increase in liquor prescribed as medicine in the period after the Volstead Act took effect, increase in the number of Chicago saloons, "soft-drinking parlors," and "wet cabarets" to a total of more than 7,000 in the three years following the Volstead Act, pervasive use of home stills, which became "commonplace domestic utensils," and routine violations by a broad range of the population, including President Harding).

[216] LITMAN, *supra* note 74, at 111 (stating that in the context of music-performing rights, societies have unsuccessfully educated the public for 85 years).

[217] LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 108-09 (2001) ("Congress has historically struck a balance between assuring that

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making legal determinations, the current range of unauthorized uses suggests the need for greater clarification of zones of acceptable uses; gray areas of uncertainty may actually reinforce undesired behaviors.

Rather than attempt to enforce copyright doctrine in a way that is antithetical to existing sociocultural norms, content owners would likely benefit from the creation of business models intended to address the technology, behaviors and other contextual features of the digital era. The concept of absolute ownership rights that is increasingly advanced by copyright owners is unsuited to the goals of copyright with respect to creation. This is a core aspect of the rationale for fair use doctrine. However, fair use doctrine is increasingly difficult in application in the digital era, largely because the increased value of intellectual property resources and value maximization business strategies applied by copyright owners have been inclined to promote views of copyright that tend to interpret copyright as an absolute property right.

Worldviews that focus on intellectual property value maximization and monetizing such assets are reinforced by copynorms based on clearance culture. Such worldviews also tend to be used to support an interpretation of copyright as a right to exploit all business opportunities that might emanate from a copyrightable work. Copyright, however, is not and should not be viewed as a substitute for a business model. As a result, copyright litigation that is used as a tool to prevent the development of competitors and competitive business models should be disfavored. Such copyright strategies and clearance culture are reinforced by the threat of legal action, which has a chilling effect on reuse and recreation. As a result, doctrines intended to temper the operation of copyright and allow unlicensed uses are decreasingly viable. The greater use of liability rules is one way to cut through this morass.[218] Liability rules may lead to greater clarity with respect to the limitations of ownership rights and the rights of future creators and users.

More fundamentally, copyright doctrine should be reconfigured doctrinally to accommodate borrowing, collaboration and sharing on an equal basis with manners of assumed creation in copyright discourse. As a result, the utilitarian calculus used to asses the creation of "new" works that weights the benefits of copyright in incentivizing such "new" creations and the costs of restricting access to such creations should also be applied to works that reflect the

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copyright owners are compensated and assuring that an adequate range of materials remains in the public domain for others to draw upon and use.").

[218] Lemley & Weiser, *supra* note 196, at 784 ("In short, where injunctions cannot be well tailored to the scope of the property right at issue but necessarily restrain the use of property not owned by the plaintiff, those consequences can overwhelm the benefits of property rules in enforcing legal rights.").

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pervasive borrowing, collaboration and sharing that are often core elements of creation.

In the context of YouTube and UGC, this utilitarian calculus should weight benefits and harms, which is a contrast with current discussions that effectively give copyright owners broad blocking rights. In the case of clips posted on YouTube, for example, the question thus becomes one of comparative benefit and harm. The utilitarian calculus in this instance would weight the nature of the harm of the clip to the copyright owner as compared with the sociocultural benefits of the creation of such clips, which would include consideration of important societal values such as free expression. Consideration of such uses would thus focus to a much greater extent on specific costs relative benefits. Application of the utilitarian calculus should also permit greater accommodation of varied uses, manners of creations and approaches to material and thus reinforce the goals of copyright.

