

**VALUABLE ASSET OR VIBRANT FORCE?**  
**INTELLECTUAL PROPERTY AND CONCEPTIONS OF CULTURE**

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**Abstract**

*Discussions of intellectual property as property often implicitly rely upon conceptions of value that give primacy to economic and business value while dismissing or even ignoring questions of cultural value. Questions of cultural value are, however, fundamental to discussions of intellectual property today. Discussions of intellectual property often emphasize treating cultural material as valuable assets and highlight the role of intellectual property in protecting such assets. Valuable asset models of culture accentuate the business and economic utility of intellectual property assets. Valuable asset approaches, however, typically reflect an incomplete understanding of the roles of culture and the intersection of culture and intellectual property. Further, perspectives that emphasize culture as a valuable asset tend to ignore the importance of cultural material as a vibrant force that plays an important role in the creation, transmission, and recycling of culture that is a key feature of vibrant and living cultural traditions and an important mechanism by which culture changes and is recreated. Perceiving culture as a vibrant force draws attention to the many potential ways in which culture is shared, used and mixed. An emphasis on culture as a valuable asset often leads to treatment that implicitly advocates the creation of museums of cultural knowledge and conceives of only particular parties as acceptable cultural curators. As a result, valuable asset models may involve questionable assumptions about authority, control, and cultural expression. Focusing on issues that arise in both the U.S. and international contexts, this article outlines the ways in which valuable asset approaches to culture are increasingly accepted in intellectual property discourse and the broader implications of such perspectives. It also evaluates the potential pitfalls of viewing culture through a valuable asset lens given the shared nature of many cultural resources and proposes more appropriate ways to conceptualize and treat cultural resources in the intellectual property arena.*

**INTRODUCTION**

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## INTRODUCTION

Discussions of intellectual property as property often implicitly rely upon conceptions of value that give primacy to economic and business value while dismissing or even ignoring questions of cultural value. Questions of cultural value are, however, fundamental to discussions of intellectual property and property today. Intellectual property frameworks today reflect an increasing emphasis on depicting knowledge and culture within a property rights paradigm.<sup>1</sup> This emphasis is evident in approaches to intellectual property that emphasize cultural material as a valuable asset. Such perspectives tend to coalesce around views of intellectual property that highlight its role in protecting valuable cultural assets. This valuable asset approach to cultural material often reflects an at best incomplete understanding of the roles of culture. Further, perspectives that emphasize culture as a valuable asset tend to ignore the importance of culture as a vibrant element in the broader cultural arena. In contrast, understanding culture from an anthropological perspective sheds insight on the ways in which cultural elements that may be protected by intellectual property play a critical role in cultural creation and the transmission of culture both contemporaneously and between generations.

Perceiving culture as a vibrant force draws attention to the many potential ways in which culture is shared. The valuable asset and vibrant force approaches to cultural material account quite differently for the role of context in the culture and intellectual property arenas. As a result, an emphasis on culture as a valuable asset often leads to treatment that may be inconsistent with the ways in which culture is recycled as a vibrant aspect in new creations and new uses of existing cultural elements.

Intellectual property rights represent ownership rights in cultural and other knowledge. Although propertization discourse is prominent today, such tendencies are by no means new features of the intellectual property landscape.<sup>2</sup> As is the case in intellectual property discussions more generally, the mechanisms of cultural propertization and propertization discourse can influence behavior and even intensify assertions of rights themselves. Control of and access to knowledge are increasingly becoming key markers of economic outcomes both on a national and transnational basis.<sup>3</sup> The digital era underscores the increasing importance of

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<sup>1</sup> Mark A. Lemley, *Property, Intellectual Property and Free Riding*, 83 TEX. L. REV. 1031 (2005) (discussing why free riding is often desirable in intellectual property and how models other than tangible property inspired ones are desirable in intellectual property discourse).

<sup>2</sup> MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 1–9 (1993) (discussing the development of ideas about authors' property rights in Britain).

<sup>3</sup> Kenneth L. Sokoloff, *Inventive Activity in Early Industrial America: Evidence From Patent Records, 1790-1846*, 48 J. ECON. HIST. 813, 813 (1988) ("Most scholars would agree that inventive

knowledge and other intangibles from a business and economic perspective.

This Article outlines the ways in which valuable asset approaches to culture are increasingly accepted in intellectual property discourse and the broader implications of such perspectives. It also evaluates the potential pitfalls of viewing culture through a propertization lens given the shared nature of many cultural resources. This Article proposes ways to better conceptualize and treat cultural resources in the intellectual property arena. Greater use of liability rules in the intellectual property arena is one means by which some balance might be restored.<sup>4</sup> This Article also considers models of culture evident in intellectual property discourse in light of relevant contemporary and historical contexts. Part I examines the ways in which valuable assets models of culture and an ethos of cultural propertization are evident in contemporary intellectual property discourse and some implications of such views. Part II explores the implications of approaches to culture that recognize both the role culture as a vibrant force and some ways in which valuable asset models are incompatible with such perspectives. Using examples from the U.S. and in the international arena, Part III outlines ways in which reconceptualization of the role and operation of culture has the potential to ameliorate existing areas of tensions within intellectual property frameworks.

I. CULTURE AS VALUABLE ASSET: INTELLECTUAL PROPERTY AND THE OWNERSHIP OF KNOWLEDGE

A. *Valuable Asset Models of Culture: Intellectual Property and Business*

The increasing prominence of valuable asset models of culture in intellectual property is closely connected to the emergence of the digital era. The business, social and economic landscape of the twentieth century heralded a fundamental shift in sources of value to a broad range of businesses.<sup>5</sup> 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

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activity is primarily responsible for the improvements in technology that contribute to sustained increases in per capita income.”).

<sup>4</sup> Mark A. Lemley & Phil Weiser, *Should Property or Liability Rules Govern Information?*, 85 Tex. L. Rev. 783, 784 (2007) (“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.”).

<sup>5</sup> ADAM B. JAFFE & MANUEL TRAJTENBERG, *PATENTS, CITATIONS AND INNOVATIONS: A WINDOW ON THE KNOWLEDGE ECONOMY 1* (2002) (noting that the transition to the “knowledge economy” has led to knowledge emerging as “the key economic asset that drives long-run economic performance” rather than labor, machines, land and natural resources).

become increasingly predominant.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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 play a prominent role in shaping intellectual property discourse and doctrine.<sup>9</sup> Although this role is by no means new, the stakes have in many respects never been higher.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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

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<sup>6</sup> See generally Olufunmilayo B. Arewa, *Measuring and Representing the Knowledge Economy: Accounting for Economic Reality under the Intangibles Paradigm*, 54 BUFF. L. REV. 1 (2006) [hereinafter Arewa, *Knowledge Economy*] (discussing some implications of the knowledge economy and the shift to an intangibles paradigm).

<sup>7</sup> *Id.* at \_\_\_\_.

<sup>8</sup> *Id.* at \_\_\_\_.

<sup>9</sup> JESSICA LITMAN, DIGITAL COPYRIGHT 61-63 (2001) (noting the prominent role of copyright stakeholders in drafting copyright legislation).

<sup>10</sup> See Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENVER J. INT’L L. & POL’Y 109, 119 (1995) (noting that the digital economy has “increased the stakes in the global dimensions of intellectual property rights”).

<sup>11</sup> See *infra* notes \_\_\_\_ to \_\_\_\_ and accompanying text.

<sup>12</sup> LITMAN, *supra* note 9, 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.”).

most highly valued and discussed businesses in the world.”<sup>13</sup> Such companies have also become less specialized and broadened to form cultural industry conglomerates that encompass multiple cultural areas, including film, publishing, television, cable, and music, for example.<sup>14</sup>

The global economic and business significance of the cultural industries is reflected in industry statistics. In 1998, Americans spent some 120 billion hours and \$150 billion on legal forms of entertainment.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> As Professor Jessica Litman has outlined, the drafting of the 1976 Copyright Act reflects the role of such interests.<sup>18</sup> 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”).<sup>19</sup> Such industry-influenced legal initiatives reflect valuable asset approaches to culture.<sup>20</sup> 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.<sup>21</sup> The extent to which the copyright structures advanced by

<sup>13</sup> DAVID HESMONDHALGH, *THE CULTURAL INDUSTRIES* 1 (2007).

<sup>14</sup> *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”).

<sup>15</sup> HAROLD F. VOGEL, *ENTERTAINMENT INDUSTRY ECONOMICS* xvii (1998).

<sup>16</sup> JULIE COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* \_\_\_ (2d ed. 2006).

<sup>17</sup> 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).

<sup>18</sup> LITMAN, *supra* note 9, at 51-59.

<sup>19</sup> 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)).

<sup>20</sup> *See infra* notes \_\_\_ to \_\_\_ and accompanying text.

<sup>21</sup> 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

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.<sup>22</sup>

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.<sup>23</sup> Similarly, copyright scholarship was largely devoted to issues related to copyright doctrine.<sup>24</sup> With the increasing importance of copyright in business, the economy, and society more generally has come greater attention to broader questions of the relationship between copyright and the broader sociocultural context of its operation.<sup>25</sup>

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.<sup>26</sup> 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 noncommercial uses such as private personal use.<sup>27</sup> 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

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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”).

<sup>22</sup> Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation and Context*, 41 U.C. DAVIS L. REV. 477, \_\_\_ (2007) (hereinafter, “Arewa, *Freedom*”).

<sup>23</sup> Netanel, *supra* note 17, at \_\_\_ (discussing the expansion in copyright’s scope); H.R. REP. NO. 94-1476, at 51-52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664-65 (noting historic expansion of copyright from time of first copyright statute in 1790 to present day); Jessica Litman, *Copyright in the Twenty-First Century: The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 34 (1994) (noting that copyright has become applicable to a broader range of things).

<sup>24</sup> Olufunmilayo B. Arewa, *YouTube and Sharing: Competing Cultural and Business Models in the Digital Era* \_\_\_ (2008), manuscript on file with author.

<sup>25</sup> *Id.*

<sup>26</sup> HESMONDHALGH, *supra* note 13, at 2.

<sup>27</sup> 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”).

uncompensated uses of materials that they own.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> As General Electric, owner of NBC-Universal Studios notes in a recent annual report: “[e]ntertainment assets are highly valued by investors.”<sup>31</sup> Similarly, Viacom notes that “our digital assets are becoming an increasingly important aspect of our business.”<sup>32</sup> An important part of the creation of market value for intellectual property assets is the 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

<sup>28</sup> LITMAN, *supra* note 9, at 27 (noting that the DMCA facilitates a pay-per-use system).

<sup>29</sup> Arewa, *Knowledge Economy*, *supra* note 6, 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).

<sup>30</sup> *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>.

<sup>31</sup> GE 2006 ANNUAL REPORT 6 (2007).

<sup>32</sup> VIACOM 2006 ANNUAL REPORT, *supra* note 14, at 4.

and financial advisors with compelling investment options and viable benchmarks.”<sup>33</sup> 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.<sup>34</sup>

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 in many respects enhanced opportunities for the control of content.<sup>35</sup> Mechanisms for control of content include digital rights management,<sup>36</sup> 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.”<sup>37</sup> 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.”<sup>38</sup>

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

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<sup>33</sup> 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>.

<sup>34</sup> 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).

<sup>35</sup> 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”); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 8 (2004) (“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 9, 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).

<sup>36</sup> 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).

<sup>37</sup> NEWS CORPORATION 2006 ANNUAL REPORT 9 (2007).

<sup>38</sup> *Id.*

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,<sup>39</sup> the use of control mechanisms in the content arena is by no means a digital era novelty.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> The availability of such alternatives on both the creation and distribution side have led to significant and deleterious business consequences in the music industry, which was the first segment of the cultural industries to confront the implications of digital era content.<sup>43</sup>

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.<sup>44</sup> 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

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<sup>39</sup> LESSIG, *FREE CULTURE*, *supra* note 35, at \_\_\_\_.

