

CONCEPTIONS OF CREATION
INTELLECTUAL PROPERTY, WORK, AND PLAY

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INTRODUCTION

Intellectual property is serious business today. Although intellectual property resources have long played a role in business contexts, the digital era has elevated intellectual property from its previous niche into a role as a core source of business value. The business importance of intellectual property assets arises at least in part from two concurrent and related trends. In the knowledge economy era, technological innovations have had a transformative effect on business organizational structure and practice.¹ These innovations have drawn attention to the widening role of information and communication technologies (ICTs) in the context of businesses, the economy and the broader society as a whole.² Further, ICT technologies such as semiconductors, computers, cellular telephones and the Internet have profoundly influenced economic growth and the ways in which businesses operate, as well as aspects of the day-to-day lives of users of such technologies. Concurrently, the cultural industries, which have also incorporated ICT innovations to a significant degree, have had increasing global economic and business significance in recent decades.

Contemporary business models among ICT-focused businesses, the cultural industries, and other businesses often involve significant exploitation of intellectual property assets.³ How businesses utilize intellectual property assets has become an issue of increasing discussion and at times dispute, particularly with respect to uses of knowledge underlying intellectual property assets, including for noncommercial and other purposes. Businesses may wield intellectual property assets as valuable assets. Since the knowledge underlying intellectual property assets is not as easily amenable to being bounded, treatment of intellectual property as a valuable asset may have significant implications for other uses and users of knowledge protected by intellectual property. Further, the increasing business value of intellectual property resources has contributed to predominant conceptions of creation that prioritize “professional” creation to the detriment of other modes of creation, including those based on play.

¹Adam B. Jaffe & Manuel Trajtenberg, *Introduction*, in ADAM B. JAFFE & MANUEL TRAJTENBERG, PATENTS, CITATIONS AND INNOVATIONS: A WINDOW ON THE KNOWLEDGE ECONOMY 1, 1 (2002) [hereinafter, JAFFE & TRAJTENBERG] (discussing the transition to the knowledge economy as involving a shift in key economic assets that drive long term performance from tangible assets to knowledge).

²Stephen D. Oliner & Daniel E. Sichel, *The Resurgence of Growth in the Late 1990s: Is Information Technology the Story?*, 14 J. ECON. PERSPECTIVES 3, 21 (2000) (commenting that information technology accounted for some two-thirds of increase in labor productivity growth between first half and second half of 1990s).

³KEVIN G. RIVETTE & DAVID KLINE, REMBRANDTS IN THE ATTIC: UNLOCKING THE HIDDEN VALUE OF PATENTS (2000); Suzanne Harrison & Kevin Rivette, *The IP Portfolio as a Competitive Tool*, in PROFITING FROM INTELLECTUAL CAPITAL: EXTRACTING VALUE FROM INNOVATION 119- 128 (Patrick H. Sullivan ed., 1998).

I. VALUABLE ASSET MODELS AND THE BUSINESS OF INTELLECTUAL PROPERTY

A. *Business and Intellectual Property in the Digital Era*

The business, social and economic landscape of the twentieth century has heralded a fundamental shift in sources of value to a broad range of businesses.⁴ During this digital era, intangibles such as intellectual property have become a core source of economic growth and business value on a global scale.⁵ Intellectual property frameworks thus operate in a business context in which intangibles have become increasingly predominant as a source of value.⁶ Although the use of such resources in business contexts is certainly not new, their exploitation in the digital era is remarkable both in scope and intensity.⁷ The increasing economic and business utility of intellectual property and other intangible resources is amplified by the value that markets increasingly attribute to the creation and exploitation of such resources.⁸

Markets for intellectual property and market responses to uses of intellectual property resources underpin and reinforce the dynamics created by valuable asset models. The increasing business and economic importance of intellectual property flows over into the political arena as business interests play a prominent role in shaping intellectual property discourse and doctrine.⁹ Although this role is by no means new, the stakes have in many respects never been higher.¹⁰ These increased stakes are largely a consequence of the increasing centrality of intellectual property resources as core economic resources in the United States and globally.¹¹ The cultural industries in the copyright arena and the growing strategic intellectual property management industry, particularly in the patent area, exemplify ways in which valuable asset models play out in real world contexts.

These trends are evident in the copyright arena, for example, where digital era debates continue unabated with respect to a wide range of uses of creative works. Companies from the cultural

⁴ Jaffe & Trajtenberg, *supra* note 1 at 1 (noting that the transition to the “knowledge economy” has led to knowledge emerging as “the key economic asset that drives long-run economic performance” rather than labor, machines, land and natural resources).

⁵ See Charles Goldfinger, *Understanding and Measuring the Intangible Economy: Some Suggestions for Further Research* 4 (Aug. 1, 1997), CIRET Seminar, Helsinki, at <http://www.gefma.com/Francais/Present-fr/Intangibles%20research%20CIRET.doc> (noting consumption of nonphysical goods).

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

⁷ *Id.* at ____.

⁸ *Id.* at ____.

