YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age

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YOUTUBE, UGC, AND DIGITAL MUSIC: COMPETING BUSINESS AND CULTURAL MODELS IN THE INTERNET AGE

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INTRODUCTION: THE RISE OF UGC

YouTube, Facebook, MySpace, and other websites that contain user-generated content (UGC) have become key reference points in broader de-
bates about copyright in the digital era.¹ Web 2.0 refers to the “explosion of blogs, social networks and video-sharing sites [that] has allowed any Internet user to become a journalist or filmmaker or music star.”² The rise of UGC reflects use of technological tools that enable end users to create and distribute a variety of content, ranging from commentary and criticism to both verbatim and modified copies of a wide range of materials.³

Many UGC websites are far more popular than they are profitable. As of mid-2009, YouTube was on track to generate a profit, but had yet to do so,⁴ while Facebook announced that it had become cash flow positive, albeit not actually profitable, in the last half of 2009.⁵ The reach of Web 2.0 is most apparent in statistics about UGC creators and viewers. On the creation side, estimates suggest that the number of UGC content creators will rise from 83 million in 2008 to 115 million by 2013.⁶ On the viewer side, UGC websites are increasingly becoming dominant locales for the consumption of content. YouTube, for example, had over 112 million U.S. viewers with 6.6 billion videos viewed in January 2010.⁷ Facebook also experienced explosive growth in the 2000s,⁸ with the number of active Fa-

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³ See Bell, supra note ¹.
⁴ Miguel Helft, Google Aims to Make YouTube Profitable with Ads, N.Y. TIMES, Aug. 22, 2007, at C1, available at http://www.nytimes.com/2007/08/22/technology/22google.html (noting that Google has developed a strategy to make YouTube profitable by delivering user-controlled advertisements with YouTube content); Richard Waters & Matthew Garrahan, Google Says YouTube on Track for First Profit, FIN. TIMES, July 17, 2009, http://www.ft.com/cms/s/0/b4d81bde-728f-11de-9d98-00144febc000.html (noting that Google indicated in July 2009 that YouTube was on track to earn a profit and that YouTube’s moves towards profitability were driven by forced banner ads on the YouTube home page and “pre-rolls” that “force visitors to watch an advert before a video”).
⁸ See Peter Corbett, 2010 FACEBOOK DEMOGRAPHIC AND STATISTICS REPORT—145% GROWTH IN 1 YEAR (Jan. 4, 2010), http://www.istrategylabs.com/2010/01/facebook-demographics-and-statistics-
cebook users growing to more than 400 million worldwide by 2010, and Facebook’s company valuation reaching as high as $33 billion. User statistics and valuation figures for Facebook and other UGC websites attest to the potential future growth of UGC more generally.

Although they have not created much profit, UGC websites and other digital era players have created much destruction of cultural industry business models. The rise of Web 2.0 thus poses significant challenges to predigital era cultural industry business models, particularly because UGC may contain copyright protected content. The challenges of YouTube and other websites containing UGC and video content follow experiences in the music arena. The music industry was the first of the cultural industries to confront the digital era, and the experiences of industry participants, users (who may also be creators), and creators in that sector have shaped disputes in other segments of the cultural industries. The recording industry in particular has not fared well during the digital era. Peer-to-peer (P2P) file sharing has negatively affected cultural industry business models, and industry participants often blame P2P for their misfortunes. The business fortunes of many cultural industry players during the digital era have, however, also been shaped by other forces, including changes in the competitive business environment and cultural changes that may reflect shifting preferences.

Companies from the cultural industries are in many instances part of conglomerates that encompass multiple areas, including film, publishing, television, cable, and music. As such, learning experiences from the music arena have an immediate impact on other cultural industry segments. The lessons of the music industry in the digital era are important factors in understanding ongoing patterns of behaviors of industry players, users, and creators. Dominant predigital business models among cultural industry

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11 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”).
13 DAVID HESMONHALLGH, THE CULTURAL INDUSTRIES 1–2 (2007) (noting emergence of industry conglomerates in the cultural industries); VIACOM INC., ANNUAL REPORT (FORM 10-K), at 3 (Dec. 31, 2008) (identifying Viacom’s multiple business lines and describing Viacom as a “leading global entertainment content company”).
firms, which have traditionally relied heavily on intellectual property, have been based to a significant extent on control of content. In the past, this control was based, at least in part, on industry players’ privileged access to technologies and business structures for the creation, reproduction, and distribution of content. Although unauthorized uses of copyrighted content did not begin in the digital era, the impact of such uses for cultural industry business models has taken on a radically different significance in the digital era, particularly due to the disruptive force of the Internet.

Copyright combines regulation of both the creation and distribution of creative and other works, as well as the display and performance of such works. Technological innovations in the Internet era have significantly challenged copyright frameworks in a number of ways. Borrowing and varied types of copying have long been norms in creation. Similarly, sharing and copying of existing works, including copyrighted works, have long been characteristic aspects of a broad range of activities on both the distribution and creation sides. Intellectual property frameworks have not taken sufficient account of the realities of such collaborative and sharing practices.

On the creation side, for example, intellectual property frameworks deployed to protect predigital industry business models have not incorporated sufficient recognition of the reality of borrowing as a key aspect in many creative activities. Further, to a significant degree, creativity in certain niche and collaborative communities existed in the predigital era in spheres outside of the reach of major cultural industry firms. As youth cultural and artistic movements such as punk and hip hop exemplify, cultural and artistic movements that began outside of the cultural industry corporate sphere were in many instances in the past later incorporated and commer-

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14 LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 69 (2008) ("But the Internet and digital technologies opened [forms of writing such as TV, film, music, and music video] to the masses. Using the tools of digital technology—even the simplest tools, bundled into the most innovative modern operating systems—anyone can begin to ‘write’ using images, or music, or video.").

15 JESSICA LITMAN, DIGITAL COPYRIGHT 111 (2001) ("Most individual end users do not observe copyright rules in their daily behavior. The phenomenon is not new. It has captured so much recent attention because networked digital communications threaten and promise to revolutionize the way people interact with information and works of authorship in ways that make the behavior of individual end users far more crucial than it has been in the past.").


18 See MATT MASON, THE PIRATE’S DILEMMA: HOW YOUTH CULTURE IS REINVENTING CAPITALISM 16–21 (2008) (discussing the origins of punk as youth culture); Andreana Clay, Keepin’ It Real: Black Youth, Hip-Hop Culture, and Black Identity, 46 AM. BEHAV. SCIENTIST 1346, 1348 (2003) (noting that hip hop in its early days was an authentic street culture that reflected the experiences of African American youths).
cialized within existing industry structures and scope of control. From a cultural industry perspective, noncommercial and commercially oriented segments of such movements existed to a large extent in separate spheres. Further, participants in these communities and movements needed cultural industry intermediation to reach wider scale commercialization. Cultural industry firms may still play an important role in movements that transition from subculture to commercial culture. However, digital era technologies may give participants in such cultural movements a wider range of choices for both the creation and distribution of creative products than had been the case prior to the digital era, leading to digital era collisions between spheres that in the past were separate in important respects.

Although contributions on UGC websites vary considerably in terms of production and other qualities, technologies for creation of high quality content (in terms of production values) have become increasingly available in the Internet era. On the distribution side, the Internet has given creators and users alternate avenues for distribution of content. These alternate avenues increasingly impinge on predigital industry distribution channels, leading increasingly to conflicts between formerly separate personal uses and commercial industry spheres of control, particularly as a result of copyrighted content posted on UGC websites.

The role of copyright law is increasingly contested in the context of these profound cultural and business transformations. During the twentieth century, copyright significantly expanded in scope and duration, in part due to visions of copyright that reflected a strong propertization rhetoric. Such rhetoric was in the past supported by the practical business reali-

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20 See MASON, supra note 18 at 6 (noting that unlike in the past when spheres of operation were separated to a greater degree, in the digital era, “illegal pirates, legitimate companies, and law-abiding citizens are now all in the same space, working out how to share and control information in new ways”).

21 See WORKING PARTY ON THE INFO. ECON., ORG. FOR ECON. CO-OPERATION AND DEV., PARTICIPATIVE WEB: USER-CREATED CONTENT 13 (Apr. 12, 2007), www.oecd.org/dataoecd/57/14/383933115.pdf (noting that technological drivers of UGC include broadband access and more accessible software tools, including html-generating software and software enabling users to edit and create audio and video without professional knowledge).

22 See, e.g., JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 4 (2006) (noting that content providers have in recent years “seized upon IP law as a means of charging money for things that used to be freely available”).

23 See NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 7 (2008) (“Property rhetoric, whether invoked reflexively or strategically, has tended to support a vision of copyright as a foundational entitlement, a broad ‘sole and despotic dominion’ over each and every possible use of a work rather than a limited government grant narrowly tailored to serve a public purpose.”).
ty of significant cultural industry control over the creation and distribution of a significant share of creative content. The business and technological realities of the predigital era thus bolstered the effective operation of copyright and cultural industry business models. Although tension points existed in the past, particularly surrounding the introduction of new technologies of copying and distribution,\textsuperscript{24} technological, business, and cultural shifts in the digital era have upended predigital copyright balances and dominant business assumptions to an unprecedented degree.

Digital era technological innovations thus increasingly challenge predigital era industry players and business models. During the digital era, content has increasingly been made available in digital form (e.g., compact discs (CDs) and digital video discs (DVDs)). Innovations such as the MP3 (MPEG-1 Audio Layer 3) and other digital formats have enabled compression of digital files, which has diminished the storage space required for such files. Compressed digital file formats have facilitated copying and dissemination of files containing musical and other content.\textsuperscript{25} Although the sound quality of compressed MP3 files has been criticized by industry professionals,\textsuperscript{26} many digital era music consumers have been willing to sacrifice quality for convenience and quantity.\textsuperscript{27} The impact of digital era copying technologies on cultural industry business models has been exacerbated by the Internet, which has enabled nonprofessionals to widely distribute their digital copies.

Digital era technological innovations such as the MP3 and other digital formats and the Internet have thus significantly broadened access to technologies of creation, copying, and dissemination, thereby effectively reducing industry control. In addition, during the digital era, business competitors have emerged with new business models that do not rely as heavily on control of copying and distribution. UGC websites and Web 2.0 illustrate the impact of such new business models and new intermediaries that implement them. These new business models are the result of disruption, as well as the cause of further disruption among the cultural industries. In response to digital era disruption, established cultural industry firms have

\textsuperscript{24} For example, the introduction of recording and player piano technologies led to disputes about the application of copyright in the context of these new technologies. \textit{See infra} notes \textsuperscript{186} \textsuperscript{193} and accompanying text.

\textsuperscript{25} A list of twentieth century technologies that have facilitated copying might include the Xerox machine, VCR, various tape player technology ranging from 8-track tape cartridges to DAT, digital file formats such as MP3 (MPEG-1 Audio Layer 3), MPEG-2, MPEG-4, and devices to play digital file formats such as MP3 players, DVD players, and CD players.


increasingly sought to deploy copyright law to bolster them against both
digital-era business competition and changing user behaviors that have
come with the Internet age. However, disruption alone is not itself a reason
for legal intervention, particularly because disruption is in some instances a
core aspect of entrepreneurial innovation, while the ability to confront such
disruption is often a key element in business success.28 The law should,
therefore, be cautious in mediating this ongoing business, technological,
and cultural shift. The shifting technological, business, and cultural land-
scapes of the digital era should, however, prompt reexamination of foun-
dational assumptions of copyright law, both on cultural and business grounds.