<sup>40</sup> Arewa, *supra* note 6, at \_\_\_\_.

<sup>41</sup> Nicola F. Sharpe & Olufunmilayo B. Arewa, *Is Apple Playing Fair? Navigating the iPod DRM Controversy*, 5 NW. J. TECH. & INTEL. PROP. (2007) (discussing music industry control mechanisms on the creation and distribution side).

<sup>42</sup> *Id.*

<sup>43</sup> 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”).

<sup>44</sup> Arewa, *supra* note 24, at \_\_\_\_.

property.”<sup>45</sup> As a number of authors have noted, however, content owners’ discussion of piracy typically reveal a sleight of hand whereby all unauthorized uses are equated with piracy.<sup>46</sup> The tendency to equate unauthorized uses with piracy has become a foundational argument for many who advocate stronger copyright laws.<sup>47</sup> 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.<sup>48</sup> 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,<sup>49</sup> but which nonetheless has a significant impact on people’s perceptions of cultural production.<sup>50</sup>

Control of cultural knowledge in the intellectual property context is often linked to questions of incentives.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> However, the incentive story in the copyright context is tenuous for a number of reasons. In addition to a lack of empirical evidence in support of typical incentive rationales, treatment of actual creators in statutory provisions such as work

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<sup>45</sup> VIACOM 2006 ANNUAL REPORT, *supra* note 32, at 14.

<sup>46</sup> LESSIG, *FREE CULTURE*, *supra* note 35, 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.”).

<sup>47</sup> LITMAN, *supra* note 9, 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”).

<sup>48</sup> *See infra* notes \_\_\_ to \_\_\_ and accompanying text.

<sup>49</sup> Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006) (discussing the pervasive nature of musical borrowing and its implications for conceptions of creation processes).

<sup>50</sup> Netanel, *supra* note 17, 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).

<sup>51</sup> *See infra* notes \_\_\_ to \_\_\_ and accompanying text.

<sup>52</sup> William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright*, 18 J. LEGAL STUD. 325, 326 (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.”).

<sup>53</sup> 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”).

for hire and typical contractual business terms suggests that the reward side of the incentive equation is highly attenuated for many creators.<sup>54</sup> 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.<sup>55</sup> As a result, most successful popular musicians earn far more from concert ticket sales than from royalties from record sales,<sup>56</sup> despite the fact that aggregate revenue from records far exceeds aggregate revenue from concert performances.<sup>57</sup> The treatment of many creators in current cultural industry business structures 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.<sup>58</sup> In the case of the recording industry, control on the creative side has been a core element in industry business models and profitability.<sup>59</sup>

Although often not as readily acknowledged, valuable asset models and value maximization approaches to cultural texts that emphasize the use of control

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<sup>54</sup> 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).

<sup>55</sup> 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.”).

<sup>56</sup> Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music* 4 (2005), NBER Working Paper No. 11282, at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=711924&high=%20rockonomics](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=711924&high=%20rockonomics) (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).

<sup>57</sup> *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).

<sup>58</sup> 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).

<sup>59</sup> 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).

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

## 2. Strategic Intellectual Property Portfolio Management: Patents as Valuable Assets

The dominance of considerations of economic and business value in the intellectual property arena today is also evident in the increasingly pervasive strategic intellectual property portfolio management practices. As is the case with copyright among the cultural industries, the uses of patents today reflect a fundamental change in societal, economic and business models that involves greater recognition of intangibles as a predominant source of value for many companies as well as in the broader economy more generally. Value maximization strategies in the patent context demonstrate some ways in which many companies actually approach and use intellectual property rights today.

Strategic uses of intellectual property rights are a prominent feature of the strategic intellectual property management literature, which discusses, analyzes and advises companies concerning the appropriate uses and role of intellectual property rights and other intangibles in business organizations.<sup>60</sup> In this body of work, intellectual

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<sup>60</sup> See, e.g., JULIE L. DAVIS & SUZANNE S. HARRISON, *EDISON IN THE BOARDROOM* (2001); KEVIN G. RIVETTE AND DAVID KLINE, *REMBRANDTS IN THE ATTIC: UNLOCKING THE HIDDEN VALUE OF PATENTS* (2000) Suzanne Harrison & Kevin Rivette, *The IP Portfolio as a Competitive Tool in PROFITING FROM INTELLECTUAL CAPITAL: EXTRACTING VALUE FROM INNOVATION* 119-128 (Patrick H. Sullivan ed., 1998); Patrick H. Sullivan, *Extracting Value from Intellectual Property in PROFITING FROM INTELLECTUAL CAPITAL: EXTRACTING VALUE FROM INNOVATION* 103, 105 (Patrick H. Sullivan ed., 1998) [hereinafter, Sullivan *Extracting Value I*]; Patrick H. Sullivan, *Extracting Value from Intellectual Assets in PROFITING FROM INTELLECTUAL CAPITAL: EXTRACTING VALUE FROM INNOVATION* 173-185 (Patrick H. Sullivan ed., 1998) ) [hereinafter, Sullivan *Extracting Value II*]; Gordon Petrash, *Intellectual Asset Management at Dow Chemical in PROFITING FROM INTELLECTUAL CAPITAL: EXTRACTING VALUE FROM INNOVATION* 205-220 (Patrick H. Sullivan ed., 1998); Lori Morrison & Paul Germeraad, *Intellectual Asset Management at Avery Dennison in PROFITING FROM INTELLECTUAL CAPITAL: EXTRACTING VALUE FROM INNOVATION* 221-241 (Patrick H. Sullivan ed., 1998); Kari Laento, *Intellectual Asset Management at Nestle in PROFITING FROM INTELLECTUAL CAPITAL: EXTRACTING VALUE FROM INNOVATION* 242-252 (Patrick H. Sullivan ed., 1998); Leif Edvinsson, *Managing Intellectual Capital at Skandia in PROFITING FROM INTELLECTUAL CAPITAL: EXTRACTING VALUE FROM INNOVATION* 279-283 (Patrick H. Sullivan ed., 1998); ROBERT S. KAPLAN & DAVID P. NORTON, *STRATEGY MAPS: CONVERTING INTANGIBLE ASSETS INTO TANGIBLE OUTCOMES* (2004).

property rights, particularly patents, have been characterized as “constitutionally enshrined golden eggs” that are just waiting to be packaged for commercial benefit:

Just as food and manufactured goods can be packaged and sold, there are ways to package knowledge for commercial benefit, using the intellectual property laws. . . These are assets protected by specific bodies of laws divided, for example, into patents, trademarks, copyrights and trade secrets. Some of these have been called our “constitutionally enshrined golden eggs,” particularly when used to create product differentiation in an increasingly competitive world where commoditization is becoming dominant.<sup>61</sup>

By focusing on the strategic uses of intangibles, the strategic intellectual property literature exemplifies the fact that intangibles are often viewed and used offensively as strategic assets and business weapons:<sup>62</sup>

The value of patents as competitive weapons and intelligence tools becomes most evident in the day-to-day transaction of business. Indeed, whether a company is trying to block a competitor’s product development plan, [or] gain entry into a hotly contested new market . . . Patents can be potent weapons – and quite possibly the greatest source of competitive intelligence on earth.<sup>63</sup>

In advocating such strategic uses, this literature focuses on the business uses of patents as a means to enhance “a company’s ability to secure and defend sources of marketplace advantage, even in times of rapid technological change.”<sup>64</sup> A major focus of this literature is on the extraction of value from patent portfolios by generating licensing income, as well as the use of patents for positioning in business negotiations and for promotion of competitive advantage.<sup>65</sup> Patents are often described as anticompetitive measures that can be used to exclude others and block competitors from entering a predetermined field.<sup>66</sup> Offensive uses involve tactical blocking to prevent commercialization of other products:

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<sup>61</sup> See Stephen P. Fox, *Intellectual Property Management: From Theory to Practice*, in PROFITING FROM INTELLECTUAL CAPITAL: EXTRACTING VALUE FROM INNOVATION 142, 143 (Patrick H. Sullivan ed., 1998).

<sup>62</sup> See Sullivan, *Extracting Value I*, *supra* note 60, at 104-105 (contrasting two widely held views of patent portfolios as protection, where the goal is exclusion, and patent portfolios as sources of corporate value, which reflects a more aggressive view).

<sup>63</sup> Kevin G. Rivette & David Kline, *Discovering New Value in Intellectual Property*, HARV. BUS. REV. 8 (Jan.-Feb. 2000).

<sup>64</sup> *Id.* at 6.

<sup>65</sup> See Sullivan, *Extracting Value I*, *supra* note 60, at 107-110.

<sup>66</sup> Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 521 (2003) (“Firms often use IP litigation to exclude their rivals from markets.”) (citations omitted); Sullivan, *Extracting Value II*, *supra* note 60, at 181 (discussing patents as anticompetitive measures that exist to block competitors from access to certain fields of technology).

Offensive estates can be clusters of improvement formed in a picket fence or a thicket around the foundation patents of a competitor or a potential licensor. Offensive use usually involves excluding competitors from using the technology or business application for the life of the product.<sup>67</sup>

The strategic intellectual property management literature reveals some ways in which intellectual property assets are exploited and deployed in contemporary business practice. This literature also reflects how intellectual property rights may be used as strategic business assets to be exploited to gain business value and market recognition of such value. As companies gain new intellectual property rights, it is not at all uncommon to see immediate strategic uses of such rights. This is by no means a new phenomenon under the intangibles paradigm, but has likely increased because the stakes involved in intellectual property ownership rights have become increasingly important for more companies in a variety of industries.<sup>68</sup> The broader sociocultural consequences of this are potentially quite significant, particularly with respect to the ways in which the boundaries of intellectual property rights are delineated and such rights allocated among varied uses, values and interested parties.

*B. Balancing the Public and Private: Allocating Ownership Rights in Culture and Knowledge*

Intellectual property rights delineate the boundaries of ownership rights with respect to varied types of cultural and other knowledge.<sup>69</sup> Intellectual property right grants are often justified as providing incentives to encourage people to engage in activities that might not otherwise be undertaken.<sup>70</sup> As defined in its broadest sense, the intangible knowledge that might become subject to a grant of an intellectual property right might encompass a wide range of areas relating to expressive culture, scientific and technological knowledge and other forms of knowledge. In this sense, an intellectual property right, particularly in the case of copyrights and patents, can be conceptualized as a title with respect to some type of underlying intangible knowledge.<sup>71</sup>

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<sup>67</sup> Sullivan, *Extracting Value I*, *supra* note 60, at 111.

<sup>68</sup> See Arewa, *Knowledge Economy*, *supra* note 6, at 6-10 discussing the increasing importance of intangibles for corporations and broader society).

<sup>69</sup> Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 *YALE L.J.* 1742, 1742 (2007).

<sup>70</sup> *Id.* at 1742 (“Intellectual property rights are conventionally said to solve an incentive problem but not an allocation problem.”).

<sup>71</sup> Arewa, *Freedom*, *supra* note 22, at \_\_\_ (noting that an intellectual property right can be viewed as a double intangible with two levels of intangibility, one relating to the underlying knowledge, with the intellectual property right itself comprising the second level of intangibility).

Intellectual property allocation decisions have broader sociocultural implications that are often not fully examined. This is particularly important since much underlying knowledge is shared.<sup>72</sup> Allocation decisions can influence representations of processes of creation themselves. As such, allocation decisions may influence conceptions of creation and facilitate worldviews that perceive culture and creation through a property rights paradigm that construes acts of creation and invention as autonomous.<sup>73</sup> Such characterizations may influence how public and private interests are both perceived and balanced in the delineation of property rights in knowledge.