C. *Potential Digital Era Approaches*

The operation of copyright in the digital era reveals significant limitations that may arise in the application of existing legal frameworks in new contexts. Copyright legal frameworks should reflect a process of accommodation, renegotiation and recalibration that adapts as necessary to new technologies and new contexts. The widespread copyright infringement that exists today highlights the need for better calibration of copyright for the digital era. The legal responses to digital era infringements thus far have tended to focus on giving content owners greater control rights to ameliorate the consequences of digital era losses. However, the digital era losses that content owners have experienced are a result of multiple factors, including a changing business competitive landscape and changing cultural norms. Modifications of copyright in the digital era must in the future take better account of this changing landscape and not assume that the cure for copyright owners' digital era problems rests in giving them greater legal control over content. Any digital era solutions should be based on empirically grounded assessment of relevant benefits and harms. As a number of scholars have noted, a need exists for clearer personal use exemptions, which could be adopted in revised copyright statutory frameworks. Any proposed levy schemes should be adopted with care, particularly given available evidence about existing levies in the EU and elsewhere.

1. Measuring Benefits and Harms: Behavioral Norms and Sociocultural Value

Greater control is not the solution for the ubiquitous copyright infringement that exists today. Further, lawsuits against grandmothers and spam litigation of the type initiated by the RIAA are unlikely to significantly improve

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copyright compliance levels. Rather, the widespread nature of copyright infringement today should foster a more serious consideration about law and legitimacy in copyright.

Copyright doctrine is one element in establishment of behavioral norms. The question then becomes what types of norms are encouraged by current system. Recognition of agency also requires closer scrutiny at actual behaviors in contexts of copyright use, and the relative benefits and harms imposed by such behaviors. As a result, consideration should be given to the extent to which current structures may encourage behaviors that may actually result in fewer new creations or impede desirable creations and competitive business models

Discussions of UGC and digital era copyright infringement more generally should weigh the relative benefits and harms of different behaviors evident. Uses that create sociocultural value and that do not impose significant harm should be permitted. The same utilitarian analysis that is used to discuss creations in copyright should also thus be applied to recreations and reuses, which are a major manner by which creation actually occurs. Treating UGC and other recreations and reuses in this manner would be beneficial by promoting the core goals of copyright. Such treatment would also aid in the development of digital era norms for permissible copying.

2. Clearer Personal Use Exemptions

The digital era and increased centrality of copyright mandate the adoption of clearer personal use exemptions. When copyright was a relatively unimportant side area of interest to experts in the field, the lack of clarity in copyright doctrine was less significant than is the case today. In contrast, today copyright is pervasive in nature and applies to a widespread broad range of the public. As a number of legal scholars and technology commentators have emphasized, a need exists for greater clarity with respect the range of acceptable personal uses.[219]

3. Evaluating Levy Schemes

Levy schemes are generally a bad way to compensate content owner losses. Further, all content owner losses are not a result of unauthorized uses. Levy schemes are quite costly to consumers and may lead to significant price distortions, particularly in instances involving new technologies.[220]

As a result, any levy scheme should require some documentation of at least estimated losses resulting from unauthorized uses and pay content owners based upon such estimates. Losses attributable to poor business decisions and

[219] [Walter Mossberg commentary] [Jessica Litman]
[220] DAMUTH, *supra* note 7, at 25.

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changing consumer preferences should not be compensated through use of a levy. Levy schemes should thus not operate as guaranteed payments to uncompetitive businesses that might, and in some instances should, otherwise cease to exist.

CONCLUSION

Recognizing culture as a shared resource involves acknowledging the ways in which users may use existing works to create new ones. Rather than restricting such uses through copyright laws that do not adequately take account of the importance of borrowing, copyright frameworks need to determine with better certitude the appropriate scope and parameters for copying and using existing material. Incorporating borrowing and sharing into copyright doctrine will better accommodate the range of uses and users evident in the culture arena and potentially stimulate creative output and contribute to the development of vibrant cultural forms that reflect the goals and intention of our copyright system.[221] UGC and YouTube offer a test case for the ways in which liability rules and a utilitarian calculus can be to create copyright doctrine that truly values works that incorporate borrowing, collaboration and sharing and permits the creation of such works in a manner that promotes the goals of copyright.

[221] Nadel, *supra* note 60, at 789 (noting net negative effect on creative output from copyright law prohibitions on copying).

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