Recognizing the impact of the digital era disruption on predigital era
business models is key to understanding legal responses by established in-
dustry players. The cultural industries have long played a role in shaping
copyright law, which has led to a complex copyright statute, which to a si-
gnificant degree reflects accommodation of cultural industry concerns.29 At
the same time, the complexity of contemporary copyright makes it difficult
for many users and creators to understand.30 This is particularly true in the
music arena, where complex copyright regulatory and licensing structures
have arisen.31

The impact of the digital era on cultural industry business models is
generally recognized. The cultural impact of the digital era has significant
business and legal implications that must also be considered. Events in the
digital era have also highlighted the existence of varied cultural models of
creation that may not fall easily within the assumptions of predigital era
cultural industry businesses. Although such varied models of creation are

failure of companies in the face of disruptive market and technological change); JOSEPH A.
SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 132 (1942) (“We have seen that the function
of entrepreneurs is to reform or revolutionize the pattern of production by exploiting an invention or,
more generally, an untired technological possibility for producing a new commodity or producing an old
one in a new way, by opening up a new source of supply of materials or a new outlet for products, by
reorganizing an industry and so on.”).
29 See Litman, supra note 15 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
amongst themselves what changes needed to be made and then present Congress with the text of appropri-
ate legislation.”).
30 See id. at 29 (noting that copyright rules are complicated and hard to understand); AM. UNIV.
SCH. OF COMM., CENTER FOR SOC. MEDIA, THE GOOD, THE BAD, AND THE CONFUSING: USER-
GENERATED VIDEO CREATORS ON COPYRIGHT 9 (2007), available at http://www.ilrweb.com/pdfdocu-
ments/ilrpdfs/CSM_report_Good_Bad.pdf (noting in empirical study of UGC creators “the need for bet-
ter general understanding of the use rights of creators, in order to create a more stable and useful frame-
work within which new creation can flourish”).
31 See, e.g., AL KOHN & BOB Kohn, KOHN ON MUSIC LICENSING (3d ed. 2002); Lydia Pallas Lo-
of copyright ownership interests and the complexity of copyright law, particularly as it applies to music,
has played a major role in the inability of the industry to respond to the changing nature of the ways in
which digital works can be distributed and otherwise exploited.”).
far from new, they have become more significant in the digital era due to the availability of technological tools that enable nonprofessionals to create works that may be substantially indistinguishable from those created by professionals.\textsuperscript{32}

This Essay will examine some implications of the changing technological, cultural, and business landscapes of the Internet age, focusing specifically on how particular visions of culture and creation shape legal frameworks and their application in the digital era. Part I discusses how events in the digital music arena have played an important role in shaping the digital content arena more generally. Events surrounding digital music can thus be seen as important episodes in the digital-era learning curve for users, creators, and corporate players. The remainder of the paper will discuss the impact of two critical features of digital content, and the learning curves they present to digital era participants. Part II examines the impact of technologies that have reduced the cost of copying. Part III considers the effects of low-cost distribution in the digital era. This Essay devotes particular attention to the ways in which digital era business and cultural expectations have shaped behaviors based on divergent perceptions of the value and appropriate uses of content protected by intellectual property.

I. DIGITAL MUSIC AND DIGITAL ERA BUSINESS MODELS

A. Digital Content, Market Signals, and the Digital Music Mess

As many have noted, the application of copyright, even in the predigital era, has often been complex and unclear.\textsuperscript{33} This lack of clarity is an important factor in digital-era copyright controversies. Although the cultural industries often characterize digital-era unauthorized uses as problems with legal compliance of those said to be copyright infringers, this perspective does not tell the whole story. Industry outcomes in the digital era may also reflect significant problems with predigital business models that have failed to adjust to new business, technological, and cultural realities of the digital era. For example, as the Internet was becoming pervasive and digital content widely distributed on the Internet in the last half of the 1990s, music industry executives had no interest in doing business in this new arena; rather, their attitude was that “[t]hey were making big money. They had the Spice Girls. They had all the time in the world. Why change?”\textsuperscript{34} Industry consolidation may also have weakened companies in the music industry by the time of widespread adoption of digital era technologies because consolidation led to a “single-minded” focus on profit, which compromised artis-

\textsuperscript{32} See Lessig, supra note 14, at 68–83.

\textsuperscript{33} See Litman, supra note 15, at 25, 29 (noting the increasing complexity of copyright law).

\textsuperscript{34} Knopper, supra note 12, at 115.
tic development, a cornerstone of the industry.\textsuperscript{35} Further, at least some cultural industry players have taken insufficient account of the market signals evident in “black” markets and have attempted to substitute copyright enforcement for the development of new business models to address such markets.\textsuperscript{36}

The encounter with the digital era has been a difficult one for many music industry players, particularly those in the recording industry. The introduction of compressed digital music files has led to widespread dissemination of digital music and a host of uncompensated and unauthorized uses of digital music content. These uses have unfolded in an environment of expanding copyright breadth. The scope of copyright infringement today may encompass behaviors that many engage in with startling regularity. Some unauthorized uses should likely constitute infringement. Much uncertainty exists, however, with respect to which uses clearly infringe and which do not. As Tim Wu has noted, a “‘giant ‘grey zone’” currently exists in copyright law, including “millions of usages that do not fall into a clear category but are often infringing.”\textsuperscript{37} Consequently, determining what actually is infringement is contested, while agreement over what should constitute infringement may be heavily disputed.

The digital music encounter was a harbinger of things to come in the digital video and other arenas, albeit with certain important distinctions. P2P file sharing technology, such as Napster and Grokster, significantly facilitated the unauthorized distribution of digital music files.\textsuperscript{38} The recording industry has devoted significant attention to the consequences of unauthorized file sharing of digital copies. However, user behaviors apparent in the digital era more generally surrounding music, video, and other content reflect a broad range of practices, from verbatim copying and distribution to transformative uses of existing works through creations such as remixes and mashups. Cultural industry responses to such digital era practices continue to reflect an element of denial by failing to acknowledge the diverse range of digital-era unauthorized uses, often combining varied types of unauthorized uses under the umbrella term “piracy.” Initial industry responses have


\textsuperscript{38} See Michael Driscoll, Comment, Will YouTube Sail into the DMCA’s Safe Harbor or Sink for Internet Piracy?, 6 J. MARSHALL REV. INTELL. PROP. L. 550, 562 (2007).
attempted to substitute legal enforcement for new business models. Such legal enforcement should not, however, be taken as a substitute for sustainable business models that respond to digital era challenges. Even industry participants that understand the importance of new business models are often hindered by assumptions they make about the value of content.\textsuperscript{39}

Music file sharing has received significant attention in part because it has become widespread during a time of declining CD sales.\textsuperscript{40} In 2008, thirty-three percent of music tracks purchased were digital tracks, while the number of CD buyers declined by seventeen million.\textsuperscript{41} Overall music sales fell by thirty percent between 2004 and 2009.\textsuperscript{42} Music listeners today increasingly engage with music in digital form through file sharing and social networking sites.\textsuperscript{43} Unauthorized downloads have become pervasive: recording industry representative IFPI estimated that ninety-five percent of all music tracks downloaded in 2008 were downloaded without users paying for content.\textsuperscript{44} Although authorized single track downloads increased by twenty-four percent between 2007 and 2008, reaching 1.4 billion downloads,\textsuperscript{45} and by ten percent in 2009, reaching 1.5 billion downloads,\textsuperscript{46} these figures pale in comparison with the estimated unauthorized file sharing of forty billion files in 2008.\textsuperscript{47} The recording industry has argued that file sharing has caused their sales to decline.\textsuperscript{48} This assumed causal connection has been an important basis for the legal responses and policy interventions promoted by the recording industry and its principal lobbying arm, the Recording Industry Association of America (RIAA). Other analyses and empirical studies suggest a complex range of potential reasons for the decline

\textsuperscript{39} See intra notes 129--162 and accompanying text.


\textsuperscript{42} IFPI, DIGITAL MUSIC REPORT 2010, at 3 (2010), www.ifpi.org/content/library/DMR2010.pdf [hereinafter IFPI 2010].

\textsuperscript{43} Press Release, supra note 41.

\textsuperscript{44} IFPI, DIGITAL MUSIC REPORT 2009, at 3 (Jan. 2009), http://www.ifpi.org/content/library/DMR2009.pdf [hereinafter IFPI 2009].

\textsuperscript{45} Id. at 6.

\textsuperscript{46} IFPI 2010, supra note 42, at 11.

\textsuperscript{47} IFPI 2009, supra note 44, at 22.

\textsuperscript{48} Felix Oberholzer-Gee & Koleman Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis, 115 J. POL. ECON. 1, 2 (2007); see also Stan J. Liebowitz, File-Sharing: Creative Destruction or Just Plain Destruction?, 49 J.L. & ECON. 1, 24 (2008) (suggesting that file sharing has significantly harmed record companies).
in CD sales,\textsuperscript{49} including a number of factors that the industry could have ameliorated with better management of the transition to the digital era and more finely tuned understanding of the implications of the Internet for pre-digital era business models.\textsuperscript{50} In the case of the recording industry, factors other than downloads that have contributed to the decline in CD sales include the decreased ability of industry players to bundle CDs and thus require that users purchase entire albums that include songs they might not want in order to obtain the songs they actually would like to buy, CD market saturation, and the decline in available physical retail locations where users can purchase music.\textsuperscript{51}

Patterns of industry and user behaviors that emerged during the music industry’s confrontation with the digital era continue to cast a shadow over other segments of the cultural industries. The ready availability of musical content on file sharing sites has played a crucial role in setting user expectations concerning the economic value of music and other digital era content. This impact is by no means limited to music. Newspapers, for example, have long sought to develop business models where users pay for newspaper Internet content.\textsuperscript{52} The widespread availability of newspaper and wire content on the Internet at no cost has had a devastating impact on existing

\textsuperscript{49} Oberholzer-Gee & Strumpf, \textit{supra} note 48 at 3 (concluding through empirical analysis that file sharing’s effect on music sales is statistically indistinguishable from zero); Connolly & Kruger, \textit{supra} note 40 at 709–14.

\textsuperscript{50} \textit{Jonathan A. Knee, Bruce C. Greenwald & Ava Seave, The Curse of the Mogul: What’s Wrong with the World’s Leading Media Companies} 35 (2009) (“In media, particularly since the advent of the Internet, misunderstanding the source of competitive advantage often leads managers to inadvertently construct bridges for competitors when they think they are actually strengthening the moat.”); \textit{id.} at 85 (“The Internet may be somebody’s friend—most notably, the consumers of media—but it is not the friend of incumbent media companies.”).


news media company business models. Users increasingly expect digital content to be cheap or free. Expectations of low prices for digital content reflect an effective reality of the Internet as an unauthorized alternate distribution channel with low costs of copying and distribution. These technological shifts and expectations of low cost content have eroded the ability of many industry players to control both pricing and uses of copyrighted material.

B. Changing Contexts: YouTube, UGC, and Web 2.0

The full impact of the digital era came later in the digital video arena, at least in part due to the larger size of video files. The expansion of Internet bandwidth and availability of BitTorrent technology have facilitated distribution of digital video files. Industry and user experiences with digital music have shaped later responses in other cultural industry arenas. These responses, in part, reflect the learning experience of industry conglomerates that seek to avoid replicating the recording industry’s digital music experience. As was the case in the digital music arena, significant tension has emerged in other content arenas. This tension is evident in behaviors that underscore the increasing dissonance between laws enacted in prior eras that now operate in the context of digital era norms and behaviors. Although the first battles in the digital video arena involved UGC sites such as YouTube, industry attention is increasingly shifting to P2P file sharing of video files, which parallels a major digital era focus of music industry attention.

53 Id.; see also SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., THE U.S. NEWSPAPER INDUSTRY IN TRANSITION 1 (July 8, 2009), available at http://www.fas.org/sgp/crs/misc/R40700.pdf (“The U.S. newspaper industry is in the midst of a historic restructuring, buffeted by a deep recession that is battering crucial advertising revenues, long-term structural challenges as readers turn to free news and entertainment on the Internet, and heavy debt burdens weighing down some major media companies.”).

54 Steve Lohr, Video Road Hogs Stir Fear of Internet Traffic Jam, N.Y. TIMES, Mar. 13, 2008, at A1 (“Moving images, far more than words or sounds, are hefty rivers of digital bits as they traverse the Internet’s pipes and gateways, requiring, in industry parlance, more bandwidth. Last year, by one estimate, the video site YouTube, owned by Google, consumed as much bandwidth as the entire Internet did in 2000.”).