Intellectual property discourse today reflects pervasive assertions of a propertization ethos that has become increasingly asserted as intellectual property rights have become more valuable in the knowledge economy era.<sup>74</sup> Such approaches emphasize the property-like aspects of intellectual property rights at the expense of countervailing considerations related to what is often termed the public interest, but which might also be characterized as other relevant sociocultural values. This calculus thus emphasizes the valuable asset aspects of knowledge while not taking adequate account of the functions of such knowledge as a vibrant cultural force. As a result, with propertization and valuable asset models of culture, an intellectual property right may become characterized as something analogous to a right to physical property, which is particularly problematic because knowledge is intangible and presents significant boundary drawing questions.<sup>75</sup> Further, the characterization of intellectual property in terms of its property-like features often ignores both balancing factors relating to public interests as well as issues that arise from the fact that knowledge is typically shared and consequently less conducive to treatment as physical property.<sup>76</sup> The failure to acknowledge balancing factors in the intellectual property arena is a key element of current disputes about the scope of intellectual property rights and views of knowledge and culture within intellectual property frameworks.<sup>77</sup>

Cultural propertization approaches tend to rely on valuable asset conceptions of culture and have led to two potentially problematic outcomes in recent years. Both

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<sup>72</sup> *Id.* at \_\_\_\_.

<sup>73</sup> *Id.* at \_\_\_\_.

<sup>74</sup> Arewa, *Knowledge Economy*, *supra* note 6 (discussing the increasing social, business, and economic value of intangibles in the knowledge economy era).

<sup>75</sup> Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 100 COLUM. L. REV. \_\_\_\_ (2007) (discussing greater difficulties in drawing boundaries of intellectual property rights); Olufunmilayo B. Arewa, *Intellectual Property as Boundary: Intangibles and the Knowledge Economy* \_\_\_\_ (2007) (manuscript on file with author) (hereinafter, “Arewa, *Boundaries*”).

<sup>76</sup> Arewa, *Boundaries*, *supra* note 75, at \_\_\_\_.

<sup>77</sup> *Id.* at \_\_\_\_.

of these outcomes reflect an insufficiently nuanced understanding of cultural value or the ways in which knowledge that may be protected by intellectual property is intertwined in broader sociocultural contexts. On the one hand, propertization rhetoric has been an important underpinning to rationalizations for greater intellectual property protection at both the national and global levels.<sup>78</sup> Such rhetoric is evident in assertions of piracy that have become pervasive in recent years.<sup>79</sup> Although something that might be termed piracy clearly exists, discussions about piracy reveal points of tension and dispute about how knowledge should be allocated between private and public interests or stated another way, between potential uses associated with valuable asset as contrasted with vibrant force models of culture.<sup>80</sup> Further, accusations of piracy may extend to behaviors that constitute inherent aspects of creative processes.<sup>81</sup> As a result, approaches to intellectual property that emphasize culture as a valuable asset are fundamentally in tension with acts of creation and widespread cultural conventions in which acts of copying and borrowing are endemic.<sup>82</sup> Valuable asset approaches, which typically advocate a greater scope of protection and exclusion rights for holders of intellectual property rights, reflect a belief that access to and uses of cultural texts should occur only with significant constraints with determinations of relative access made using considerations heavily weighted toward measures of economic and business value.<sup>83</sup> Such valuable asset approaches have been associated with an expansion of the private at the expense of the public, which means that the shared nature of cultural resources may be denied, minimized or otherwise ignored, leading to significant contestation in a number of arenas concerning the appropriate scope of intellectual property rights.<sup>84</sup>

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<sup>78</sup> *Id.* at \_\_\_\_.

<sup>79</sup> LESSIG, *FREE CULTURE*, *supra* note 35, at 17, 173 (“Since the inception of the law regulating creative property, there has been a war against ‘piracy.’ The precise contours of this concept, ‘piracy,’ are hard to sketch, but the animating injustice is easy to capture. . . Today we are in the middle of another ‘war’ against ‘piracy.’ The Internet has provoked this war.”) . . . [t]he property right that is copyright has become unbalanced, tilted toward an extreme.”); LITMAN, *supra* note 9, at 85 (discussing the expansion in uses of the term piracy, which used to be applied to those who made and sold large numbers of counterfeit copies but which today is used to describe “any unlicensed activity”); Malcolm Gladwell, *Something Borrowed*, *THE NEW YORKER*, Nov. 22, 2004, available at: [http://www.gladwell.com/2004/2004\\_11\\_25\\_a\\_borrowed.html](http://www.gladwell.com/2004/2004_11_25_a_borrowed.html) (“Fighting piracy has become an obsession with Hollywood and the recording industry”).

<sup>80</sup> Arewa, *Freedom*, *supra* note 69, at \_\_\_\_.

<sup>81</sup> *Id.* at \_\_\_\_.

<sup>82</sup> *Id.* at \_\_\_\_.

<sup>83</sup> *Id.* at \_\_\_\_.

<sup>84</sup> *Id.* at \_\_\_\_.

C. *Hierarchies and Cultural Property: Cultural Assets and Museums of Culture*

Valuable asset models implicitly invoke conceptions of cultural hierarchy in part by narrowly defining who constitutes an authorized user, interpreter or transformer of existing cultural texts. Hierarchies are potent mechanisms that have been used in the intellectual property arena to draw lines that are then used to identify and create categories of cultural property.<sup>85</sup> Legal structures reflect underlying societal values and are thus infused with assumptions about relative values.<sup>86</sup> Valuable asset models both reflect hierarchies of value as well as reinforce treatment of cultural assets as museum pieces. Valuable asset treatment has potentially significant cultural implications that merit greater scrutiny, particularly with respect to its implications for living cultural traditions.

The promotion of museums of culture is a persistent concept that emerges from valuable asset models in varied contexts. One key aspect of museums of culture concepts relates to how authorized users, interpreters, and transformers are defined and the scope of authority given such actors. Valuable asset models characterize particular cultural texts in a manner such that only certain parties are deemed acceptable curators of cultural material. In the context of the cultural industries and commercially produced cultural texts, valuable asset models tend to result in intellectual property right owners being given broad latitude to control a wide range of potential uses of the assets that they own. Owners may even be thought to be entitled to prevent any potential uses from which an owner might receive commercial benefit with little regard for the broader cultural implications of such exclusion.

Valuable asset models tend to conceive of valuable assets in terms of museums of culture, which serve as important mechanisms by which control functions are actually exercised. Conceptualizations of museums of culture in the digital era bear remarkable similarities to nineteenth century cultural sphere. In the nineteenth century U.S., culture that was at a that time deemed valuable was increasingly subject to what historian Lawrence Levine has characterized as “sacralization.”<sup>87</sup> This sacralization process “entailed the separation of elite culture from popular culture and the creation of sacred authors. Works of these sacred authors could not

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<sup>85</sup> Olufunmilayo B. Arewa, *Glocalization and Intellectual Property: History, Hierarchy and Hegemony* (2008), manuscript on file with author.

<sup>86</sup> Gana, *supra* note 10, at 112 (noting that laws “reflect underlying values of a society”); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 785 (1994) (noting that “[c]onflicts among diverse kinds of valuation permeate private and public choice”).

<sup>87</sup> LAWRENCE LEVINE, *HIGH BROW, LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* (1988) (noting the change in the relationship of Shakespeare and other cultural forms to the American audience, from a part of mainstream popular culture to become part of elite culture).

be abridged or altered and were to be performed in worship-like settings in which audience participation was not permitted.”<sup>88</sup> This sacralization process reflects conceptions of culture as a valuable asset with the owner of the valuable asset or certain authorized representatives controlling its access and use. Further instances of cultural asset conceptions were evident in the music arena, which during the nineteenth century was increasingly involved in business and economic changes associated with the ending of the patronage system and growth of the commercial music publishing industry.<sup>89</sup> The classical music tradition thus constitutes an invented tradition constructed in the nineteenth around works deemed to have value.<sup>90</sup> The invention of the classical tradition of music reflects an attempt to valorize certain composers and types of music and place such music into categories that made them increasingly untouchable and unable to be modified or altered.<sup>91</sup>

Particularly relevant today are ways in which sacralization in the music arena in the nineteenth century led to significant changes in the ways in which cultural works were transmitted and shared. In the cultural industries today, for example, conceptions of control increasingly overlap with ideas about who are appropriate stewards to control access to and uses of the products of the cultural industries. Such cultural texts, however, are increasingly part of the common cultural toolkit. The nineteenth century trend to sacralization also demonstrates the broader cultural impact of the adoption of valuable asset conceptions in the cultural arena with respect to what are now characterized as high culture forms.<sup>92</sup> For example, sacralization in opera occurred relatively later, and opera retained elements of a shared musical culture well into the nineteenth century.<sup>93</sup> The opera *Cinderella*

<sup>88</sup> Arewa, *Hip Hop*, *supra* note 49, at \_\_\_\_.

<sup>89</sup> William Weber, *Mass Culture and the Reshaping of European Musical Taste, 1770–1870*, 25 INT’L REV. AESTHETICS & SOC. MUSIC 175, 186 (1994) (attributing rise of a classical tradition in music to the “simultaneous collapse of the patronal tradition and the rise of the printing industry”).

<sup>90</sup> Robert Walser, *Eruptions: Heavy Metal Appropriations of Classical Virtuosity*, 11 POPULAR MUSIC 263, 265 (1992) (noting that the classical tradition is an invented tradition in which present interests have constructed a vision of the past to legitimate present-day institutions or social relations); James Parakilas, *Classical Music as Popular Music*, 3 J. MUSICOLOGY 1, 4 (1984) (“The repertory of Western ‘classical music,’ however, was formed under the spell of nineteenth century European ideas of history: the archeological idea of history as reconstruction, the evolutionary idea of history as a process of perpetual change, the progressive idea of history as the formation of the present.”); Robert Fink, *Elvis Everywhere: Musicology and Popular Music Studies at the Twilight of the Canon*, 16 AM. MUSIC 135, 141 (1998) (“Since about 1830 or so we have lived in the West with a quite circumscribed repertoire of so-called Classical Music . . . [which until 1965] occupied a secure . . . position at the top of a generally accepted hierarchy of musical culture.”).

<sup>91</sup> Arewa, *supra* note 49, at \_\_\_\_.

<sup>92</sup> JENNIFER HALL-WITT, *FASHIONABLE ACTS: OPERA AND ELITE CULTURE IN LONDON, 1780-1880* (2007).

<sup>93</sup> Charles Hamm, “*Hear Me, Norma*”; or *Bel Canto Comes to America—Italian Opera as Popular Song*, in *YESTERDAYS: POPULAR SONG IN AMERICA* 62, 71 (1983).

exemplifies the treatment of operatic works in the nineteenth century. This opera had its first American performance in 1831, just one year after its London premiere, and became one of the “most popular works of musical theater in the history of the American stage.”<sup>94</sup> However, authority to alter this work was not limited to the composer of the work from which it was extracted, rather, in the nineteenth century accepted cultural practices deriving from earlier time periods also gave others authority to engage with and modify existing works.<sup>95</sup> An English language version of Rossini’s opera *La Cenerentola*,<sup>96</sup> *Cinderella*, was created by an Irishman named Rophino Lacy, who retained most of Rossini’s music, but who also made “copious additions of music from other operas by the same composer.”<sup>97</sup> Reflecting the dominance of the sheet music industry in music of the time, the success of the Rossini-Lacy *Cinderella* led to “a rash of publications of favorite songs from this opera.”<sup>98</sup>

Bellini’s opera *Norma*, which premiered in the U.S. in 1836 following its 1831 Milan debut, has been described as one of the central musical events of the nineteenth century.<sup>99</sup> Many sheet music versions were made of songs from *Norma*,<sup>100</sup> and the first sheet music versions were still in print in 1870, more than 30 years after their first publication.<sup>101</sup> Further, many popular songs borrowed from *Norma*,<sup>102</sup> reflecting a nonsacralized view of musical authorship. Opera thus existed as part of a living musical tradition in which existing works were used and otherwise recycled to create new works.