55 Spencer Kelly, BitTorrent Battles Over Bandwidth, BBCNEWS.CO.UK, Apr. 13, 2006, http://news.bbc.co.uk/2/hi/programmes/click_online/4905660.stm (noting that larger video file sizes lead to longer upload times; these times have been reduced by BitTorrent technology, which facilitates efficient distribution of large files in discrete chunks).

56 Brian Stelter & Brad Stone, Digital Pirates Winning Battle with Studios, N.Y. TIMES, Feb. 4, 2009, at A1, available at http://www.nytimes.com/2009/02/05/business/media/05piracy.html?page wanted=all (“Perhaps most important, media companies are learning from the music industry’s mistakes and trying to avert broader adoption of piracy techniques. The No. 1 lesson: provide the video on the platform that users want.”).

57 Id. (“But if media companies are winning the battle against illegal video clips, they are losing the battle over illicit copies of full-length TV episodes and films.”).
The digital era has heightened existing tension points between copyright law and norms. Copyright is contested in the digital era in part due to competing interpretations of the scope of acceptable digital era sharing, copying, and collaboration, on both the creation and distribution sides. On the one hand, industry participants point to the increasing gap between copyright law and real world uses of content protected by intellectual property law and widespread lack of compliance with copyright and use it as a basis to promote more law and stronger enforcement. In contrast, others have argued in favor of digital era recalibration of copyright law and greater focus on needed modification of industry business models. Current disputes raise questions about how law should adapt in transitional environments, as well as the extent to which law should recognize and accommodate widespread noncompliance. Current industry approaches tend to assume that law can be used to circumscribe or reduce noncompliance. The unfolding of the digital era thus far, however, raises serious questions about whether such approaches are feasible or even desirable.

Unauthorized copying and distribution on the Internet have stressed cultural industry business models in significant ways. The recording industry has dealt with the digital threat in a number of ways, including using digital rights management (DRM) and technological protection measures (TPM) to control uses of content. TPM technologies are intended to prevent unauthorized use of digital works and play a role in DRM systems. Both DRM and TPM can, in almost all cases, however, be circumvented by sophisticated users. Although the recording industry once actively sought to deploy DRM, the futility of DRM in a context where tracks without


DRM are already widely available has led a number of major record labels to permit distribution of authorized DRM-free digital music.62 The recording industry decision to drop DRM reflects an important step in recording industry accommodation of customer demand: customers did not like DRM, which was in any case fairly easy to circumvent.63

Cultural industry digital era copyright policy has also focused, to a significant extent, on promoting enactment of laws that make devices that circumvent TPMs illegal.64 The U.S. Digital Millennium Copyright Act (DMCA),65 for example, includes anticircumvention provisions. In addition to promoting DRM and lobbying for more favorable copyright laws, the recording industry has also undertaken an aggressive education campaign that has equated file sharing with theft and similar crimes against physical property.66 The ability of the recording industry to define appropriate moral behavior with any degree of credibility is, however, significantly undermined by the past history of the industry and the ways in which the industry has, in the eyes of many, exploited a wide range of artists.67 The largely unsuccessful attempt by the recording industry to seize the moral high ground has been accompanied by aggressive litigation strategies based on copyright infringement lawsuits.

Although the recording industry at first focused on suing technology companies that provided digital music and file sharing technologies,68 from 2003 to 2008, the recording industry and its principal lobbying arm, the RIAA, followed an aggressive litigation strategy that targeted individual


customers.\footnote{See Sharpe & Arewa, supra note \textit{63} at 338 & n.61 (discussing the lack of a recording industry business strategy in the digital era and the current RIAA litigation strategy); ELEC. FRONTIER FOUND., RIAA V. THE PEOPLE: FIVE YEARS LATER, 4–5 (Sept. 2008) (whitepaper), http://www.eff.org/files/eff-riaa-whitepaper.pdf (discussing evolving RIAA litigation strategies).} The RIAA’s litigation strategy has been used to heighten awareness of the impact of file sharing, promote a view that file sharing is the equivalent of stealing, and reduce the amount of file sharing more generally by making file sharers fearful of potential legal action against them.\footnote{David Kravets, \textit{File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation}, WIRED.COM, Sept. 4, 2008, http://www.wired.com/threatlevel/2008/09/proving-file-sh (noting that the RIAA “admits that the lawsuits are largely a public relations effort, aimed at stirring fear into the hearts of would-be downloaders,” but that the RIAA believes that “the lawsuits have spawned a ‘general sense of awareness’ that file sharing copyrighted music without authorization is ‘illegal’”).} The lack of success of the RIAA educational efforts and litigation strategies is reflected by the increase in file sharing since the strategy was initiated,\footnote{ELEC. FRONTIER FOUND., supra note \textit{63} at 9 (“However, virtually all surveys and studies agree that P2P usage has grown steadily since the RIAA’s litigation campaign began in 2003.”).} surveys that suggest most people do not equate file sharing with stealing,\footnote{Mohsen Manesh, \textit{The Immorality of Theft, the Amorality of Infringement}, 2006 STAN. TECH. L. REV. 5, ¶ 6, http://stlr.stanford.edu/STLR/Articles/06_STLR_5 (noting that “file-sharers seem to share a subjective belief that copyright infringement is not morally wrong”); Jared Moya, \textit{Canada Survey: File-Sharing the “New Normal,” ZEROPAIRED.COM}, Mar. 20, 2009, http://www.zeropaid.com/news/10059/canada_survey_filesharing_the_new_normal/ (“A majority of Canadian Internet users see nothing wrong with P2P file-sharing services, and most react negatively to the notion of a so-called ISP tax that would help to compensate music artists for the losses it allegedly creates.”).} significant public relations damage to the RIAA and the recording industry more generally,\footnote{Erika Morphy, \textit{RIAA Abandons Mass Lawsuit Strategy in File-Sharing War}, ECOMMERCE TIMES, Dec. 19, 2008, http://www.ecommercetimes.com/story/65590.html?wlc=1254543930 (noting the negative public relations consequences of the lawsuit strategy and that “the group targeted some very sympathetic people with its lawsuits, including elderly couples, children and single mothers”).} and opposition to attempts to characterize file sharing as theft.\footnote{Jon Healey, Op-Ed., \textit{File “Sharing” or File “Stealing”?}, L.A. TIMES, Feb. 18, 2008, http://www.latimes.com/news/opinion/la-oew-healey18feb18,0,5092348.story (quoting an email from legal scholar Mark Lemley as stating “Let me be clear: copyright infringement is wrong, and should be punished . . . But simplistic statements that infringement is ‘just like’ stealing a CD, or using a room in my house, are wrong. They are also counterproductive, because people instinctively know they are wrong, and so they are likely to ignore histrionics of this sort”).} The characterization of file sharing as theft has in particular been resisted by many, and RIAA antipiracy videos have spawned a large number of parodies.\footnote{See Finlo Rohrer, \textit{Getting Inside a Downloader’s Head}, BBC NEWS MAG., June 18, 2009, http://news.bbc.co.uk/2/hi/uk_news/magazine/8106805.stm (discussing parodies of anti-piracy ads); \textit{see, e.g.}, YouTube, Piracy Video, http://www.youtube.com/watch?v=R2S70WJ80Ze&feature=fvw# (last visited June 8, 2010).}

The RIAA litigation strategy has enabled the RIAA to garner settlements averaging $4000 from legal actions against more than 30,000 alleged infringers, as well as sizeable damage awards in two cases in which juries
rendered verdicts.\textsuperscript{76} In October 2007, the first RIAA infringement case that reached a jury resulted in a victory for the recording industry.\textsuperscript{77} In the initial trial, the jury awarded $222,000, which was based on an award of $9250 for each of the 24 songs involved in the trial.\textsuperscript{78} In a second trial in the same case,\textsuperscript{79} a second jury also ruled for the recording industry and awarded $1.92 million in damages, or $80,000 per song.\textsuperscript{80} The jury in the second file sharing case to go to trial awarded damages of $675,000 to four record labels following the file sharer’s admission of having downloaded and distributed thirty songs.\textsuperscript{81}

Even if recording industry litigation strategies had been successful in materially diminishing the amount of P2P file sharing, which available evidence suggests has not been the case,\textsuperscript{82} litigation strategies are unlikely to alter the current business trajectory of many recording industry players. For example, a litigation strategy does not address the fundamental challenge of developing business models that reflect the business and cultural realities of the digital era. In December 2008, the RIAA decided to stop suing its end users and focus instead on working with Internet service providers (ISPs) to block Internet access of those making music available,\textsuperscript{83} which may suggest that the costs of the lawsuit strategy exceeded its benefits.\textsuperscript{84} Further, industry litigation strategies are a problem in that they are a distraction that directs industry attention away from profound and sustained threats to existing business models. Through the course of changing recording industry litigation strategies, music industry CD sales, for example, continued to plummet.\textsuperscript{85}


\textsuperscript{77} Id.

\textsuperscript{78} Id. Section 504 of the Copyright Act provides that infringers are liable for either actual damages and profits or statutory damages that may range from $750 to $30,000 per infringement and up to $150,000 per infringement in cases involving willful infringement. 17 U.S.C. § 504 (2006).

\textsuperscript{79} Capitol Records v. Thomas, 579 F. Supp. 2d 1210, 1228 (D. Minn. 2008) (setting aside jury verdict and granting a new trial due to erroneous jury instruction to the effect that making a track available on a file sharing site would constitute a “distribution” within the meaning of Section 106(3) of the Copyright Act).


\textsuperscript{82} See \textit{ELEC. FRONTIER FOUND.}, \textit{supra} note 69 at 1, 9–11.


\textsuperscript{85} See \textit{id.}
In addition to being a distraction from business threats to core industry business models, recording industry litigation strategies may seriously underestimate the extent to which the file sharing phenomenon reflects a generational shift that industry leaders may have difficulty comprehending. The aggressive use of litigation and threats of litigation have significantly damaged the recording industry’s reputation among certain users. Recording industry principals may also have underestimated the sophistication and determination of users of P2P networks and the extent to which the relative technology profiles of the industry and its users have changed. In the past, cultural industry firms had privileged access to technologies that enhanced their ability to control creation and distribution that were not widely available to the average user. In many respects, UGC reflects how some technologically sophisticated users may have access to technologies that enable them to both approximate professional production values and actively counter industry attempts to control content.

Most importantly, the recording industry fundamentally erred in its reaction to market signals. When it realized that its customers were interested in a new product (DRM-free digital music files made available one track at a time), it first refused to provide that product and then chose to sue its customers instead of making the product itself readily available. This meant that the industry chose a path that was doubly difficult. In refusing to meet identified customer demand, the recording industry made it more likely that unauthorized black market downloads would actually increase. Digital music litigation strategies have also focused on using copyright law to block unauthorized or unlicensed uses that present a competitive business threat to recording industry business models. Industry responses to digital era unauthorized uses have taken advantage of copyright statutory damage provisions, which permit plaintiffs to recover damages of $750 to $150,000 per infringed work without showing actual damages.

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86 See Posting of Jennifer Rice to CORANTE.COM BRANDSHIFT BLOG, Law of Causality, http://brandshift.corante.com/archives/2005/05/18/law_of_causality.php (May 18, 2005) (“The backlash against the RIAA is the best case study of what happens when you try to forcibly change customer behavior. Customers will do whatever they want to do. If you can’t create a really compelling reason for them to change (other than passing laws to make their actions illegal), then give them another option that’s more of a win-win. RIAA should stop fighting the inevitable and work towards a more realistic objective: ensuring a revenue stream for musicians regardless of distribution method. Sure, it requires more creative thinking. But it’s better than being hated.”).

87 See Kot, supra note 35 at 47 (asserting that many file sharers know that they are on shaky ground morally, but decide to break the law in response to the recording industry’s strong-arm tactics).


90 17 U.S.C. § 504(c) (2006) (“Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages
awards have been highly variable and have been characterized as “frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”

Recording industry failures also eased the path of new entrants with competitive business models such as the Apple iTunes Music store, whose pricing model reflects a low value given to content and cross-subsidization from associated hardware devices. Music industry navigation of shifting terrains of business competition and user preferences in the digital era has been less than adequate.

The application of copyright to YouTube and UGC should be considered within the context of the broader business, economic, social, and cultural transition that first confronted the music industry and later challenged other cultural industry sectors. YouTube, which Google purchased in 2006 for $1.65 billion, has established itself at the forefront of Web 2.0. YouTube has had a significant social and cultural impact in a number of spheres. Unlike traditional cultural industry players, whose business models have relied in many cases to a significant extent on licensing revenues from content, YouTube has an advertising-based revenue model, which means that its revenues tend to increase as traffic to its website increases. As its business model develops, however, YouTube, like Apple before it in the digital music arena, is increasingly partnering with content providers.

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Samuelson & Wheatland, supra note 40 at 441.


See Driscoll, supra note 38 at 552 (“YouTube, a free video sharing website, ranks number one worldwide in video and movie website visitors with twice the number of viewers as the next ranked site.” (footnote omitted)); *Full Text: Keen vs. Weinberger*, WALL ST. J. ONLINE, July 18, 2007, http://online.wsj.com/article/SB118460229729267677.html; *The Good, the Bad, and the ‘Web 2.0’; supra note 23.


See Driscoll, supra note 38 at 553 (“YouTube receives revenue by offering various types of advertising space. Thus, the more visitors YouTube attracts, the more revenue received from advertisers. Despite the large number of visitors, this business model has failed to generate substantial revenue because of high operating costs.” (footnotes omitted)); cf. David Kohler, *This Town Ain’t Big Enough for the Both of Us—Or Is It? Reflections on Copyright, the First Amendment and Google’s Use of Others’ Content*, 2007 DUKE L. & TECH. REV. 5, ¶ 1 (“Using a variety of technological innovations, Google became a multi-billion dollar content-delivery business without owning or licensing much of the content that it uses.”).

which may have implications in the future for its business model and approaches to copyright law interpretations and enforcement.

In the entertainment and broader content arena, YouTube has created innovative functionality and uses that have been rapidly adopted by users. At the same time, however, YouTube’s operation has presented significant challenges to existing business and legal frameworks. Many of the copyright concerns with respect to YouTube and other UGC websites relate to the ways in which users of such sites copy, alter, distribute, and otherwise use copyrighted material. YouTube exemplifies a fundamental paradox that has arisen in the digital era between predigital legal and business structures and digital era behaviors. In that regard, YouTube illustrates some ways that technological changes enable behaviors that profoundly challenge existing cultural industry business models and the application of intellectual property law.

C. Black Markets, Legal Markets, and Business Models

Digital era technologies have enabled the development of black markets with pervasive unauthorized uses of copyright protected materials by nonprofessional users. Cultural industry companies at first failed to take such markets as indicators of user preferences to be met with new business models. For example, the music industry initially sought to eliminate markets that were proving so popular with users, particularly younger ones. Gerry Kearby, founder of Liquid Audio, an early Internet music pioneer, noted that recording industry executives at Sony were honest in expressing their opposition to licensing content online. Kearby characterizes the recording industry as being, “in effect, buggy-whip manufacturers, trying to keep the auto at bay as long as they could.” Although the major recording labels eventually entered into licensing agreements for online content with Apple for the iTunes Music Store, the course of negotiations between Apple and the recording industry reflected many of the same attitudes noted by Kearby.

These attitudes towards the Internet and digital music have continued to shape industry business and legal responses. The recording industry, for example, used all available legal avenues to suppress online markets that might compete with its core business models. Similarly, these same atti-

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97 See Driscoll, supra note 38 at 552 (“The reasons behind YouTube’s tremendous popularity are probably due to several factors. First, YouTube’s site is completely free. Second, the site is easy to use. Third, its servers hold videos that are in high demand, including infringing videos.” (footnote omitted)).
98 See Kopper, supra note 12 at 119.
99 Id. at 120.
100 Id.
101 See Levy, supra note 89 at 27–51 (describing negotiations for the iTunes store and noting the gulf between the technology industry and music industry).
102 See Kot, supra note 35 at 2.
tudes hindered recording industry attempts to integrate new business models. For the most part, early success stories with respect to digital era music content were associated with technology companies such as Apple, which has become a significant force in the music industry by virtue of its domination of the digital music sphere.103 In contrast to Apple’s iTunes Music Store, content-owner digital music business initiatives have not been very successful.104 The increased dominance by technology players such as Apple has not eliminated the ongoing struggle between competing players and business models in varied digital content arenas.105 Creative artists, partially in response to the failure of the recording industry to adopt new models, have themselves started using alternative models. For example, artists such as Radiohead and Nine Inch Nails have distributed music over the Internet at no cost or at a price determined by users.106

Other entertainment industry segments, including the book industry and major film studios, hope to learn from the experience of the music industry and make a better accommodation of digital era realities in the transition from distribution of physical content to electronic delivery of content.107 Cultural industry learning in the digital music space has facilitated the establishment of Hulu, an at least initially successful NBC and Fox creation that offers video content online.108 The continuing controversy sur-

103 See Levy, supra note 89 at 169.
104 See id. at 153 (describing music industry digital music services, including Pressplay and MusicNet, as “pathetic, half-hearted efforts”); Connolly & Krueger, supra note 40 at 714 (noting the efficiency of P2P distribution networks); Hiatt & Serpick, supra note 40 (noting the disastrous two-year gap between the closing of Napster and the recording industry’s agreement to license content for sale at the iTunes Music Store and the failed industry initiatives during that time period).
rounding YouTube, however, reflects fundamental and continuing disagreement about the role of the Internet. In May 2009, during a panel discussion on the future of filmmaking, Michael Lynton, Chief Executive Officer of Sony Pictures Entertainment, reportedly stated:

I’m a guy who doesn’t see anything good having come from the Internet . . . , [which has] created this notion that anyone can have whatever they want at any given time. It’s as if the stores on Madison Avenue were open 24 hours a day. They feel entitled. They say, “Give it to me now,” and if you don’t give it to them for free, they’ll steal it.¹⁰⁹

Although some cultural industry players now clearly “get it,” and understand the implications of the digital era for industry business models, prominent attitudes towards the Internet among those in the cultural industries have in the past ranged from lack of understanding and indifference to contempt and even hostility. These attitudes have been significant factors in broader industry failures to develop innovative and effective business models that truly confront the reality of the Internet.

In addition to shaping industry business models, attitudes about the Internet also motivate legal responses. Debates about the appropriate scope of copyright in the digital era arise, in part, from the increasing divergence between attitudes and behaviors of many users and businesses with respect to the Internet. On the one hand, content owners frequently accuse YouTube and its users of copyright infringement because of the copyrighted material posted to YouTube.¹¹⁰ A number of legal cases that have been filed against YouTube assert claims of copyright infringement on account of the material that users uploaded, viewed, and disseminated via the site.¹¹¹ The stakes in this ongoing battle are potentially quite high. A suit filed by Viacom in 2007 against YouTube and Google, for example, claimed $1 billion in damages; although Google won a summary judgment motion in this case in June 2010, Viacom has appealed the court’s ruling.¹¹² The struggle over YouTube also reflects, in part, attempts by video content owners to avoid the messy situation that came to pass in the digital music sphere.¹¹³

¹¹⁰ See Driscoll, supra note 33, at 550–51.
¹¹¹ See, e.g., Tur v. YouTube, No. CV064436, 2007 WL 1893635, at *1 (C.D. Cal. June 20, 2007) (denying defendant’s motion for summary judgment in case involving suit against YouTube by a photographer claiming copyright infringement and unfair competition by YouTube on account of clips uploaded, viewed and—or distributed to the public without consent).
¹¹³ See supra note 33 and accompanying text.
Sites containing UGC such as YouTube also highlight the broad range of activities that content owners may assert constitute copyright infringement. Although YouTube clearly contains copyright-protected content, debates between content owners and YouTube underscore the lack of clarity of the place of users and certain types of creators under existing copyright doctrine. Similarly, the parameters of copyright doctrine, including the scope of fair use and permitted personal uses, remain uncertain and difficult to predict. Technological measures that restrict uses, even fair uses, also complicate the situation. The DMCA provides a potential safe harbor from liability for copyright infringement for ISPs. Section 512 gives ISPs safe harbor if they “expeditiously” remove any material on their servers once a copyright owner tells the ISP in good faith that the material is infringing; no additional legal process is required for the content to be removed. The DMCA takedown process has, however, been characterized as highly problematic in application, partly due to the aggressive activities of copyright owners in their use of Section 512 in ways that some assert create a chilling effect that may actually hinder the creation of new works. Users have, however, challenged takedowns of material. In 2007, a video uploaded on YouTube by Stephanie Lenz that featured her thirteen-month-old son holding to the Prince song “Let’s Go Crazy” was taken down by Universal Music. In 2010, a California district court

114 A number of scholars have pointed to the lack of an appropriate conception of the place of users as a core issue of concern in copyright. See Julie Cohen, The Place of the User in Copyright Law, 74 FORDHAM L. REV. 347, 374 (2005) (“Copyright should recognize the situated, context-dependent character of both consumption and creativity.”).
116 Id.
117 17 U.S.C. § 512 (2006) (providing that ISPs shall not be liable for infringing content if certain statutory requirements are met); see also Marjorie Heins & Tricia Beckles, Brennan CTR. FOR JUSTICE, N.Y. U. SCH. OF LAW, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 4–5 (2005), http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf (“[The DMCA] is a far-reaching law that controls the public’s ability to access and copy materials in digital form.”).
118 17 U.S.C. § 512(1).
119 See Second Amended Complaint, Lenz v. Universal Music Corp., 572 F. Supp. 3d 1150 (N.D. Cal. 2008) (No. C 07-03783-JF), available at http://www.eff.org/files/filenode/lenz_v_universal/Lenz 2ndAmendedComplaint.pdf [hereinafter Second Amended Complaint] (seeking injunctive relief and damages for misrepresentation of DMCA copyright claims and alleging that Universal Music Group issued a DMCA takedown notice to YouTube despite knowledge that use of the allegedly infringing Prince song in the YouTube video was a noninfringing fair use); Heins & Beckles, supra note 117 at 5 (noting that Section 512 “provides an insufficient check on overreaching, and creates an unacceptable shortcut around the procedures that are needed to decide whether speech is actually infringing”).
120 Second Amended Complaint, supra note 119 at 3. The video clip is available at: http://www.youtube.com/watch?v=N1KfHFWlhbQ (last visited June 10, 2010).
granted partial summary judgment to Lenz, permitting Lenz to pursue a claim for damages against Universal under DMCA section 512(f).\textsuperscript{121}

Discussions about copyright in the digital era often reflect significant discord among various interests, which demonstrates at a minimum the need for middle ground solutions that give greater digital era guidance.\textsuperscript{122} Such middle ground approaches might include codes of best practices, such as one developed for online video that suggests ways to apply fair use to UGC creations.\textsuperscript{123} Although to truly be effective, any such agreements should reflect participation among all interest parties, which has not always been the case. Discussions about copyright and UGC, such as those surrounding the UGC Principles adopted in 2007 (the supporters of which do not include YouTube), far too often take place among industry members and do not always take sufficient account of the needs of a sufficiently broad range of industry participants and users.\textsuperscript{124} The lack of participation of all interested parties, particularly on the consumer and user side, reflects a historical pattern in copyright lawmaking of industry writing the laws.\textsuperscript{125} The increasing importance of copyright in the everyday lives of nonprofessional users mandates greater representation of such parties in proposed solutions to current copyright disputes.\textsuperscript{126}