Toward the latter part of the nineteenth century, as was the case with Shakespeare,<sup>103</sup> music became increasingly sacralized and reflected to a greater extent valuable asset assumptions.<sup>104</sup> This sacralization and increased emphasis on music authorship significantly influenced the performance of musical texts in that performers “were obliged increasingly to stick to the sacred text of the great

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<sup>94</sup> *Id.*

<sup>95</sup> Arewa, *supra* note 49, at \_\_\_\_.

<sup>96</sup> Hamm, *supra* note 93, at 71.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 74, 76 (noting that operatic sheet music (in English) also became quite popular, with operatic songs becoming part of the American popular song repertory as parlor music that was sung inside the home).

<sup>99</sup> *Id.* at 79.

<sup>100</sup> *Id.* at 79-81.

<sup>101</sup> *Id.* at 82.

<sup>102</sup> *Id.* at 81-83.

<sup>103</sup> LEVINE, *supra* note 87, at 20-32 (discussing sacralization and Shakespeare).

<sup>104</sup> Hamm, *supra* note 93, at 87 (noting that opera “became class entertainment, produced chiefly for the cultural and social aristocracy of America”).

masters.”<sup>105</sup> In addition, the practice of abridgement, once common in the nineteenth century and which had:

[N]ot disturbed such composers as Mozart and Chopin, was not consistent with the growing aura of sanctity that surrounded symphonic compositions or the sense that a true work of art had an integrity which must not be interfered with by anyone, be it audience, soloist, or conductor, and was increasingly relegated to such manifestly less “serious” occasions as concerts of the Boston Pops Orchestra.<sup>106</sup>

Growing sanctity associated with sacralization demonstrates one way in which valuable asset treatment may influence living cultural traditions. The core of nineteenth century sacralization processes and other valuable asset approaches rests on assumptions about how valuable cultural assets should be treated. Valuable asset models emphasize the importance of ensuring that valuable cultural assets are controlled by their creators or other authorized curators. Maintaining control was at least implicitly part of models of culture that connected unauthorized uses with a diminution of value of the original work. Although cultural values were to some extent embedded in such discussions, the business and economic value that such valuable assets might generate were intimately connected to this worldview.<sup>107</sup>

Valuable asset models have significant cultural implications that deserve serious scrutiny. Prior to the nineteenth century, for example, the classical music tradition was a living tradition. This living musical tradition was embedded in a social context where music performance was connected to the activities of everyday life, including marriages, funerals, namedays and saints’ days.<sup>108</sup> The classical tradition as a living musical tradition necessarily reflected widespread collaboration and borrowing among creators and active involvement of audiences with this living musical tradition.<sup>109</sup>

The valuable asset focused model that became prominent in the nineteenth century that valorized autonomy. This model also promoted behavioral norms of creation

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<sup>105</sup> LEVINE, *supra* note 87, at 138.

<sup>106</sup> *Id.* at 139.

<sup>107</sup> Arewa, *supra* note 49, at 585 (“The sacralization process also reflected the increasing influence of commercial forces such as the sheet music industry and the increasing commercial focus of composers more generally.”)

<sup>108</sup> Greg Dimitriadis, *Hip Hop: From Live Performance to Mediated Narrative*, 15 *POPULAR MUSIC* 179, 182 (1996) (discussing the autonomy from social context evident in post-renaissance classical music); Weber, *supra* note 89, at 177 (noting the original contexts of musical performance of much classical music)

<sup>109</sup> Arewa, *supra* note 49, at 584-590; 601-612.

that deemphasized the collaboration and sharing that has been characteristic of musical creation in all genres and time periods.<sup>110</sup> The valuable asset aspects of the construction of the classical music canon significantly diminished the living culture aspects of classical music and led increasingly to a musical tradition in which museum pieces became predominant and the work of living composers less performed.<sup>111</sup> The predominance of such museum pieces is a significant contrast to the living musical traditions that had previously been dominant before the eighteenth century.<sup>112</sup> For example, improvisation was a significant force in classical music into the twentieth century, but became diminished as the classical canon took form.<sup>113</sup> The elimination of improvisation from the classical tradition by the early twentieth century gives testimony to the ways in which valuable asset conceptions have the potential to shape and diminish important aspects of living cultural traditions.<sup>114</sup> The products of such living cultural traditions are by their nature used by others. The classical music tradition as museum tradition also reflects changing assumptions about the acceptable use of existing cultural texts by others and further reflects the attenuation of the classical music living tradition. The elimination of improvisation from the classical tradition is a consequence of sacralization and the reverence given music of the canonized classical tradition.<sup>115</sup> This museum tradition rooted in assumptions similar to valuable asset models of culture has been a significant factor in the fading of classical music as a living musical tradition.<sup>116</sup>

In addition to constraining living cultures by a tendency to insist that existing texts not be changed or are somehow diminished by being changed, valuable asset models may also lead to tyrannies of tradition that make it difficult for those not

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<sup>110</sup> J. Peter Burkholder, *Borrowing*, in 4 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 1 (Stanley Sadie & John Tyrrell eds., 2001), available at <http://www.grovemusic.com>

<sup>111</sup> J. Peter Burkholder, *Museum Pieces: The Historicist Mainstream in Music of the Last Hundred Years*, 2 J. MUSICOLOGY 115, 119 (1983) (noting the development of classical music as a museum tradition and the accompanying decline in performances of works by living composers).

<sup>112</sup> Arewa, *supra* note 49, at 589-591.

<sup>113</sup> DEREK BAILEY, IMPROVISATION: ITS NATURE AND PRACTICE IN MUSIC 19, 29-38 (1992) (noting that “improvisation played an important part throughout most of its [classical music’s] early history”).

<sup>114</sup> Philip Tagg, *Open Letter: ‘Black Music’, ‘Afro-American Music’ and ‘European Music’*, 8 POPULAR MUSIC 285, 290 (1989) (noting that improvisation was virtually eliminated from the European classical tradition by 1910).

<sup>115</sup> Robin Moore, *The Decline of Improvisation in Western Art Music: An Interpretation of Change*, 23 INT’L REV. AESTHETICS & SOC. MUSIC 61, 79 (1992) (“Reverence for the music of past eras is in itself an impediment to improvisation. Spontaneous innovations cannot occur in music which is intended to be more a replication from 1790 than a musical event of today.”).

<sup>116</sup> Tagg, *supra* note 114, at 290 (“The ideological aim of this notation fetish . . . was to forestall sacrilege upon the ‘eternal values’ of immutable Masterworks . . . . This strategy was so successful that it finally managed to suffocate the living tradition it claimed to hold so dear . . .”).

deemed authorized to change existing cultural texts.<sup>117</sup> Conceptions of cultural knowledge that rest upon the valuable asset model fail to incorporate sufficient understanding of the importance of culture as a vibrant living force. Examining culture through this lens enhances our understanding of how change, modification and reuse are inherent aspects of living cultural traditions that contrasts significantly with museum traditions. Valuable asset models thus do not adequately contemplate living cultural traditions in which borrowing, sharing and similar practices are often the norm.<sup>118</sup> Rather, they are often based on idealized notions of culture that reflects assumptions of nineteenth century sacralization applied to ever greater swathes of cultural material. The assumptions on which conceptions of sacralization are based contain remarkable similarities to valuable asset conceptions of cultural material protected by intellectual property. Consequently, twenty-first century advocates of valuable asset models of culture extend its assumptions to virtually all material to which economic and business value might attach. As a result, valuable asset models in the intellectual property arena have spread this worldview such that it encompasses virtually all cultural material that is commercially exploited, regardless of source or derivation.<sup>119</sup>

## II. CULTURE AS VIBRANT FORCE: SHARED CULTURAL RESOURCES AND INTELLECTUAL PROPERTY BOUNDARIES

### A. *The Vibrant Force of Cultural Transmission: Sustaining Living Cultures*

Cultural texts are often valuable assets. Further, the owners of such valuable assets can and should be able to profit from controlling some uses of such assets. The economic and business value that can be generated for such owners is a key element in current assumptions about how intellectual property right boundaries should be delineated. What such discourse often fails to properly take account of, however, is the dual role of such valuable assets, which may also function as essential cultural elements. Propertization and valuable asset discourse fundamentally fails to consider the role of culture as a vibrant force. Consequently, valuable asset models typically ignore or minimize other significant sources of value that do not accrue to the owners of such valuable assets, but rather to the participants in cultural systems in which such assets exist. Such participants may include creators, users, consumers and others.

Cultural texts that are also valuable assets may at the same time be key elements in

<sup>117</sup> Moore, *supra* note 115, at 79 (“Classical performers, bound both to the score and a desire to interpret it ‘correctly,’ feel constrained by a ‘tyranny of tradition.’ ”).

<sup>118</sup> Arewa, *supra* note 49, at \_\_\_\_.

<sup>119</sup> LESSIG, FREE CULTURE, *supra* note 35, at \_\_\_\_.

sustaining living cultural traditions. At the core of such living traditions is the ability of cultural participants to use, recreate and recycle existing cultural texts for a variety of purposes, including the creation of new texts, criticism, play and myriad other activities.<sup>120</sup> Current intellectual property discussions often valorize the economic and business value using theories rooted in unverified models based on questionable assumptions about creativity and creation.<sup>121</sup> The use of cultural texts in today's age of digital reproduction highlights a paradox that emerges from the growth of the cultural industries in recent years. As the products of the cultural industries become more popular and widely distributed, these texts increasingly become embedded culturally. Such texts may thus form part of a cultural toolkit that may be used by multiple cultural participants. As such, they may have a dual function as cultural product of the cultural industries and cultural element within broader sociocultural contexts. The broader sociocultural significance of such texts must be acknowledged in intellectual property discourse.<sup>122</sup> This means that valuable asset models used to ensure that value flows to owners of cultural texts must be tempered with recognition of the operation of such texts as elements in vibrant and living cultural contexts.

Technological changes have further magnified the significance of uses of such texts that might be deemed valuable assets. Uses of such texts in the digital era take place in a universe where technological advances from the Xerox machine to the VCR to digital content have all facilitated copying of existing cultural texts. The term copying as typically used, however, encompasses a continuum of activities from something that is likely piracy to uses within cultural contexts that are far more complex and that may defy easy categorization. This latter category encompasses activities that may have significant cultural value that is not always account for in debates about delineating the appropriate scope of intellectual property right grants.

#### B. *Intellectual Property, Culture and Boundaries*

Since knowledge, information and intellectual property rights are all intangibles, greater attention must be given to the potential cultural consequences of particular property rights configurations for living cultural traditions. Strong property rights in intangibles effectuated through intellectual property exclusion and control mechanisms create potentially significant problems due to uncertain boundaries. Questions of boundaries are increasingly magnified today by virtue of the increasing

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<sup>120</sup> Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER'S MAG., Feb. 2007, at 63 (discussing the ways in which literature is reused, recreated and recycled in contradiction to current assumptions in copyright).

<sup>121</sup> Arewa, *Freedom*, *supra* note 22, at \_\_\_\_.

<sup>122</sup> Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990).

stakes on all sides and the increased economic and business value that many derive from intellectual property resources.