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\textsuperscript{121} Lenz v. Universal Music Corp., No. C 07-03783-JF, 2010 WL 702466, at *10–11 (N.D. Cal. Feb. 25, 2010); Zusha Elinson, \textit{Universal May Have to Pay the Piper Over Takedown of Dancing Baby}, The Recorder, Mar. 1, 2010, http://www.law.com/jsp/article.jsp?id=1202444734702&pos=ataglance (“The decision is significant as the first one to construe the question of how broadly the terms damages and fees should be construed under the DMCA.” (quoting Internet law expert Ian Ballon) (internal quotation marks omitted)).
\textsuperscript{124} \textit{Principles for User-Generated Content Services}, supra note\textsuperscript{123} at 1387–88, 1407–08 (discussing informal nonbinding agreement among commercial market participants concerning treatment of UGC and noting the incomplete representation and lack of diversity in participation of content owners; Principles for User Generated Content Services, http://www.ugencprinciples.com/ (last visited June 10, 2010) (listing companies supporting the principles, which include CBS, Disney, Fox, Microsoft, MySpace, NBC-Universal, Sony, and Veoh).
\textsuperscript{125} Jessica D. Litman, \textit{Copyright, Compromise, and Legislative History}, 72 Cornell L. Rev. 857, 860–61 (1987) (noting that copyright reflects a constellation of rights assembled over time, some of which were added as a result of particular problems in the application of copyright law or at the behest of specific industries).
\textsuperscript{126} Tehrani, supra note\textsuperscript{37} at 539 (“[C]opyright law is increasingly relevant to the daily life of the average American.”).
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II. THE DIGITAL ERA AND THE COSTS OF COPYING

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

Many cultural industry firms have based their responses in the digital era on assumptions about the value of intellectual property assets. These assumptions, in turn, are based on industry licensing strategies that predate the digital era. The increasing prominence of what might be termed “valuable asset models” of culture in intellectual property is closely connected to the emergence of the digital era. Valuable asset models treat content as a valuable asset to be monetized through extraction of maximum amounts of revenues. The business, social, and economic landscape of the twentieth century heralded a fundamental shift in sources of value for a broad range of businesses. The increasing global policy importance of copyright today is one outgrowth of these innovations have reduced the value of content.

In the cultural realm, innovative technologies have fundamentally altered the meaning of acts of copying and distribution, particularly for the business models that once derived significant value from control of the creation and distribution of content. During the digital era, for better or worse, users have also developed an expectation that content should be cheap or even free, as well as readily available. Consumer expectations about prices

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128 HESMONDHALGH, supra note 13 at 1.
130 Nick Wingfield & Ethan Smith, Music’s New Gatekeepers, WALL ST. J., Mar. 9, 2007, at W1 (noting that although Apple earns little from sales of music at the iTunes store, it is not under much pressure from a profit standpoint because of the money it makes on iPods).
are in important respects contrary to the assumptions of value made and business configurations developed by many traditional cultural industry participants.

This diminution in the value of some content may run counter to assumptions commonly made by industry participants about the value of digital content. Industry digital era losses have, however, led many industry participants to search for new revenue streams that might be harnessed from uses of content. Valuable asset approaches rely heavily on intellectual property, which enables content owners to maximize value by controlling uses of and maximizing revenue from cultural material that they own. Valuable asset perspectives in copyright contrast significantly with prior eras when copyright was leakier and gave greater space for noncommercial uses such as private personal use. As the impact of the Internet has become more apparent, valuable asset approaches have become ever more pervasive, with firms in the cultural industries attempting to institute a pay-per-use model that maximizes the value of content by eliminating uncompensated uses of materials that they own or control.

In addition to eliminating uncompensated uses, industry players have sought to develop additional revenue streams from uses for which compensation is already being paid. For example, in 2009, the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and other performance rights organizations, which collect performance royalties on behalf of music publishers, composers, and songwriters, found uncompensated uses in the iTunes Music Store for which they believe they should be compensated. The publishers lobbied Congress to be paid for the thirty second samples or previews users may choose to hear prior to purchasing a digital download. Payment of performance royalties for these previews represent an attempt by music publishers to develop alternate digital era revenue streams to compensate for losses of revenue in other areas. The search for additional revenue streams may involve payments by other industry participants. In the case of iTunes previews, music publishers want to receive performance royalties when iTunes song samples are played, as well as for downloads of music, movies, and television shows. The assertion of an entitlement to these new revenue streams is based on a theory that activities such as playing previews and downloading content involve a public performance that deserves additional compensation beyond any royalties or fees already paid for such material. Industry participants already receive payments for the uses for which performance royal-

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131 See Litman, supra note 115 at 1873 (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” (footnote omitted)).

132 See Litman, supra note 115 at 27 (noting that the DMCA facilitates a pay-per-use system).

ties are also now being asserted, including synchronization fees for incorporation of music in movies and television shows, performance royalties for public film and television screenings, and mechanical license fees for musical downloads.134 Mechanical license fees are paid when a copyrighted musical composition is used on a “mechanical” device such as a CD, record, or tape, or in certain digital formats.135

The search for new alternative sources of revenues is not limited to composers and publishers. In 2008, the recording industry lobbied Congress to pass a bill that would entitle it to receive royalties from radio stations, stating that “broadcasting music without payment is akin to piracy.”136 The recording industry position on radio broadcasting of music is intended to enable the industry to bolster its revenues by addressing the uneven application of copyright law to radio transmissions.137 Recorded music typically involves two separate copyrights, one in the musical work, generally retained by the composer or songwriter, and one in the sound recording, generally held by recording companies.138 Broadcast radio stations currently pay performance royalties to copyright owners of the musical work (e.g., composers, songwriters, and publishers), but do not pay performance royalties to holders of sound recording copyrights.139 In contrast, all other broad-

134 Id. (noting that publishers would have already received synchronization fees for use of music in films and television shows, performance royalties for public screenings of movies and television shows including music, and mechanical royalties for music downloaded through services such as iTunes).
135 See infra notes 184-192.
137 The Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of Ralph Oman), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=4011&wit_id=8167 (“[A] broadcast performance right will finally put over-the-air broadcasters on the same level playing field as satellite, cable and Internet radio. All four should pay a reasonable royalty for the use of sound recordings. . . . This solution will establish the parity we need to ensure a competitive and robust marketplace for the distribution of music, and give consumers a rich menu of services from which to choose.”); Cassondra C. Anderson, “We Can Work It Out”: A Chance to Level the Playing Field for Radio Broadcasters, 11 N.C. J.L. & TECH. 72, 73–74 (2009), available at http://jolt.unc.edu/abstracts/volume-11/ncjtech/p72 (noting that terrestrial broadcasters do not pay for performance rights for sound recordings, while Internet and other broadcasters must pay royalties for such rights for digital transmissions of sound recordings).
casters, including Internet and satellite radio, must pay performance royalties to both composers and sound recording copyright owners,¹⁴⁰ with performance rights being administered under a statutory license framework.¹⁴¹ The application of sound recording performance rights to webcasters has led to disputes between recording industry and webcaster representatives, with some arguing that royalty rates for webcasters have the potential to significantly harm the development of that industry.¹⁴²

Payment of performance royalties was also at issue in a 2009 court case in which ASCAP asserted that the playing of ringtones on cellular phones constituted a public performance. ASCAP, a leading performance rights organization, lost a case in the Second Circuit involving Verizon Wireless in which ASCAP sought to establish that its members should receive performance royalties every time a ringtone containing copyrighted music is played on a cellular phone.¹⁴³ ASCAP had sued Verizon for performance royalties despite the fact that Verizon was already paying mechanical license fees to ASCAP members.¹⁴⁴ The Verizon ringtone case reflects one example of dominant business approaches by a number of cultural industry players in the digital era who seek to expand both the applica-


¹⁴¹ Id. at 4–5 (noting that the DMCA established a statutory licensing framework for webcasters administered by the Copyright Royalty Board (CRB)).


¹⁴³ In re Cellico Partnership, 663 F. Supp. 2d 363, 372 (S.D.N.Y. 2009) (“As described below, however, there is no qualifying public performance under § 106(4) when the customer uses the ringtone to alert her to an incoming call. Thus, even when the downloading of a ringtone is considered as the first link in a chain of transmissions, it does not qualify as a public performance.”); David Kravets, Judge: Cellphone Ringtones Are Not Concerts, WIRED.COM, Oct. 15, 2009, http://www.wired.com/threatlevel/2009/10/judge-mobile-phone-ringtones-are-not-concerts.

¹⁴⁴ Cellico Partnership, 663 F. Supp. 2d at 378 (“[I]t is undisputed that Verizon pays mechanical license fees to ASCAP’s members. . . . This litigation will resolve whether it must pay as well for the previewing of ringtones.”); Mechanical and Digital Phonorecord Delivery Rate Adjustment, 71 Fed. Reg. 64303, 64304 (U.S.C.O. Oct. 16, 2006) (finding that certain types of ringtones are subject to statutory licenses under Section 115 of the Copyright Act), available at www.copyright.gov/docs/ringtone-decision.pdf.
tion of copyright law and collect additional revenues even from uses of copyrighted material for which they may already receive compensation.

Market forces have also contributed to the appeal of value maximization models that attempt to exploit cultural content as assets: markets for entertainment assets have expanded, investment markets are increasingly recognizing the market value of intellectual property assets, and trading markets for intellectual property have emerged and continue to develop. Consequently, investors and markets value intangibles such as content and other entertainment assets, which have become core assets for many companies in the digital era. As General Electric, which in 2006 owned NBC–Universal Studios, stated in its 2006 annual report: “Entertainment assets are highly valued by investors.” Similarly, Viacom notes: “Our digital assets are becoming an increasingly important aspect of our business.”

An important part of the creation of market value for intellectual property assets is the emergence of players such as Ocean Tomo that specifically focus on creating liquid markets for intellectual property assets. Further, transactions involving the securitization of royalty streams from copyrighted works have contributed to the development of intellectual property markets. In 1997, David Bowie became the first popular artist to issue bonds backed by royalties from his copyrighted works, raising $55 million from issuing asset-backed bonds whose collateral consisted of future royalties from twenty-five albums recorded before 1990. Following the Bowie Bond issuance, a number of other music industry players issued bonds or engaged in similar transactions, including artists Marvin Gaye (estate), James Brown, and Rod Stewart. Other bond issuance transactions involved songwriters and music catalogs. The creation of markets for intellectual property assets has added to pressures to make intellectual property rights stronger.


146 See supra note at 6.


151 Medansky, supra note 149; Davies, supra note 150.

152 Medansky, supra note 149; Davies, supra note 150.

153 See 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).
Finally, although the perception that Internet and technology encourage freedom is an enduring one, technological changes during the digital era have, in many respects, enhanced opportunities for the control of content. For example, DRM, at least in theory, offers content owners a level of control over content not possible in the predigital era. Even in practice, although users can circumvent DRM, such circumvention still comes with a cost, such as the amount of work required. The combination of increased value attributed to intangibles, such as entertainment assets and technological mechanisms of control, explains why some industry players characterize recent technology shifts as the “prelude to a new golden age of media.” As the 2006 News Corporation Annual Report notes, “[t]echnology is liberating us from old constraints, lowering key costs, ease[ing] access to new customers and markets and multiplying the choices we can offer.”

Many players in the cultural industries during the digital era have focused on using control to maintain and enhance the value of content. The use of control mechanisms in the content arena is by no means a digital era novelty. Control on the creation and distribution sides has been an essential element of the contractual terms to which industry participants and creators are subject. Contractual terms in the recording industry reveal significant power asymmetries both in the allocation of intellectual property rights and relative economic benefits. Creators, for example, have typically had less power than industry players, although power hierarchies among creators have been commonplace. Under existing music industry business models, top popular musicians actually earn far more from concert ticket sales than from record sales royalties, despite the fact that aggregate revenue from records far exceeds aggregate revenue from concert performances. The treatment of many creators in current cultural industry business structures belies, to some extent, the incentive story of copyright and reveals the de-

154 See Lawrence Lessig, Code and Other Laws of Cyberspace 6 (1999) (noting with respect to cyberspace that the “invisible hand, through 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) [hereinafter Lessig, Free Culture] (“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.”).

155 See Kerr, supra note 40 at 167–69 (noting that laws enabling DRM facilitate its implementation as a primary means of enforcing digital copyright).


157 Id.


159 Connelly & Krueger, supra note 40 at 670 (noting that for the top thirty-five artists in 2004, income from concert tours exceeded income from record sales by a 7.5 to one ratio).

160 See id. at 673 (noting that the total value of record sales in 2004 was $11.8 billion, contrasted with $2.1 billion in concert ticket sales).
gree to which perception diverges from reality in the context of valuable asset models as currently deployed: “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.” In the case of the recording industry, control over creation and distribution was a core element in industry business models and profitability.

B. Competing Cultural Models and Creation: Folklore and UGC

Even industry participants that recognize the need to address the challenges of the digital era may not entirely understand the implications of the Internet for the value of content. Industry visions of control and value are increasingly at odds with digital era technological and cultural realities. Discussions of YouTube and UGC underscore a discontinuity between different cultural models of creation, specifically between models that see creation as independent and autonomous, and ones that see creation as collaborative. The digital era highlights three important trends relevant to consideration of competing cultural models. First, discussions of copyright often involve a restricted vision of creation. Secondly, dominant cultural assumptions that worked in the predigital era are increasingly challenged by digital era technological realities. Finally, technology shifts and changing user preferences continue to shape events in the digital era in ways that negatively affect predigital era business models.

A restricted copyright cultural vision is often evident in much discourse about YouTube and websites containing UGC. This limited vision of cultural production is highly influenced by conceptions of autonomous high culture production associated, for example, with classical music creations since the latter half of the nineteenth century. This high culture model of autonomous and independent creation is historically specific and not necessarily generalizable as a model to describe manners of creation in the past, present, or future. Such models became particularly prevalent in

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161 See Greenfield & Osborn, supra note 158 at 99 (discussing how the recording industry has shaped the conditions within which genre practices and creative techniques have been deployed).

162 Jason Toynbee, Musicians, in MUSIC AND COPYRIGHT 123, 124 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (noting that industry “control over the means of exploiting music leads to a situation where most writers and composers are forced to sell on their copyright. No-one can make it without a publishing deal, something which always involves the assignment of rights”).

163 Robert Emeritz, Content Owners, Fair Use Advocates Debate UGC Principles, INTERNET L. & REG., July 14 2007, available at http://web.archive.org/web/20070714064934/http://www .centerforsocialmedia.org/files/pdf/Internet_Law_and_Regulation_ALERT.pdf (“My company is constantly accused of being a dinosaur, and a Luddite,’ . . . . But in fact, he insisted, ‘it gets it’ . . . . ‘But we feel that it’s our right to be the one to profit from licensing out the content. If someone wants to make our copyrighted works available, they should get a license from us, or should ensure that the use is fair and non-infringing.’” (quoting NBC Universal’s Government Relations vice president Alec French at panel discussion at American University)).

164 Arewa, supra note 17 at 550–51.
music during the nineteenth century, when the classical music tradition was invented.\textsuperscript{165} Twentieth century media conglomerate intellectual property-centered business models, based largely on conceptions of professional creators, reflect important aspects of this autonomous vision of creation.\textsuperscript{166} Autonomous visions of creation, authorship, and ownership do not, however, take sufficient account of a broad range of manners of creation and dissemination of cultural material, including those that might be characterized as “amateur to amateur.”\textsuperscript{167} Discussions of creation and transmission in the digital era should better contextualize creative traditions in varied cultural contexts.

The need to better take account of varied modes of creativity flows from recognition of the constitutional goal of copyright to promote creativity.\textsuperscript{168} Promoting creativity, in turn, should be taken in its broadest sense to encompass all forms of creativity, and not narrowly construed to skew toward particular business models or communities of creative practice. The need to view creativity in a broader fashion also suggests that utilization of more varied models of creation would be useful in understanding the full range of creativity. Given this, viewing YouTube and UGC using the insights of folklore may lend greater understanding to collaborative ways in which new works may be created.

Folklore has long been an important aspect of culture, and may have relevance to considerations of YouTube. Folklore is shaped collaboratively by cultural participants and may reflect the decentralized forms of transmission said to characterize Web 2.0. Folklore forms such as proverbs, riddles, folk narratives, ballads, urban legends, and urban office folklore are core aspects of culture.\textsuperscript{169} Although folklorists often speak in terms of folklore genres, many aspects of culture may derive from or include folkloristic elements.\textsuperscript{170} In addition, for more than two centuries, folklore has served a powerful role in shaping ideology about culture and cultural production.\textsuperscript{171}

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\item[\textsuperscript{165}] id. at 595.
\item[\textsuperscript{166}] Arewa, supra note 127 at 9–10.
\item[\textsuperscript{168}] The Intellectual Property Clause of the Constitution states: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.
\item[\textsuperscript{169}] Elliott Oring, On the Concepts of Folklore, in FOLK GROUPS AND FOLKLORE GENRES 1, 13 (1986).
\item[\textsuperscript{170}] Folklore has been defined as a compound term encompassing both folk, or any group of people that share at least one common factor, as well as lore, which is often taken to mean particular genres or types of folklore production. See Alan Dundes, What Is Folklore?, in THE STUDY OF FOLKLORE 1, 2 (1965); Oring, supra note 169 at 1–22 (noting some limitations of the conception of the folk outlined by Dundes).
\item[\textsuperscript{171}] JOHN STOREY, INVENTING POPULAR CULTURE: FROM FOLKLORE TO GLOBALIZATION 1–2 (2003).
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Discussions of YouTube and other UGC websites often emphasize discontinuities between predigital era and digital era practices. However, using folklore as a model for creative efforts draws greater attention to potential continuities and is important for contextualizing these websites within the broader landscape of cultural production. The continuities between UGC websites and predigital forms of cultural production are not always recognized. For example, vidding, a form of fan fiction that emerged in the mid-1970s, has been characterized as an early example of remix culture and involves largely female creators who create music videos from existing footage. The dissemination of video recording technologies gave vidders tools to enable their creations. Digital era practices also reflect how technological changes have facilitated changing user preferences that contribute to the digital era mismatch between laws and norms. The Internet has been a disruptive element and has exacerbated this mismatch.

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

The relative ease of copying in the digital era is just one factor underlying continuing problems with cultural industry business models that cling to outmoded assumptions or attempt to return the industry to its status prior to the digital era. Technological changes on the distribution side have also proven to be disruptive, fundamentally compromising many existing business models. Prior to the digital era, standard business practices had entailed maximizing the value of content by exercising greater control on both the creation and distribution sides. This is evident, for example, in the music industry, which in the past maximized the value of content through control mechanisms on both the creation and distribution sides with respect to artists and users. The Internet has challenged the ability of industry participants to exercise such control.

Events in the music industry have likely reinforced valuable asset tendencies among cultural industry firms more generally. 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 value of content in the digital era. Firms within the cultural industries, not surprisingly, use various means to increase the value of content


173 Sharpe & Arewa, *supra* note 63 at 337 (discussing music industry control mechanisms on the creation and distribution side).

174 See Arewa, *supra* note 17 at 631–32.
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 its 2006 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’ ability to protect and exploit their property.”175 As a number of authors have noted, however, content owners’ discussions of piracy typically reveal a sleight of hand whereby all unauthorized uses are equated with piracy.176 The tendency to equate unauthorized uses with piracy has become a foundational argument for many who advocate broader copyright protection. 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.177 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,178 but which nonetheless has a significant impact on people’s perceptions of cultural production.179 Finally, in seeking greater control over content in the aftermath of the crash of the recording industry, other industry segments may have learned the wrong lessons from events in the digital music space.

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

YouTube users, file sharers, and others are often accused of violating copyright laws as a result of their copying and sharing of copyrighted con-

175 Viacom, supra note 147, at 14.
176 See Lessig, Free Culture, supra note 154, 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.”).
177 See Litman, supra note 15, at 85 (noting expansion in uses of the term piracy, which in the past was applied to those who made and sold large numbers of counterfeit copies but which today is used to describe “any unlicensed activity”).
178 Siva Vaidhyanathan, Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity 12 (2003) (“[C]opyright issues are now more about large corporations limiting access to and use of their products. . . . Instead of trying to prevent ‘theft,’” we should try to generate a copyright policy that would encourage creative expression without limiting the prospects for future creators. We must seek a balance. . . . Instead of bolstering ‘intellectual property,’ we should be forging ‘intellectual policy.’”).
179 Arewa, supra note 17, at 622 (discussing the pervasive nature of musical borrowing and its implications for conceptions of creation processes).
180 Neil W. Netanel, Why Has Copyright Expanded? Analysis and Critique, in 6 New Directions in Copyright Law 3, 12 (Fiona Macmillan ed., 2008) (“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.’” (footnote omitted)).
tent through unauthorized uploading and downloading of such content. Uses of existing content on YouTube and similar websites are, at least in some instances, more complex than they might first appear.\textsuperscript{181} The range of user behaviors in the digital era encompasses a wide spectrum of practices ranging from verbatim copying to forms of sharing, borrowing, and other collaborative practices that reuse, and in some instances transform, existing copyrighted works.\textsuperscript{182} Uses of existing content on YouTube and other sites also demonstrate both continuities and significant changes in the landscape of cultural production and dissemination. The existing lack of clarity in the application of copyright reflects, in part, the fact that copyright laws may be overinclusive as applied to a broad range of activities, including at least some material disseminated through sites such as YouTube.\textsuperscript{183}

Technology has long influenced the scope of copyright. The ways in which copyright interfaces with technology are particularly evident in the digital era, but were apparent even in the early days of the twentieth century. For example, in the 1908 \textit{White-Smith Music Publishing Co. v. Apollo Co.} case,\textsuperscript{184} the Supreme Court considered whether piano roll technology created copies within the meaning of the copyright act. At the time of the \textit{White-Smith} case, the extent to which the copyright act applied to recorded music was not clear.\textsuperscript{185} In significant parallels to circumstances today, prior to the \textit{White-Smith} case, composers and music publishers had been significantly damaged by player piano roll and recording technologies.\textsuperscript{186} As is the case today, although they at first acquiesced to these new technologies, after piano roll and recording technologies began to hurt their businesses, music copyright composers and publishers sought the assistance of Congress. More specifically, they asked that Congress give them the exclusive right to block the manufacture or sale of any “appliance especially adapted” mechanically to record musical compositions.”\textsuperscript{187} Piano player manufacturers opposed the bill, not because they objected to sharing reve-

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\textsuperscript{182} \textit{See} Driscoll, \textit{supra} note 38.

\textsuperscript{183} \textit{See} Tim Wu, \textit{Tolerated Use: The Copyright Problem}, \textit{Slate}, Oct. 16, 2007, http://www.slate.com/id/2175730/entry/2175731 (“Every week, in various ways, you probably violate the copyright law. How? When, say, you check out old MTV videos on YouTube. Or if you, bored at work, decide to research the surprising origins of the character Grimace. Or if you make a mix CD for a friend or play DVDs at a house party. Each will lead you into a facial violation of the copyright law, and in today’s world, it’s almost unavoidable.”).

\textsuperscript{184} 209 U.S. 1 (1908).

\textsuperscript{185} \textit{Paul Goldstein}, \textit{Copyright’s Highway: From Gutenberg to the Celestial Jukebox} 51 (2003).