Intellectual property frameworks reflect assumptions about knowledge deemed important and worthy of protection as property. Categorization of certain types of knowledge as protectable as intellectual property thus reflects both historical and sociocultural distinctions that have arisen in particular local contexts.<sup>123</sup> The notions of cultural property that emerged from among the countries that negotiated the first international intellectual property agreements reflected assumptions about cultural property and boundaries that remain tenuous and uncertain.<sup>124</sup> The scope and implications of such assumptions about property and boundary were largely unquestioned with respect to countries outside of the small circle of countries at the negotiating table.<sup>125</sup> The underlying assumptions of many of these frameworks are now increasingly questioned within many of these same countries. This is reflected, for example, in copyright narratives that have responded to dominant proprietization narratives by questioning whether the balance between private and public interests in intellectual property frameworks needs to be restored.<sup>126</sup> This is the case in the United States where the scope and boundaries of intellectual property rights, particularly copyright, are quite contested.<sup>127</sup>

Not surprisingly, given the intangible nature of the knowledge to which intellectual property rights attach, the scope of property rights with respect to intellectual property and the appropriate boundaries of such rights remain a recurrent and significant point of tension.<sup>128</sup> The determination of boundaries remains a significant problem in large part as a consequence of the shared nature of the underlying knowledge to which intellectual property rights attach. Consequently, delineating intellectual property boundaries is often difficult in the face of shared knowledge resources.<sup>129</sup> The shared nature of knowledge resources is a core aspect of understanding the role of culture as vibrant force. Sharing may be described in a

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<sup>123</sup> Arewa, *Glocalization*, *supra* note 85, at \_\_\_\_.

<sup>124</sup> Frischman & Lemley, *supra* note 75, at \_\_\_\_.

<sup>125</sup> Arewa, *Glocalization*, *supra* note 85, at \_\_\_\_.

<sup>126</sup> Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L. 279, 283 (2004).

<sup>127</sup> LITMAN, *supra* note 79, at \_\_\_\_.

<sup>128</sup> BRAD SHERMAN AND LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* 61 (1999) (noting conflicts inherent in intellectual property law between the demands of replication (or abstraction) and identification and the fact that many current debates reflect the law working through these conflicts in new contexts).

<sup>129</sup> Arewa, *Freedom*, *supra* note 69, at \_\_\_\_ (discussing the implications of collaborativity for copyright frameworks); Arewa, *Boundaries*, *supra* note 75, at \_\_\_\_ (discussing the difficulties that may arise in drawing boundaries around intangible knowledge in the patent, copyright and trademark spheres).

number of ways, including borrowing, diffusion, creolization, mixture, collaboration, all of which typically involve copying and all of which may be an important force in innovation. Incorporating culture as vibrant force assumptions in intellectual property entails better recognition of the mechanisms by which culture is and has always been shared and collaborative. Vibrant force models of culture thus draw attention to borrowing, creolization and appropriation as cultural norms that need greater accommodation within intellectual property frameworks, which typically start from the assumption that such practices are anomalous or should be accorded secondary status in light of an assumed norm of autonomous or “true” creation.<sup>130</sup>

C. *Borrowing and the Diffusion of Knowledge: Creolization and Appropriation as Cultural Norms*

Borrowing and creolization are endemic in both cultural systems and in cultural texts. Current discussions of intellectual reflect tensions inherent between valuable asset and vibrant force models of cultures. These tensions are pervasive in intellectual property discussions in a broad range of areas. Local or traditional knowledge, for example, encompasses a broad range of knowledge most unified by its lack of intellectual property protection and identification as existing in the developing world and among indigenous groups.<sup>131</sup> Most relevant in assessing local knowledge discussions are assumptions made about culture and cultural texts.<sup>132</sup> For myriad reasons, local knowledge is not protected within existing global intellectual property frameworks,<sup>133</sup> which has led to significant controversy today. Discussions of local knowledge raise similar boundary questions to those relevant in intellectual property discussions generally.

1. Borrowing and Mixture in Cultural Systems

Vibrant force models of culture recognize that borrowing and the forces of diffusion interact with and extensively affect cultural systems. Cultural systems are not discrete and autonomous units that can be separated by clear lines analogous to delineating territories on a map. Instead, cultural boundaries are fluid and shifting

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<sup>130</sup> Arewa, *Hip Hop*, *supra* note 49, at \_\_\_\_.

<sup>131</sup> Arewa, *Glocalization*, *supra* note 85, at \_\_\_\_ (discussing definitions of local knowledge); Hilary Nwokeabia, *Why Industrial Revolution Missed Africa: A Traditional Knowledge Perspective* 12, U.N. Economic Commission for Africa, ECA/ESPD/WPS/01/02 (noting that traditional knowledge encompasses a wide variety of types of knowledge, including in relation to biological and other material for medical treatment, agriculture, production processes, literature, music, rituals and other techniques and arts).

<sup>132</sup> Arewa, *Glocalization*, *supra* note 85, at \_\_\_\_.

<sup>133</sup> *Id.*

and cultural systems significantly affected by outside forces and influences.<sup>134</sup>

The fluidity of cultural boundaries means that definitions of cultural heritage often prominent in discussions of local knowledge are seriously flawed in that they fail to account for the fact that, as a result of borrowing, diffusion and other factors, cultural elements are often shared among multiple cultural systems.<sup>135</sup> Legal discussion of local knowledge often reflect assumptions about cultural systems that are no longer accepted in disciplines such as anthropology and folklore.<sup>136</sup> In fact, borrowing, creolization and cultural mixture are normal aspects of the development of cultural systems.<sup>137</sup> Creolization is “most vividly manifested and represented in the expressive forms and artistic behaviors of everyday and ceremonial life as folklore.”<sup>138</sup> Cultural mixture can also be an important force in innovation.<sup>139</sup> Borrowing and cultural mixture are characteristic of human history and evident in language, religion, diseases, agricultural practices and crops, folklore and a myriad of other cultural elements that may constitute local knowledge.<sup>140</sup>

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<sup>134</sup> Jane Eva Baxter, *Commentary on “Fear, Hope, and Longing for the Future of Authorship and Revitalized Public Domain in Global Regimes of Intellectual Property,”* 52 DEPAUL L. REV. 1235, 1237 (2003) (noting that “culture is inherently fluid and dynamic, rich in history, and ever changing.”).

<sup>135</sup> Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEG. STUD. 59, 77 (1998) (“indigenous cultures are often oversimplified, blurring the actual fluidity and permeability of knowledge and cultural boundaries. Just as dominant cultures appropriate knowledge from indigenous ones, indigenous knowledge itself contains knowledge shared between cultures, as well as information brought by colonists.”).

<sup>136</sup> Robert Baron & Ana C. Cara, *Introduction: Creolization and Folklore—Cultural Creativity in Process*, 116 J. AM. FOLKLORE 4, 6 (2003) (noting that such assumptions were often applied in the discipline of folklore, for example, which is often “stereotyped as a field centered upon the study of homogenous, discrete cultures and their expressive products”).

<sup>137</sup> *Id.* at 4 (noting that “[t]raditionally associated with the New World cultures of Caribbean and Latin American creole societies, creolization is now increasingly viewed as a universal process that could occur anywhere cultures encounter one another.”); MICHAEL BROWN, WHO OWNS NATIVE CULTURE? 106 (2003) (noting that the tomato, critical to southern Italian cuisine, originated in New World, while chili peppers in Chinese food came from Central and South America and plantain, a staple of the Yanomami of Brazil and Venezuela came from Southeast Asia and horses radically transformed the Amerindian cultures of the American Plains).

<sup>138</sup> Baron & Cara, *supra* note 136, at 5.

<sup>139</sup> Bruno Nettl, *World Music in the Twentieth Century: A Survey of Research on Western Influence*, 58 ACTA MUSICOLOGICA 360, 361 (1986) (discussing cultural mixture as a major prevailing force in musical innovation).

<sup>140</sup> JERRY H. BENTLEY, OLD WORLD ENCOUNTERS: CROSS-CULTURAL CONTACTS AND EXCHANGES IN PRE-MODERN TIMES (1993) (analyzing pre-modern encounters between people of different civilizations and cultural regions); TYLER COWEN, CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD’S CULTURES (2002) (discussing the intersection between cultural exchange and trade); JARED DIAMOND, GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES (1997); Nettl, *supra* note 139, at 361-362 (commenting that intercultural influences “were not

## 2. Borrowing and Cultural Texts: The Distribution of Folktales

Borrowing and mixture are not limited to cultural systems but are endemic in the creation of cultural texts as well. The distribution and dissemination of folklore texts demonstrates how diffusion and mixture are reflected in cultural texts that include common elements. The collaborativity and sharing in such texts is important to highlight, particularly with respect to local knowledge, where valuable asset based assumptions are sometimes made with respect to intangible cultural property, which is at times described as comprising part of the patrimony of a particular group.

Any process of borrowing necessarily involves acts of appropriation, which are a means by which such borrowing occurs. Folktales and other types of cultural expression that are cited as being part of the cultural heritage of a people may in fact be a result of borrowing and may also exist simultaneously in many different versions among many different groups. The widespread diffusion of folktales is one reason why folklorists developed reference sources called tale type indexes,<sup>141</sup> classification tools that compile tale types and indicate the geographic distribution of certain specified tales.<sup>142</sup> Tale type indexes highlight the fact that particular tales are often not exclusive elements of the cultural patrimony or heritage of specific groups.<sup>143</sup>

In most cases, a given item of folklore “will not be limited to a single culture, nor will it be worldwide.”<sup>144</sup> The distribution of a particular item of folklore cannot be known in advance.<sup>145</sup> Particular folktales, for example, may be widely distributed: some Indo-European folktales have been reported from India to Ireland.<sup>146</sup> Such

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invented by the Western missionaries or colonialists who first brought Western music to much of the world . . . Some things are known, and much is suspected, about the confluence of indigenous, Indian and Middle Eastern [sic] cultures in the development of Javanese music, the influences of Persians on the music of North Indian under the Mughals, the combination of older African and North African elements in the course of the Islamicization of parts of West Africa, and on a smaller scale, the exchange of styles accompanying the prehistoric movements of North American Indian peoples.”)

<sup>141</sup> ROSEMARY LÉVY ZUMWALT, *AMERICAN FOLKLORE SCHOLARSHIP* 56 (1988).

<sup>142</sup> ANTTI AARNE & STITH THOMPSON, *THE TYPES OF THE FOLK-TALE; A CLASSIFICATION AND BIBLIOGRAPHY* (rev. ed. 1987) (hereinafter, the “Arne-Thompson Folktale Index”) (covering folktales in Europe, the Mediterranean, the Near East and India); ZUMWALT, *supra* note 141, at 56-58 (discussing the origins of the Arne-Thompson Folktale type index and noting enlargement of geographic scope of coverage with Thompson revision)

<sup>143</sup> STITH THOMPSON, *TALES OF THE NORTH AMERICAN INDIANS* 201-266 (1929) (including Chapter 8 entitled “Tales Borrowed from Europeans” and Chapter 9 entitled “Bible Stories”).

<sup>144</sup> ALAN DUNDES, *CINDERELLA: A FOLKLORE CASEBOOK* v-vi (1982).

<sup>145</sup> *Id.*; ANNA BIRGITTA ROTH, *THE CINDERELLA CYCLE* (1951).

<sup>146</sup> DUNDES, *supra* note 149, at vi.

Indo-European tales would typically exist in multiple variants across their range of distribution, but would likely not be found, at least prior to the colonial period, among Australian Aborigines or South American Indians.<sup>147</sup> Diffusion of tales may also reflect patterns of population movements and are reflected in the transmission of African oral narratives to African American folklore traditions,<sup>148</sup> as well as folktales such as Cinderella to the New World. In the case of Cinderella,<sup>149</sup> variants have been reported from China to Europe.<sup>150</sup>

In addition to tale type indexes, which demonstrate the potentially widespread diffusion of items of folklore such as folktales that reflect borrowing, folklorists have developed motif indexes, which identify particular motifs that are common to different tales.<sup>151</sup> A motif is a potentially recurring basic element of a narrative.<sup>152</sup> A tale is thus comprised of a series of motifs, which may include actions, objects and dramatic personae.<sup>153</sup> Motif indexes highlight the fact that similar motifs or elements may exist in otherwise unrelated expressions of folklore, which may also have significant implications for the effective ability to enforce ownership rights with respect to expressive culture, and not just with respect to local knowledge.