\textsuperscript{187} Goldstein, \textit{supra} note 185 at 51–52.
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ru es with music composers and publishers, but because they feared the power of the Aeolian Company, which in anticipation of this new mechanical license right had bought most of the rights from principal publishers.\footnote{188} Aeolian also financed the White-Smith litigation.\footnote{189} The Supreme Court found that piano rolls did not constitute copies.\footnote{190} Following White-Smith, Congress adopted the Copyright Act of 1909, which provided for the mechanical rights sought by composers and publishers.\footnote{191} In an attempt to attenuate Aeolian’s market power, however, Congress subjected the mechanical license right to a compulsory license. This compulsory license provision provided that once copyright owners licensed to one piano roll or record company, any other company could make its own piano roll or record version of the musical composition by simply paying the copyright owner a statutory (mechanical) license fee, which was then set at two cents.\footnote{192}

Events surrounding the White-Smith case reflect an interplay between Congress, industry players, and courts that continues to be relevant in the face of changing technologies. White-Smith is one of a number of cases and statutes that have addressed the extent to which new technologies that enable or facilitate reproduction should be permitted.\footnote{193} The content industries, including the cultural industries and software industries, have long played a role in seeking to shape copyright law to benefit their interests and maximize their economic returns.\footnote{194} The twentieth century expansion of copyright scope is in tension with unfolding technologies that have made copying far easier. The convergence of technological developments at the end of the twentieth century greatly magnified the effects of these unfolding technologies. The creation of digital file formats enhanced the ability of nonprofessionals to create verbatim copies with little or no degradation in quality.\footnote{195}

\footnote{188} Id. at 52.
\footnote{189} Id.
\footnote{190} White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1, 18 (1908) (finding that piano rolls are not copies within the meaning of the applicable copyright statute).
\footnote{191} GOLDSTEIN, supra note 185 at 53.
\footnote{192} Id.
\footnote{194} See Netanel, supra note 180 discussing the multiple causes for copyright’s expansion).
\footnote{195} Many commonly used audio and video digital file formats, such as MP3, AAC, and most MPEG-4 formats, are lossy (i.e., entail a loss in quality) file formats that typically result in some diminution in quality as a result of compression. See Tilman Liebchen et. al., MPEG-4 Audio Lossless Coding, http://web.archive.org/web/20080501111141/http://www.nue.tu-berlin.de/forschung/projekte/lossless/mp4als.html (last visited June 9, 2010) (describing MPEG-4 ALS, which extends the MPEG-4 format to permit lossless coding of audio files, which “enables the compression of digital audio data without any loss in quality due to a perfect reconstruction of the original signal”); see also KEITH JACK, VIDEO DEMYSTIFIED: A HANDBOOK FOR THE DIGITAL ENGINEER 6 (5th ed. 2007) (describing analog and

104:431 (2010) YouTube, UGC, and Digital Music
The impact of digital file formats has been magnified by the Internet, which has offered an inexpensive way to distribute copies.

Although reproduction of content was fairly easy prior to the digital era, the ability to create and widely distribute perfect (or close to perfect) copies changed the copyright balance by creating an easy path for at least some degree of disintermediation of existing intermediaries, and has contributed to the emergence of new intermediaries with business models that seek to profit from the technological and cultural shifts. New technologies have facilitated changing cultural practices and increased visibility of existing practices that involve reproduction and dissemination. Perhaps more importantly, incumbent industry players’ existing business plans did not, in most cases, address the reality of the shifting cultural, business, and technological landscapes. Industry players have also been slow to embrace new technologies for fear of cannibalizing existing sources of revenue.

B. Digital Era Piracy: The Meaning and Significance of Unauthorized Uses

The expansion of copyright law during the twentieth century was paralleled by important shifts in language that led to any unauthorized use of a copyrighted work being characterized as “piracy.” This shift in language use has been the foundation of legal strategies by cultural industry firms that have sought to encourage the adoption of legal frameworks that are favorable to their interests. The tendency to characterize unauthorized uses as piracy is connected to industry business models that seek to treat copyright protected works as valuable assets whose owners should control their exploitation. These business models and accompanying uses of intellectual property are consistent with a pay-per-use model that maximizes the value of content by eliminating uncompensated uses of materials. Such business models are, however, increasingly at odds with the business and cultural realities of the Internet age.

Given the traditional industry focus on controlling use of copyrighted works, user behavior has become a focal point in the digital era. Some unauthorized uses infringe the exclusive rights of copyright owners. Some of


196 Such disintermediation is by no means limited to the traditional media arena, but reflects broader societal trends concerning access to and dissemination of information. See, e.g., Lawrence Solum, Download It While It’s Hot: Open Access and Legal Scholarship, 10 Lewis & Clark L. Rev. 841 (2006) (discussing the shift in legal scholarship from law reviews to open access legal blogs and noting that existing intermediaries are being supplemented by disintermediated forms).

197 See Hiatt & Serpick, supra note 40 at 14 (“Innovation meant cannibalizing their core business.”) (quoting Jim Guerinot, manager of Nine Inch Nails and Gwen Stefani).

198 See supra note 177 and accompanying text.

199 Arewa, supra note 177 at 632–33.

200 See supra note 132 and accompanying text.
these unauthorized uses are ones for which copyright owners should have received compensation. Establishing when a particular use constitutes an infringement or a fair use and whether and how much compensation copyright owners should receive remain topics of significant contention.\textsuperscript{201} Further, existing industry legal approaches in the digital era, such as under the DMCA, may significantly neuter application of fair use in digital contexts.\textsuperscript{202}

Although content owners generally assume that unauthorized uses mean less compensation for them, the effects of unauthorized uses depend on the extent to which unauthorized uses actually displace purchases. In the music arena, empirical studies suggest that the topography of unauthorized uses is more complex than industry statements depict. One study suggests that the impact of digital music downloads on record sales is statistically indistinguishable from zero.\textsuperscript{203} The results of this empirical study are consistent with a digital music story that sees decreasing record sales as connected to broader business and economic trends but not necessarily caused by P2P downloads. The extent to which digital music downloads negatively impact record sales may, therefore, depend on the extent to which the substitution effect trumps the sampling effect.\textsuperscript{204}

Recording industry discussions of P2P generally assume that the substitution effect is dominant, which means that free P2P downloads substitute for actual purchases and that users download content instead of purchasing it. Although this effect is no doubt a feature of the contemporary use landscape, the relative magnitude of the substitution effect may be difficult to evaluate. A number of studies have found a substitution effect by demonstrating a link between unauthorized downloads and declining industry sales.\textsuperscript{205} In contrast to the substitution effect, the sampling effect measures

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\item FRED VON LOHMANN, EFF, \textit{UNINTENDED CONSEQUENCES: TWELVE YEARS UNDER THE DMCA} 9–11 (Feb. 2010), \textit{available at} http://www.eff.org/files/eff-unintended-consequences-12-years.pdf (describing how copying protection combined with bans on DVD copying tools make fair uses of digital content difficult or impossible).
\item PPI Research \& Info., \textit{The Impact of Illegal Downloading on Music Purchasing} 1 (Nov. 20, 2009), \textit{available at} www.ifpi.org/content/library/The-Impact-of-Illegal-Downloading.pdf (not-
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the extent to which users make use of downloads as a part of a purchasing process to sample music that they wish to buy. Some studies suggest that unauthorized downloaders may actually be the biggest purchasers of music, which lends support to at least some elements of a sampling effect. For example, in a study of the Canadian recording industry, the sampling effect was found to be greater than the substitution effect. Existing studies suggest that content owner interpretations of the impact of the digital era should not be accepted uncritically. Rather, we must assess the empirical reality on the ground, and assess the business and economic impact of the digital era and digital era behaviors as a part of the copyright policymaking process.

Copyright policy must take account of the shifting cultural, technological, and business landscapes of the digital era. Further, attention should be paid to the role of hierarchies in rationalizing copyright public policy choices. The assumed high culture model of autonomous production upon which copyright often rests provides an inexact fit for a wide range of cultural production, particularly creations that acknowledge or evidence their derivation from existing works. The regulation of the aesthetics of cultural production is thus an integral aspect of copyright frameworks as presently applied. As such, copyright to some extent functions as an arbiter of sociocultural value.

Cultural arbiters and other intermediaries have long sought to address questions related to appropriate uses and demonstrations of culture. Folklore collectors of the past, for example, sought to protect the idealized rural peasant heritage of the urban folk who partook of dance halls and dance hall music. Such urban folk were not engaging in more suitable (at least in the minds of folklore collectors) forms of expression such as folk dance. Folklorists sought to preserve and protect “authentic” cultural expression in its unsullied form. Although not always disclosed, a number of folklorists modified the works collected and in some instances sought to popularize

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207 Andersen & Frenz, supra note 204 at 33–34.

208 See Benjamin Filese, Romancing the Folk: Public Memory & American Roots Music 9–10 (2000) (describing late eighteenth and early nineteenth century intellectuals who, influenced by Johann Gottfried von Herder, undertook a flurry of efforts to identify and understand vanishing folk cultures); Storey, supra note 171 at 3, 11 (describing the attitude of folklore collectors such as the Brothers Grimm, who sought to collect and preserve a “vital and valuable heritage” that was being swept away by industrialization and urbanization and describing views of Sir Hubert Parry, who characterized the common popular music hall as an “enemy at the door of folk music” (internal quotation marks omitted)).
and disseminate such expression. In other instances, folk collectors themselves copyrighted works they collected.

Similar assumptions about authenticity, the role of intermediaries, and the potential of participants’ acts to sully or damage existing works or traditions are also evident in current discussions of YouTube and UGC. Use and recycling can, however, add value to existing works by facilitating intergenerational transmission, bringing attention to obscure works, and increasing the value of existing works by virtue of their use. The difficulty in determining which uses are likely to increase value and the cumulative nature of much creativity suggests that less strong property rules could actually promote greater creativity.

C. The Internet and Sharing: Digital Era Uses and Generational Shifts

As was the case with nineteenth century cultural intermediaries, including folklorists who sought to preserve an idealized rural peasant heritage of folklore, intermediaries today who seek to exert greater control over unauthorized uses of copyright-protected materials may make assumptions about such uses based on idealized notions of past practices. In reality, the cultural shifts heralded by the Internet age are here to stay and are likely to be resistant to industry attempts to return to assumed predigital norms. Both business models and copyright enforcement strategies will likely need to be adjusted to Internet-era realities of access, use, and participation. For example, digital-era technologies have enabled users to utilize digital content differently than was the case prior to the digital era. Changing use patterns are evident in the music arena. The Apple iPod facilitates music

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209 John M. Ellis, One Fairy Story Too Many: The Brothers Grimm and Their Tales 37–43 (1983) (discussing how the Brothers Grimm prepared the first edition of their seminal fairytale collection Kinder- und Hausmärchen); Filene, supra note 208, at 17–21 (discussing the activities of folk music collectors in the United States).

210 See Ulrik Volgsten & Yngve Åkerberg, Copyright, Music, and Morals: Artistic Expression and the Public Sphere, in Music and Manipulation: On the Social Uses and Social Control of Music 336, 337 (Steven Brown & Ulrik Volgsten eds., 2006) (describing how folk collector Alan Lomax made minor changes in and copyrighted Leadbelly’s entire repertoire in exchange for $10, with Leadbelly retaining some performance rights); Dave Marsh, Mr. Big Shift: Alan Lomax: Great White Hunter, or Thief, Plagiarist, and Bigot?, CounterPunch, July 21, 2002, http://www.counterpunch.org/marsh0721.html (“Lomax and his father recorded Huddie ‘Leadbelly’ Ledbetter’s song first, so when the song needed to be formally copyrighted because the Weavers were about to have a huge hit with it, representatives of the Ledbetter family approached him. Lomax agreed that this copyright should be established. He adamantly refused to take his name off the song, or to surrender income from it, even though Leadbelly’s family was impoverished in the wake of his death two years earlier.”).


212 See infra notes 229, 230 and accompanying text.
purchasing culture based on songs rather than albums. At the time digital music became commonplace, the recording industry focused on selling users bundled albums, which often forced users to buy an album even if they just wanted a song. A number of prominent artists, including Pink Floyd and AC/DC, have also objected to their albums being split into separate digital downloads. Although Pink Floyd won a ruling in 2010 that prevents unbundling of its albums by its record company EMI without its permission, faced with the option of buying an entire bundled CD or buying single song digital downloads, users have increasingly opted for digital downloads, which is one likely reason for continued declines in CD sales. The iPod shuffle functionality exemplifies how technology may change consumption patterns in ways that may themselves have negative consequences for existing cultural industry business models. The iPod shuffle functionality enables users to listen to all or some segment of the tracks contained on an iPod in randomly shuffled order. Unbundled CDs and shuffle technology have thus also unbundled listening and changed the way many people listen to music, which has certainly not helped the business fortunes of a recording industry organized around album sales.