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<sup>147</sup> *Id.*

<sup>148</sup> ZUMWALT, *supra* note 141, at 130-135 (noting that after more than a century of debate, it was generally acknowledged by the 1980s that African oral narratives “have a significant place in Afro-American folklore”).

<sup>149</sup> DUNDES, *supra* note 144, at xiv; JACK ZIPES, FAIRY TALE AS MYTH/MYTH AS FAIRY TALE 10-12 (1994) (noting that fairy tales were “first *told* by gifted tellers . . . [a]s *oral folk tales*” and that the literary fairy tale had been long institutionalized by the time the Brothers Grimm started their work in the early nineteenth century).

<sup>150</sup> Anna Birgitta Rooth, *Tradition Areas in Eurasia*, in CINDERELLA CASEBOOK 129, 133 (noting that the distribution of Cinderella includes the Far East, Near East, Eastern Europe, Southern Europe and Northern Europe); R.D. Jameson, *Cinderella in China*, in CINDERELLA CASEBOOK 71-97 (noting that the oldest version of Cinderella discovered to date comes from ninth-century China); NAI-TUNG TING, THE CINDERELLA CYCLE IN CHINA AND INDO-CHINA (FF Communications No. 213, 1974) (discussing Cinderella variants in China and Indo-China); STITH THOMPSON, THE FOLKTALE 127 (1946) (noting that Cinderella is found in not fewer than 500 versions in Europe alone, is popular in India, is found in North Africa, the Western Sudan, Madagascar and on Mauritius; Cinderella was taken by Europeans to the Philippines and Indonesia as well as North America, where versions exist among the Ojibwa of the Great Lakes and the Zuni of New Mexico).

<sup>151</sup> ZUMWALT, *supra* note 141, at 58-59.

<sup>152</sup> *Id.* at 104; *Definition of Motif*, FUNK & WAGNALLS STANDARD DICTIONARY OF FOLKLORE, MYTHOLOGY & LEGEND 753 (Maria Leach, ed., 1949) (defining a motif as “the term used to designate any one of the parts into which an item of folklore can be analyzed”).

<sup>153</sup> THOMPSON, *supra* note 150, at 415-416. The standard motif index in the folklore field was developed by the renowned folklorist Stith Thompson and is worldwide in scope. See STITH THOMPSON, MOTIF-INDEX OF FOLK LITERATURE, 6 vol. (1955-58); ZUMWALT, *supra* note 141, at 104.

### 3. Borrowing, Diffusion and Ownership of Cultural Elements

Many other examples exist of cultural elements and aspects of local knowledge that are widely diffused among various groups. Borrowing and diffusion are not limited to expressive culture. In the agricultural area, crop germplasm flows between different farming systems, which may also undermine assertions of ownership from an individual person or cultural system.<sup>154</sup> This flow of germplasm reflects the manner in which crop cultivation originally spread from points of origin early in the history of human crop cultivation.<sup>155</sup>

As a result of borrowing and diffusion, the question of who owns a folktale, as well as many other cultural elements, is often not really a question that can be answered in any kind of cogent way. In addition, since borrowing, appropriation and diffusion are widespread and critical features of the development of cultural systems and creation of cultural texts, focusing on acts of appropriation or borrowing in isolation as evidence of something necessarily inappropriate is misguided. A generalized rhetoric of ownership and control is thus not an appropriate or feasible way to deal with acts of appropriation in the cultural realm. Instead, a focus on the act of transmission itself and defining the range of acceptable borrowing is a more feasible approach.

Folklore reflects the dynamics of culture that approaches informed by vibrant force assumptions should recognize. As is the case with folklore, which often does not acknowledge authors, cultural texts where authors are known also reveal significant intermixture, collaboration, borrowing and sharing.<sup>156</sup> These forces of collaboration are evident across varied expressive fields. In music, for example, borrowing is endemic across time and genre and constitutes a norm of creation.<sup>157</sup> In literature, borrowing and sharing are endemic and also constitute a norm of creation.<sup>158</sup>

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<sup>154</sup> Stephen B. Brush, *Comment: David A. Cleveland and Stephen C. Murray, The World's Crop Genetic Resources and the Rights of Indigenous Farmers*, 38 CURRENT ANTHROPOLOGY 497, 497 (1997).

<sup>155</sup> DIAMOND, *supra* note 140, at 293-305.

<sup>156</sup> Arewa, *Hip Hop*, *supra* note 49, at \_\_\_\_; Arewa, *Freedom*, *supra* note 22, at \_\_\_\_.

<sup>157</sup> Arewa, *Hip Hop*, *supra* note 49, at \_\_\_\_.

<sup>158</sup> Lethem, *supra* note 120, at 60 ("Literature has been in a plundered, fragmentary state for a long time.").

### III. VALUABLE ASSETS OR VIBRANT THINGS: RECONCEPTUALIZING CULTURE IN INTELLECTUAL PROPERTY DOCTRINE

#### A. *Indigenous Culture and Intellectual Property: Competing Conceptions of Culture*

The reality of borrowing and sharing both within and among cultural systems mandates reconceptualization of the role of culture in intellectual property discourse. In the music arena, for example, intellectual property structures should better accommodate norms of borrowing.<sup>159</sup> In literature, copyright frameworks should similarly take account of widespread borrowing.<sup>160</sup> Discussions of local knowledge offer particularly fruitful grounds for considering how best to modify conceptions of culture so as to take account of culture as living and vibrant force rather than rely on valuable asset conceptions of culture.

##### 1. Control and Cultural Heritage

In discussions of intellectual property protection generally, the notion of autonomous, unitary and authentic cultural products is more easily applied in the context of tangible cultural products. As a result, when physical cultural products are involved, the process of connecting a cultural product to its source is often less ambiguous because the manifestation of local knowledge is evident in a physical object most often created by an identifiable individual or within some identifiable group. Claims of ownership with respect to intangible cultural products are more ambiguous, complex and potentially problematic. Consequently, in the case of intangible aspects of cultural elements, the creation of property rights in cultural knowledge thus raises many potential questions and issues.

Because claims in the intellectual property realm often derive from those in the tangible property universe,<sup>161</sup> the incorporation of valuable asset conceptions in the local knowledge context is unsurprising. Valuable asset models in the local knowledge context derive from conceptions of the cultures as owners of particular configurations of cultural knowledge with certain authorized parties within such cultures deemed appropriate curators that may control such knowledge. Groups deemed to own such knowledge are in many formulations thought to deserve rights to control access to and use of such knowledge. Such knowledge may be characterized as deserving intellectual property protection on account of the investment made by members of the group over time in developing or maintaining

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<sup>159</sup> Arewa, *Hip Hop*, *supra* note 49, at \_\_\_\_.

<sup>160</sup> Lethem, *supra* note 120.

<sup>161</sup> Lemley, *supra* note 1, at \_\_\_\_.

the knowledge. As is the case in intellectual property more generally, assertions of intellectual property rights with respect to local knowledge often emphasize similar notions of control over access to and exploitation of protected local knowledge.

Current movements to extend intellectual property protection to local knowledge, particularly with respect to indigenous knowledge, are in part an outgrowth of considerations of tangible cultural property such as in relation to indigenous land rights.<sup>162</sup> Claims of ownership with respect to intangible cultural heritage are often positioned at least implicitly as an outgrowth of rights claims with respect to tangible resources such as land and cultural property.<sup>163</sup> The conceptual transition from tangible property to intangible cultural elements comprising cultural heritage has been discussed in relation to Native American cultures:

Intellectual property rights consist of efforts to assert access to, and control over, cultural knowledge and to things produced through its application. . . Traditional creative works . . . may be of great cultural and spiritual significance. Cultural information is transmitted through these creative works and is therefore crucial to the continuing survival of Native cultures. This is particularly the case for most Native groups that have long since lost control over their community's tangible assets (principally, their native land) and thus, these intangible assets serve as the primary remaining means of identifying and uniting themselves as a community.<sup>164</sup>

This phenomenon of moving from claims of ownership with respect to tangible assets to claims with respect to intangible assets is also occurring more generally with respect to intellectual property doctrine,<sup>165</sup> which could have potentially serious and adverse behavioral consequences.<sup>166</sup> This again suggests that an approach that focuses on recognizing culture as a vibrant force regulating borrowing and acts of transmission is better suited to protection of local knowledge and intellectual property more generally.

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<sup>162</sup> Rachael Grad, Note, *Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia*, 13 DUKE J. COMP. & INT'L L. 203, 205-06 (2003); *Mabo v. Queensland*, 175 C.L.R. 1 (Austl. 1992); *Delgamuukw v. British Columbia*, 153 DLR (4th) 193 (Can. 1997).

<sup>163</sup> Grad, *supra* note 162, at 206.

<sup>164</sup> Amina Para Matlon, *Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting*, 27 COLUM. J.L. & ARTS 211, 220-221 (2004).

<sup>165</sup> Olufunmilayo B. Arewa, *Strategic Behaviors and Competition: Intangibles, Intellectual Property and Innovation* (2006) (manuscript on file with author) (hereinafter, "Arewa, *Strategic Behaviors*").

<sup>166</sup> James F. Weiner, *Anthropologists, Historians and the Secret of Social Knowledge*, 11 ANTHROPOLOGY TODAY 3, 6 (1995) (discussing alleged fabrication of secret and sacred knowledge for political purposes by indigenous peoples with respect to the proposed bridge construction); BROWN, *supra* note 137, at 173-204 (discussing alleged fabrication of secret and sacred knowledge with respect to the construction of Australian bridge).

It is understandable that a historical experience of oppression and appropriation may lead to a desire to assert control over remaining elements of what a group sees as its remaining cultural heritage. At the same time, however, assertions of claims of ownership with respect to intangible cultural elements raise a number of questions and concerns, particularly relating to contested ownership and meanings.<sup>167</sup>

## 2. Cultural Heritage, Cultural Boundaries and Contested Claims

In order to assert a claim of ownership with respect to intangible cultural elements, the boundaries surrounding the culture element must be determined and drawn. Since cultural systems and cultural texts are not distinct and autonomous, drawing such boundaries can be quite difficult in at least some instances and potentially contested in the local knowledge context as between different groups having claims with respect to the same cultural elements.<sup>168</sup> Further, since these types of uses of cultural elements have not previously been subject to intellectual property ownership restrictions or claims of rights of ownership, any such tension may be exacerbated to the extent that compensation is involved.

In addition to potential external claims contesting assertions of ownership with respect to elements of cultural heritage, internal meanings and uses may be contested as well. The question of internal dissidence is a concern, particularly since valuable asset conceptions in local knowledge discussions and intellectual property more generally focus significantly on questions of control.<sup>169</sup> Suggested approaches that focus on ownership of a people's cultural heritage would essentially give control over expressions deemed to be part of cultural heritage to a specific group or body. Since cultural meanings are not unitary and cultural knowledge not evenly distributed, this could have profound implications for alternate uses and meanings within cultural systems. The assertion of rights of property ownership over cultural heritage would mean that some entity within the cultural system controlling this heritage would be able to make determinations as to acceptable uses of cultural

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<sup>167</sup> WIPO Secretariat, *Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options* 6, IGC, Sixth Session, Geneva, March 15-19, 2004 (recognizing the issue of potentially overlapping claims with respect to such expressions, noting with respect to folklore shared within a country and regional folklore that "options could include: co-ownership of rights; allowing communities separately to hold rights in the same or similar TCEs; vesting rights in the State or statutory body").

<sup>168</sup> Graham Dutfield, *TRIPs –Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 243 (2001) (noting that traditional knowledge may be shared by two or more peoples or communities, making tracing difficult).

<sup>169</sup> BROWN, *supra* note 137, at 21-23 (discussing issues of control with arise with respect to practitioners of New Age religions that incorporate aspects of Native American religions).

material.<sup>170</sup> This connection between authority, control and cultural expression is one of the more troubling aspects of many valuable asset models.

Although the motive for gaining such control is a desire to prevent what are considered to be disparaging or inappropriate uses, examples of increased exercise of control over intangible resources deemed to be owned by a holder of intellectual property is a core feature of valuable asset models and has led to negative consequences in the intellectual property realm generally.<sup>171</sup> Given this experience, the extension of this approach to a wider realm involving local knowledge does not seem feasible or reasonable. This propertization logic entails privileging cultures in their existing form and supports the creation of museums of culture. As is the case with museums of culture in other contexts, creation of authoritative and potentially static cultural configurations in the local knowledge context has the potential to restrict or even eliminate borrowing and the forces of diffusion, which are powerful factors in the development of human cultural systems. Cultural protectionism, even for the most laudable purposes, is not the best way to deal with deleterious consequences of borrowing or appropriation of any type of knowledge.<sup>172</sup> Further, the complexity and varied nature of local knowledge systems suggests that cultural protectionism could have significant unintended and undesirable result in the local knowledge context.

B. *Imitation and International Intellectual Property: Development and Diffusion as Vibrant Force*

Vibrant force conceptions of culture and cultural transmission are not only relevant in the realm of expressive culture but are applicable and relevant with regard to treatment of knowledge more generally. Vibrant force conceptions are thus related to the intersection of intellectual property and development and treatment of diffusion within this context. Treatment of culture as property within a valuable asset paradigm thus has important practical implications today. To the extent that propertization and valuable asset approaches, particularly with respect to copyrights

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<sup>170</sup> *Id.* at 31-33 (discussing the fact that even instances where tribes control material, choices concerning access can be difficult).

<sup>171</sup> Arewa, *Strategic Behaviors*, *supra* note 165, at \_\_\_\_.

<sup>172</sup> Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 94-95 (2000) (noting that “[f]urthermore, we must be wary of cultural protectionist arguments in a modern world characterized by culture flows facilitated by technology, diaspora, globalization, and liberalization . . . For better or for worse, diaspora and new technologies facilitate the flow of culture and are a source of new ideas, language, and identities.”) (citations omitted); Stephen D. Osborne, *Protecting Tribal Stories: The Perils of Propertization*, 28 AM. INDIAN L. REV. 203, 236 (2003/2004) (noting that “[e]mploying intellectual property law to prevent appropriation and commodification by outsiders could, ironically, end up freezing cultures into static commodities.”).

and patents, create property rights that are too strong, which has been a tendency recently,<sup>173</sup> the diffusion of knowledge can be inhibited.<sup>174</sup>

The allocation of property rights to knowledge has important implications for economic development. This is particularly true in the knowledge economy era in which access to knowledge is increasingly a marker of economic prosperity on both a national and global level.<sup>175</sup> For this reason, diffusion and disclosure are important aspects of intellectual property frameworks and form an important element of the balance on which private and public interests may be weighed. The importance of diffusion is not limited to today's knowledge economy era. Studies of the role of patents in the industrial revolution in Britain, for example, have highlighted the importance for economic development of "leaky" intellectual property frameworks that permitted the broader dissemination of knowledge.<sup>176</sup> In addition, in Germany, "[i]t has been argued that the lack of restrictions on the use of innovations and the incentives to patent around existing processes spurred productivity and diffusion in these [food products, pharmaceutical and chemical] industries."<sup>177</sup> More recently, studies of the development of the Silicon Valley have highlighted the importance of horizontal flows of information between firms as a key aspect underlying the growth of the region.<sup>178</sup> Historical examples thus lend support to the importance and potential economic benefits of flexible intellectual property frameworks that permit access to and dissemination of knowledge.

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<sup>173</sup> LITMAN, *supra* note 79, at \_\_\_ (discussing the logic of current intellectual property reasoning that are used to support an unlimited scope of intellectual property rights); Arewa, *Freedom*, *supra* note 69, at \_\_\_ (discussing the implications of intellectual property maximalist approaches that focus on the property aspects of the intellectual property right).

<sup>174</sup> Arewa, *Freedom*, *supra* note 69, at \_\_\_.

<sup>175</sup> See *supra* notes \_\_\_ to \_\_\_ and accompanying text.

<sup>176</sup> H.I. DUTTON, *THE PATENT SYSTEM AND INVENTIVE ACTIVITY DURING THE INDUSTRIAL REVOLUTION 1750-1852*, at 204 (1984) (noting that the imperfect nature of early the patent system in nineteenth century Britain was key to successful economic development because it made diffusion possible).

<sup>177</sup> B. Zorina Khan, *Intellectual Property and Economic Development: Lessons from American and European History* 19-20 (2002), Study Paper 1a, Commission on Intellectual Property Rights, at [http://www.google.com/url?sa=t&ct=res&cd=1&url=http%3A%2F%2Fwww.iprcommission.org%2Fpapers%2Fpdfs%2Fstudy\\_papers%2Fsp1a\\_khan\\_study.pdf&ei=MIEaRq\\_0CYn0iAH8osGVDQ&usg=\\_\\_w6-8XuWxfcCal18qbrTdj7WrsvM=&sig2=ygOzsFD9mKuFbSoXiXa5mA](http://www.google.com/url?sa=t&ct=res&cd=1&url=http%3A%2F%2Fwww.iprcommission.org%2Fpapers%2Fpdfs%2Fstudy_papers%2Fsp1a_khan_study.pdf&ei=MIEaRq_0CYn0iAH8osGVDQ&usg=__w6-8XuWxfcCal18qbrTdj7WrsvM=&sig2=ygOzsFD9mKuFbSoXiXa5mA).

<sup>178</sup> ANNALIE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128*, at 2 (1996) ("The [Silicon Valley] region's dense social networks and open labor markets encourage experimentation and entrepreneurship. Companies compete intensely while at the same time learning from one another about changing markets and technologies through information communication and collaborative practices; and loosely linked team structures encourage horizontal communication among firm divisions and with outside suppliers and customers.").

The international intellectual property rights frameworks that had emerged at the end of the nineteenth century were characterized by significant flexibility with respect to countries that participated in such systems. This reflects the limited reach of the earliest global rights frameworks on account of limited enforceability: it was difficult for countries to get effective remedies about other countries that breached their obligations under such agreements.<sup>179</sup> In contrast, the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement (“TRIPs”),<sup>180</sup> incorporates intellectual property into the world trading system,<sup>181</sup> which traditionally has had powerful enforcement mechanisms.<sup>182</sup> The world trading system into which intellectual property issues were integrated reflected a similar configuration of constituent interests in that many of the same countries on whose local norms international intellectual property frameworks were based were also leading players in the global trade arena. The multilateral global trading system that emerged following World War II was developed by a relatively small group of countries in the North and later expanded to other countries, including Third World countries.<sup>183</sup> Such multilateral frameworks have further always existed together with bilateral and regional trading relationships and agreements.<sup>184</sup>

Visions of knowledge under the TRIPS agreement are firmly rooted in valuable asset conceptions. Further, institutional mechanisms instituted under TRIPS contrast markedly with the flexibility that characterized the enforcement of intellectual

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<sup>179</sup> J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. INT’L & COMP. L. 11, 11-14 (1998).

<sup>180</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994) (hereinafter “TRIPs” or the “TRIPs Agreement”), at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

<sup>181</sup> J.H. Reichman, *The TRIPs Agreement Comes of Age: Conflict or Cooperation with the Developing Countries*, 32 CASE W. RES. J. INT’L L. 441, 443 (2001) (noting that TRIPs imposes comprehensive set of relatively high minimum standards).

<sup>182</sup> Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 18-24 (2004) (discussing why countries in the West wanted to place global intellectual property frameworks at the WTO rather than WIPO); John. H. Jackson, *The World Trade Organization: Watershed Innovation or Cautious Small Step Forward?* in THE JURISPRUDENCE OF GATT AND THE WTO 399, 399 (2000).

<sup>183</sup> John C. Thomure, Jr., *The Uneasy Case for the North American Free Trade Agreement*, 21 SYRACUSE J. INT’L L. & COM. 181, 189 (1995) (“The founders of the postwar system had been a club of relatively like-minded nations; mostly advanced industrial economies, mostly welfare states with strong union movements, mostly net importers of raw materials, and mostly net exporters of manufactured goods.”).

<sup>184</sup> See Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 127 (2004) (discussing bilateralism in intellectual property protection).

property frameworks in the pre-TRIPS era. The loss of flexibility for many developing countries under TRIPS may have significant broader economic implications. Historical examples in the U.S. and among several countries in Asia suggest that the ability to use intellectual property frameworks flexibly has historically been an important aspect of development. Such flexibility has in many instances given space for vibrant force aspects of culture to play out and for transmission of knowledge to occur with relative fluidity. A core aspect of this earlier flexibility has been the ability of many countries to copy from the broader global context in order to develop technological and scientific capacity. The development of such capacity in many instances gave countries a better ability to integrate themselves within existing international frameworks on their own terms. These historical examples also reflect the ways in which local norms that emerged from particular local contexts and circumstances can play an important role in modifying the operation of norms that may at least in part have come from outside of such local contexts.

### 1. Stealing and Copying: Diffusion and U.S. Development

The U.S. was once a developing country with a standard of living lower than many countries in South America and the West Indies:<sup>185</sup> “Even on the eve of the Declaration of Independence the United States was an undistinguished developing country with an agricultural economy, rural production, and few pretensions to local cultural output.”<sup>186</sup> Although the United States now plays the role of chief enforcer of global intellectual property norms, the U.S. has actually played a number of different roles in the international context. The varied roles played by the U.S. in the broader international arena have reflected a domestic policy that applied existing global frameworks in light of the needs of the local American context. The interaction of the U.S. with global intellectual property frameworks historically highlights the manners in which local norms can influence the ways in which countries in prior eras chose to interface with global frameworks.<sup>187</sup>

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<sup>185</sup> Khan, *supra* note 177, at 48; Kenneth L. Sokoloff & Stanley L. Engerman, *History Lessons: Institutions, Factor Endowments and Paths of Development in the New World*, 14 J. ECON. PERSPECTIVES 217, 232 (2000) (discussing the relative economic development of the U.S. as compared with South America and the West Indies); Stanley L. Engerman & Kenneth L. Sokoloff, *Factor Endowments, Institutions and Differential Paths of Growth Among New World Economies*, in HOW LATIN AMERICA FELL BEHIND 260, \_\_\_\_ (Stephen Haber, ed. 1997); Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 119 (1993) (“Americans were also keenly aware of the disadvantages in their socioeconomic and cultural status vis-a-vis European nations.”).

<sup>186</sup> Khan, *supra* note 177, at 58.

<sup>187</sup> Arewa, *Glocalization*, *supra* note 85, at \_\_\_\_.

Prior to the twentieth century, the thus U.S. had a varied approach to compliance with international intellectual property norms. From its inception, the U.S. patent system has been acknowledged as the best in the world.<sup>188</sup> The U.S. patent system was developed in recognition of the needs of the local American context, and thus reflected acknowledgment of the importance of the development of scientific and technological capacity for the new American nation.<sup>189</sup> The U.S. patent system at its inception differed significantly from those in Europe with which the framers of the U.S. Constitution were familiar.<sup>190</sup> The American system reflected the creation of institutional structures that sought to achieve democratic objectives, including reserving patent rights to first and true inventors, efficient centralized processing and examination of patents, low levels of patent fees, and “countervailing checks and balances in the legal system.”<sup>191</sup> The institutional features of the U.S. system enabled easy access to patent specifications to the public and facilitated the commercialization of patented technologies.<sup>192</sup> In contrast, patent systems in Britain and France reflected their emergence as royal privileges.<sup>193</sup> Under the British system, for example, patents were costly, involved complicated administrative procedures, and access to property rights in inventions were restricted to a class of inventors who were wealth, well connected or technically qualified.<sup>194</sup> When the British patent system was reformed in 1852, it “incorporated features that drew on testimonials to the superior functioning of the American system.”<sup>195</sup> This reflects a convergence to the U.S. patent system norm by developed countries by the end of the nineteenth century.