The impact of technology on use is not limited to music. YouTube and other websites with video content have popularized the video clip, which has revolutionized how people access video content and how much content they may actually see. Similarly, part of the difficult digital era transition

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216 Joseph P. Kahn, All Shook Up: Our Listening Habits Are Being Revolutionized by the iPod Shuffle, BOSTON GLOBE, Apr. 5, 2004, at B8, available at http://www.boston.com/news/living/articles/2004/04/05/all_shook_up/ (noting that users find that playing music in shuffle mode “can be aesthetically stimulating, even liberating . . . because the software’s shuffle-play capability juxtaposes them in intriguing ways”); Alex Ross, Listen to This, NEW YORKER, Feb. 16 & 23, 2004, at 154, available at http://www.therestisonoise.com/2004/05/more_to_come_6.html (“I have seen the future, and it is called Shuffle—the setting on the iPod that skips randomly from one track to another. I’ve transferred about a thousand songs, works, and sonic events from my CD collection to my computer and on to the MP3 player. There is something thrilling about setting the player on Shuffle and letting it decide what to play next. Sometimes its choices are a touch delicious . . . the little machine often goes crashing through barriers of style in ways that change how I listen.”).
in the newspaper industry may be a result of shifting user preferences and changing use patterns. Prior to the digital era, individual newspaper brand value was greater. The digital era offers greater possibilities of use of news content in arenas other than websites of specific newspapers. Users may thus read news on individual newspaper websites, through aggregation sites such as Google News or Newser or by use of Really Simple Syndication (RSS) feeds, as well as on blogs that incorporate content from multiple news sources. The migration of news consumption from print to the Internet, combined with other more industry-specific factors, are having a devastating impact on newspaper industry business models in the digital era. This devastation may lead firms to resort to assertions of intellectual property exclusion rights to prevent digital era behaviors that challenge existing incumbent business models. As is the case in other digital-era arenas, where lines should be drawn between permitted and infringing may not be clear.

Recourse to intellectual property and copyright in contexts of failing business models highlight digital era mismatches in expectations and behaviors among varied participants, as well as the appropriate pricing of digital content. Cultural shifts highlighted by the Internet also reflect significant generational aspects and forms of creativity that are more prevalent among younger creators and users. The dissonance between creative practices and perceptions of the application of copyright may be ameliorated with the passage of time as the generation of “native” Internet users assumes positions of greater authority in cultural industry firms.

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


219 What is RSS?, USA.gov, http://www.usa.gov/Topics/Reference_Shelf/Libraries/RSS_Library/What_Is_RSS.shtml (last visited June 9, 2010) (noting that use of RSS feeds facilitates keeping abreast of news and information and enables users to avoid browsing or searching on the Internet for information or relying on receiving information through email).

220 KIRCHHOFF, supra note 35 at 11 (“Though readers want news, they do not necessarily want it from a traditional paper, and are using multiple sources.”).

221 Id. at 1–2.


223 See KOR, supra note 35 at 153–54 (drawing attention to the intergenerational issues involved in consideration of how courts look at music being created today involving sampling technology and quoting Lawrence Lessig as stating that “[w]e’ve never used the law to block the next generation’s form of creativity, but that’s what we’re doing in this case in particular”).

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larly in conjunction with P2P technologies, provides a decentralized mechanism for broad dissemination of information. The flipside, of course, is that copyright owners now have more tools by which to control such uses, including personal uses that have long been accepted as a behavioral norm despite any lack of consonance between such uses and copyright doctrine. Technological transformations have thus driven changes in both access and control. As a result, behaviors that were commonplace in earlier eras, such as personal private copying, are increasingly demonized and characterized as impermissible or illegal, or as piracy. The broad brush by which activities are characterized as piracy is problematic and impedes differentiation of behaviors that should constitute infringement from those that likely should not.

The digital era has given both users and creators a broader range of choices. In the music arena, for example, the recording industry has, to some extent, been disintermediated by virtue of the users’ ability to exercise choice concerning their CD purchases. Digital era technological and business innovations have given users greater ability to exercise choice in their consumption of cultural content more generally. During the digital era, for example, users have embraced ease of use as a priority over sound quality, as is evident in the popularity of MP3 players such as the Apple iPod. This popularity is largely a result of innovative products offered by new entrants. Prior to the digital era, users had fewer choices with respect to consumption of musical content, in part as a result of music industry bundling. By the same token, music creators are now potentially less dependent on music industry distribution to disseminate works, which may give at least certain creators greater power.

The Internet has created alternative ways to disseminate works that have potentially empowered both users and creators. Thus far, traditional content owners have not developed, to a sufficient extent, business models that reflect an understanding of this new landscape of cultural production, although this may be changing. Although fundamentally new business models do not appear to be on the immediate horizon, the music industry, recognizing the power of alternative means of distribution, is now taking advantage of the Internet for various purposes, including to generate word-of-mouth buzz for the artists it represents. The Internet offers a mechanism for users and creators to access existing content with ease. Significant debate, however, exists as to whether unauthorized uses are appropriate or desirable. These debates are certainly not new and in some instances incor-

224 Sharpe & Arewa, supra note 63, at 335–37.
225 Id. at 337.
226 Id. at 337–38.
227 See, e.g., Ethan Smith & Peter Lattman, Download This: YouTube Phenom Has a Big Secret, WALL ST. J., Sept. 6, 2007, at D1 (noting that YouTube sensation Marié Digby is signed by Hollywood Records, who helped her devise her Internet strategy).
porate hierarchical and unitary visions of culture that reflect longstanding
debates about culture and its appropriate uses.228

Technological tools enable users and creators to manipulate content
and disseminate it in both its original and transformed forms. Although the
technological means and specific techniques used to create UGC are new,
the use and manipulation of existing material is not. Rather, UGC reflects
the types of uses that users have always made of existing material, as evi-
dent in folklore and other cultural arenas, albeit in different contexts with
new technological tools. Current debates reflect to some degree a recurring
pattern in which cultural arbiters attempt to define appropriate uses of cu-
lture. Given that a primary goal of copyright is to stimulate creation, the
application of copyright and fair use in digital era contexts should be
evaluated in light of those goals rather than operate as a prop for failing cul-
tural industry business models.

CONCLUSION: ADDING VALUE IN THE DIGITAL ERA

Digital era copyright should track business models that acknowledge
the cultural and technological realities of the digital era. As a result, rather
than using copyright to attempt to smash unauthorized black markets, in-
dustry players would likely profit more from acknowledging the existence
of such markets, taking such markets as indicators of what users actually
want, and developing business models to accommodate user desires. This
adaptation would mean taking an approach where copyright law enforce-
ment follows from workable business models rather than one that attempts
to use law to bolster fading business models. From a copyright law persp-
ective, this would entail making finer distinctions with respect to unau-
thorized uses, and basing determinations of which uses are truly infringing on a
reasonable and balanced application of copyright law. The process of iden-
tifying and delineating the scope of acceptable uses in the digital era topo-
graphy would necessarily involve recognition that, at least in some
instances, acceptable uses may diverge from those of prior eras.

The goals of copyright are multifaceted. In addition to giving incen-
tives to create to a wide range of potential creators with varied manners of
creating works, copyright is intended to promote the undertaking of activi-
ties that create sociocultural value. The widespread nature of borrowing,
collaboration, and sharing generally means that sequential innovation is a
norm in the creation of many copyrightable works. In order to accommo-
date such activities, copyright law must better assess the value of all works,
including those that clearly reflect sequential or cumulative innovation.

228 See e.g., MATTHEW ARNOLD, CULTURE AND ANARCHY 70 (J. Dover Wilson ed., Cambridge Un-
KILLING OUR CULTURE 15 (2007) (discussing the implications of Web 2.0 and stating that Internet de-
velopment is “threatening the very future of our cultural institutions”); STOREY, supra note 171 at
16–23 (discussing Matthew Arnold’s views of culture).
Such sequential innovation means that it is often optimal to permit some type of sampling on the creation side, particularly since a lack of certainty may exist as to the value of the follow-on innovation.\textsuperscript{229} Similarly, on the distribution side, sampling is increasingly becoming a norm in purchasing decisions. Although music publishers now seek to be paid for iTunes pre-purchase sample previews,\textsuperscript{230} these previews facilitate purchasing decisions by users. The extension of the conceptions of rights in such contexts should be strongly questioned.

Changes in technology that facilitate UGC essentially allow individual users to assume a role formerly available primarily to publishers and other industry professionals. Such uses underscore the continuing tension in copyright between balancing the rights of copyright owners and promoting future creations, which often incorporate and use existing works. Maintaining the creative commons, leaving a sufficient public domain to provide the basis for future creations, and restocking the public domain are also important considerations.\textsuperscript{231} Although noncompliance alone should not be a basis for making legal determinations, the current range of unauthorized uses suggests the need for greater clarification of zones of acceptable uses; gray areas of uncertainty may actually reinforce undesired behaviors.

The operation of copyright in the digital era reveals significant limitations that may arise in the application of existing legal frameworks in new contexts. Copyright legal frameworks should reflect a process of accommodation, renegotiation, and recalibration that adapts to new technologies and new contexts. The legal responses to digital era infringements thus far have focused on giving content owners greater control rights to ameliorate the consequences of digital era losses. However, these digital era losses result from multiple factors, including a changing competitive business landscape, new technologies, and changing cultural norms.\textsuperscript{232} Modifications of copyright in the digital era must in the future better take account of this changing landscape and not assume that the cure for copyright owners’ digital era problems rests in giving them greater legal control over content and wringing greater revenues from existing uses. Any digital era solutions

\begin{flushleft}229 See Rufus Pollock, Cumulative Innovation, Sampling and the Hold-Up Problem 18–19 (DRUID, Copenhagen Bus. Sch. Working Paper No. V1.3, Mar. 17, 2007), available at http://ssrn.com/abstract=961351 (discussing how asymmetric information about the value of follow-on innovation can lead to holdup problems and noting that technological change such as that evident in the digital era that reduces the costs of sampling new ideas should imply “a reduction in the socially optimal level of intellectual property rights”).

230 See supra notes 132–134 and accompanying text.

231 See LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 108–09 (2001) (“Congress has historically struck a balance between assuring that copyright owners are compensated and assuring that an adequate range of material remains in the public domain for others to draw upon and use.”).

232 KNEE, GREENWALD & SEAVE, supra note 59 at 1 (noting that the magnitude of media industry losses and asset writedowns “reflects the level of desperation among media moguls faced with new competitors, new technologies, and new customer demands”).
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should be based on empirically grounded assessments of relevant benefits and harms. As a number of scholars have noted, a need exists for clearer personal use exemptions, which could be adopted in revised copyright statutory frameworks.233

Cultural industry participants also face the fundamental business question of what value they add in the Internet era. In a world of low cost copying and distribution and reintermediation by technology company players, the answer to this question for many traditional cultural industry businesses is surely far different than it would have been prior to the advent of the Internet age. The fallout from the Internet era will continue to reverberate in the cultural industries as they seek to confront the challenges presented by the digital era and the Internet.

To successfully confront the digital era, cultural industry firms will need to develop approaches that give sufficient profit to sustain business models truly crafted for the digital era, which may involve fundamentally reconfiguring firms. These business models will likely require pricing that is below that associated with predigital era business models, which may create continued pressures with respect to profitability. New business models must also meet user needs, preferably with as few threats or assertions of lawsuits against such users as possible. Business models that avoid treating users like thieves would also likely be helpful. Greater use of persuasion rather than prosecution is likely in the best long term interests of cultural industry firms. The present tendency in many segments of the cultural industries to label a broad range of unauthorized uses as piracy is also counterproductive in important respects. Meeting digital era challenges will entail prioritizing to a better extent which unauthorized uses constitute the greatest threats, acquiescing at times with respect to other uses, and focusing on developing business models and legal strategies that are specifically focused on tackling the most significant threats.