The policy objectives underlying the strong U.S. patent system on paper did not, however, necessarily carry over to the realm of enforcement in other policy arenas, particularly with respect to the interests of foreigners. During the eighteenth century, as was the case with major European states, the United States followed an aggressive industrial policy of technology piracy.<sup>196</sup> This policy led the U.S. and its agents to steal machines and other advanced technology from European countries,

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<sup>188</sup> B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920*, at 13 (2005).

<sup>189</sup> *Id.* at 2-3 (discussing beliefs concerning the power of technology and industry to serve the many among the founding fathers of the U.S.).

<sup>190</sup> *Id.* at 29 (noting that the framers were familiar with and influenced by European intellectual property systems).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 30.

<sup>194</sup> *Id.* at 30-33.

<sup>195</sup> *Id.* at 34.

<sup>196</sup> DORON S. BEN-ATAR, *TRADE SECRETS: INTELLECTUAL PIRACY AND THE ORIGINS OF AMERICAN INDUSTRIAL POWER* \_\_\_\_ (2004)

particularly Britain.<sup>197</sup> As a result, during the eighteenth and nineteenth century, the United States engaged in a policy of technology piracy that reflects a colorful period in U.S. history.<sup>198</sup> Although technology piracy was officially disavowed following the adoption of the first U.S. patent law in 1790, industrial espionage and covert thefts of European technology were apparently tolerated by federal officials.<sup>199</sup> The formal support of strong patent rights was thus combined with a policy of industrial espionage meant that the U.S. might not have effectively enforced the property rights of foreigners. As a result, the early U.S. patent system based on clear delineations of property rights reflecting valuable asset conceptions, implicitly recognized important aspects of cultural knowledge from a vibrant force perspective. Such vibrant force perspectives recognized the importance of diffusion and reflected the realities of the American condition the benefits the U.S. could receive from absorb foreign knowledge that could be used to help ensure continued scientific and technological progress and future economic development

In contrast to patent, the formal structures of U.S. copyright law explicitly discriminated against foreigners.<sup>200</sup> These discriminatory aspects of U.S. copyright law were a major factor in the U.S. failing to accede to the Berne Convention until 1989.<sup>201</sup> The U.S. followed a copyright policy that suited its status as a developing country with a trade deficit with respect to copyrightable knowledge products.<sup>202</sup> The weak protection given copyright holders and discrimination against foreign copyright holders reflected American accommodation of unique features of the U.S. local context that tended to make valuable asset conceptions less feasible given the reality of American economic and social conditions. For example, recognition existed that restrictions on access to cultural goods had “important and deleterious implications for the degree of education, equality, and democracy.”<sup>203</sup> The weaker formal protected afforded copyright also reflected acceptance of important vibrant force approaches as conducive to economic development and a belief that the statutory grant of weaker rights was “likely to have a smaller disincentive effect for creators of copyrighted materials than for creators of useful inventions.”<sup>204</sup> The

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<sup>197</sup> *Id.* at \_\_\_\_.

<sup>198</sup> *Id.* at \_\_\_\_ (discussing the adventures of U.S. industrial spies in Britain).

<sup>199</sup> *Id.* at \_\_\_\_.

<sup>200</sup> See *supra* notes \_\_\_\_ to \_\_\_\_ and accompanying text.

<sup>201</sup> Khan, *supra* note 177, at 45 (noting that the U.S. declined to attend a pivotal copyright conference in Berne in 1883, attended but refused to sign the 1886 agreement of the Berne convention, and finally signed the Berne Convention in 1988); Berne Notification No. 121 Berne Convention for the Protection of Literary and Artistic Works, Accession by the United States of America, Nov. 17, 1988, at [http://www.wipo.int/edocs/notdocs/en/berne/treaty\\_berne\\_121.html](http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_121.html) (noting that the Berne Convention would enter into force in the U.S. on March 1, 1989).

<sup>202</sup> *Id.* at 258; see also *supra* notes \_\_\_\_ to \_\_\_\_ and accompanying text.

<sup>203</sup> KHAN, *supra* note 188, at 224.

<sup>204</sup> *Id.*

existence of strong network externalities with knowledge and cultural goods were also a factor, particularly since “weaker enforcement of property rights might lead to improvements in social welfare.”<sup>205</sup> Stronger legal frameworks and enforcement of U.S. copyright increasingly based on valuable asset models came as U.S. commercial interests became stronger and more globally competitive.<sup>206</sup>

## 2. The Asian Miracle: Diffusion, Imitation and Capacity

The flexible approach of the U.S. with respect to global rights frameworks contributed to its economic development: “[t]his calculus [of balancing private welfare and social welfare] ensured that the legal system reinforced the rights of intellectual property holders while reducing the social costs of exclusion.”<sup>207</sup> Similarly a number of countries in Asia have followed a similar strategy of weak intellectual property as a mechanism for facilitating the adaptation and imitation of foreign technologies, which was used as a means by which to develop technological, scientific and commercial capacity.<sup>208</sup> What is often referred to as the “Asian Miracle” reflects in part the diffusion and successful assimilation of foreign technology.<sup>209</sup> The assimilation of foreign technology was facilitated by intellectual property regimes that included vibrant force elements that accommodated needs that arose from specific local contexts. In South Korea, for example, intellectual property rights frameworks enabled adaptations and duplicative imitation of foreign technologies.<sup>210</sup> In the South Korean case, companies that absorbed such technologies later became innovators themselves.<sup>211</sup> Although South Korean laws met minimal international standards, as was the case in the United States in a prior

<sup>205</sup> *Id.* at 224-25.

<sup>206</sup> See *supra* notes \_\_\_ to \_\_\_ and accompanying text.

<sup>207</sup> KHAN, *supra* note 188, at 309.

<sup>208</sup> LINSU KIM, *LEARNING AND INNOVATION IN ECONOMIC DEVELOPMENT* \_\_\_ (1999)

<sup>209</sup> Nagesh Kumar, *Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries* 21 (2002), Study Paper 1b, Commission on Intellectual Property

Rights, at

[http://64.233.167.104/search?q=cache:1yIBP3NbcvwJ:www.twinside.org.sg/title2/FTAs/Intellectual\\_Property/IP\\_and\\_Development/IPR\\_TechnologyandEconomicDevelopment-Nagesh\\_Kumar.pdf+Nagesh+Kumar,+Intellectual+Property+Rights,+Technology+and+Economic+Development:+Experiences+of+Asian+Countries&hl=en&ct=clnk&cd=1&gl=us](http://64.233.167.104/search?q=cache:1yIBP3NbcvwJ:www.twinside.org.sg/title2/FTAs/Intellectual_Property/IP_and_Development/IPR_TechnologyandEconomicDevelopment-Nagesh_Kumar.pdf+Nagesh+Kumar,+Intellectual+Property+Rights,+Technology+and+Economic+Development:+Experiences+of+Asian+Countries&hl=en&ct=clnk&cd=1&gl=us) (“[E]vidence is

now available to confirm that the assimilation of foreign technology was a ‘critical component of the Asian Miracle’. There seems to be a general consensus that the East Asian success owes a lot, in general, to their ability to imitate, absorb, assimilate, replicate or ‘duplicative imitation’ of foreign inventions.”); LINSU KIM & RICHARD R. NELSON, *EDS., TECHNOLOGY, LEARNING, AND INNOVATION: EXPERIENCES OF NEWLY INDUSTRIALIZING ECONOMIES* (2000).

<sup>210</sup> Kumar, *supra* note 209, at 24; LINSU KIM, *IMITATION TO INNOVATION: THE DYNAMICS OF KOREA'S TECHNOLOGICAL LEARNING* \_\_\_ (1997)

<sup>211</sup> Kumar, *supra* note 209, at 24; KIM, *supra* note 210, at \_\_\_.

era, enforcement of such laws was not strict.<sup>212</sup>

As was the case in the U.S. during the nineteenth century, other countries in Asia, including Taiwan, used weak intellectual property rights to “facilitate local absorption of foreign knowledge through reverse engineering on the lines of Japan and South Korea.”<sup>213</sup> In India, the “abolition of product patents in chemicals and pharmaceuticals . . . facilitated the development of local technological capability in chemicals and pharmaceutical industry by enabling the domestic firms in their process innovative activity.”<sup>214</sup>

The experiences of the United States and other developing nations underscore the importance of an accommodation between valuable asset and vibrant force elements in intellectual property frameworks. Any accommodation between local contexts and global rights is likely to be a core aspect of economic development for many countries. In addition, such an accommodation represents an important path for the development of scientific and technological capacity that can enable such countries to participate fully in global intellectual property regimes on equal terms.

The U.S. development model thus represents an important one for developing countries today. In the copyright arena, for example, the U.S. followed a developing country approach toward intellectual property enforcement that took account of the needs of the local context with respect to access to knowledge.<sup>215</sup> The U.S. accommodation between local and global interests also highlights the importance of participation and ways in which a particular framework shaped by culture as vibrant force conceptions is in many respects far better suited to the reality of cultural flows than are valuable asset assumptions.<sup>216</sup>

## CONCLUSION

Conceptions of culture play an important role in determining policy outcomes.

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<sup>212</sup> KIM, *supra* note 210, at \_\_\_\_.

<sup>213</sup> Kumar, *supra* note 209, at 25.

<sup>214</sup> *Id.* at 28.

<sup>215</sup> KHAN, *supra* note 188, at \_\_\_\_.

<sup>216</sup> See Amartya Sen and Martha Nussbaum have developed versions of a capabilities approach that emphasizes the role of participation, freedom, liberty, and equality in development. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 3-4 (1999) (discussing the role of participation and fundamental freedoms in development); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 70, 144 (2000) (discussing her version of Sen’s capabilities approach and noting the need for “a theory of human capability that includes accounts of equality and liberty – to provide the normative basis that desire fails reliably to provide us.”); Arewa, *Freedom*, *supra* note 69, at \_\_\_\_ (discussing how the Sen and Nussbaum capabilities approaches can be incorporated within intellectual property doctrine).

Policy choices informed by recognition of culture as a vibrant force draw attention to the ways in which culture is transmitted and shared and give needed attention to questions of cultural value. Policy choices rooted in a conception of culture as a valuable asset often give priority to questions of economic and business value and minimize or ignore the cultural consequences of such choices.<sup>217</sup>

Cultural resources are both valuable assets and essential elements in living cultures. Reconciling these two potentially conflicting conceptions of culture remains a key element to restoring what many consider to be needed balance to intellectual property frameworks. The operation of cultural resources today as valuable assets cannot be denied given the business structure of the cultural industries and other intellectual property intensive industries and the economic and business importance of intangible resources generally. However, intellectual property discussions and doctrine must take greater account of the dual nature of cultural resources as both valuable assets and potentially essential cultural elements that have significant cultural value that should not be dismissed or ignored.

Recognizing and balancing valuable asset and vibrant force and economic, business and culture value entails greater recognition of the implications of shared culture, which includes understanding the nature and types of borrowing and collaboration that are often inherent parts of creation and invention processes. Such recognition can be incorporated in a number of ways, including by addressing the scope, power and duration of intellectual property rights, incorporating liability rule in intellectual property rights frameworks in certain instances, and generally giving greater recognition to the importance of borrowing and collaboration in creation and invention. Solutions that fully acknowledge the dual nature of the cultural knowledge underlying intellectual property rights may potentially help resolve persistent tensions and conflicts between competing cultural models in intellectual property.

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<sup>217</sup> Jessica Litman, *Innovation and the Information Environment: Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22-23 (1996) (noting that “copyright law has been addressed primarily to commercial and institutional actors who participated in copyright-related businesses.”).