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

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

¹¹ See *infra* notes ____ to ____ and accompanying text.

industries, which include players from film, music, publishing and other areas, have long played a role in shaping copyright law.¹² The increasing global policy importance of copyright today is one outgrowth of the greater economic and business significance of the information and entertainment industries. In recent years, cultural industry companies have become among “the most highly valued and discussed businesses in the world.”¹³ Such companies have also become less specialized and broadened to form cultural industry conglomerates that encompass multiple cultural areas, including film, publishing, television, cable, and music, for example.¹⁴ The global economic and business significance of the cultural industries is reflected in industry statistics. In 1998, Americans spent some 120 billion hours and \$150 billion on legal forms of entertainment.¹⁵ In 1999, “core” copyright industries, including motion pictures, sound recordings, music publishing, print publishing, computer software, theater, advertising, radio, television and cable, accounted for 6% of U.S. Gross Domestic Product, or some \$626 billion.¹⁶

The economic heft of the cultural industries is reflected in the tendency for copyright doctrine and policy to reflect a public choice story of industries seeking to shape copyright law to benefit their interests and maximize their economic returns.¹⁷ As Professor Jessica Litman has outlined, the drafting of the 1976 Copyright Act reflects the role of such interests.¹⁸ The interests of the cultural and other core copyright industries have not surprisingly generally been accommodated in the 1976 Act and more recent copyright legislation such as the Copyright Term Extension Act.¹⁹ Such industry-influenced legal initiatives reinforce valuable asset approaches to culture.²⁰ Legal avenues such as fair use that potentially provide avenues for greater access to existing cultural materials remain uncertain and fundamentally unable to properly accommodate the reality of culture as a vibrant and living force.²¹ The extent to which the copyright structures advanced by

¹² LITMAN, *supra* note 9, at 23 (“About one hundred years ago, Congress got into the habit of revising copyright law by encouraging representatives of the industries affected by copyright to hash out among themselves what changes needed to be made and then present Congress with the text of appropriate legislation.”).

¹³ DAVID HESMONDHALGH, *THE CULTURAL INDUSTRIES 1* (2007).

¹⁴ *Id.* at 1-2 (noting emergence of industry conglomerates in the cultural industries); VIACOM INC., 2006 ANNUAL REPORT ON FORM 10-K, at 1-3 (2007) (identifying Viacom’s multiple business lines and describing Viacom as a “leading global entertainment content company”).

¹⁵ HAROLD F. VOGEL, *ENTERTAINMENT INDUSTRY ECONOMICS* xvii (1998).

¹⁶ JULIE COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* ___ (2d ed. 2006).

¹⁷ Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, in *NEW DIRECTIONS IN COPYRIGHT LAW*, VOL. 6, (Fiona Macmillan, ed., 2008) (discussing the multiple causes for copyright’s expansion).

¹⁸ LITMAN, *supra* note 9, at 51-59.

¹⁹ Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 *CARDOZO ARTS & ENT. L.J.* 491, 518 (1999) (“Congress has repeatedly extended the breadth and scope of copyright protection, straining the meaning of the phrase ‘for limited times’ well beyond any historical recognition.”); *see also* Copyright Term Extension Act of 1998, 17 U.S.C. §§ 302, 304 (2000) (amending 17 U.S.C. §§ 302, 304 (1976)).

²⁰ *See infra* notes ___ to ___ and accompanying text.

²¹ Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 *U. CIN. L. REV.* 1405, 1495 (2004) (noting that fair use does not take account of traditional practices such as musical borrowing); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 *HARV. L. REV.* 1659,

industry parties fail to take account of other interests and may conflict with other goals of the copyright system has become a significant theme in copyright scholarship.²²

B. *From Niche to Center: The Roles of Intellectual Property in the Digital Era*

The current centrality of intellectual property from a broader societal perspective is a clear contrast to intellectual property in prior eras. This is evident, for example, in the copyright arena. In the past, copyright was less important and more limited in scope.²³ Similarly, copyright scholarship was largely devoted to issues related to copyright doctrine.²⁴ With the increasing importance of copyright in business, the economy, and society more generally has come greater attention to broader questions of the relationship between copyright and the broader sociocultural context of its operation.²⁵

The cultural industries produce content, which might also be described as cultural products and cultural texts. Such material is increasingly consumed on a multinational or even global basis.²⁶ Valuable asset business models entail the exploitation of cultural material from a value maximization perspective. Valuable asset approaches rely heavily on intellectual property, which enables content owners to maximize value by controlling uses of cultural material that they own. Valuable asset approaches typically advocate control and extraction of profit from all actual and potential uses of cultural material. This perspective contrasts significantly with prior eras when copyright was leakier and gave greater space for noncommercial uses such as private personal use.²⁷ As valuable asset approaches have become more pervasive, many businesses in the cultural industries have attempted to institute a pay-per-use model that maximizes the value of content by

1693 (1988) (noting that disarray in fair use doctrine); MARJORIE HEINS & TRICIA BECKLES, *WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL* 8 (2005), <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>; Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1576-77 (2004) (noting that case-by-case character of fair use adjudication makes fair use doctrine useless as a predictive device for copyright owners, copyright consumers, and for courts”).

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

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

²⁴ Olufunmilayo B. Arewa, *YouTube, Digital Music, and Sharing: Competing Cultural and Business Models in the Digital Era* ___ (2009), manuscript on file with author.

²⁵ *Id.*

²⁶ HESMONDHALGH, *supra* note 13, at 2.

²⁷ Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1872-73 (2007) (noting that the lawful personal use zone is indeterminate and shrinking and that “[f]ifty years ago, copyright law rarely concerned itself with uses that were not both commercial and public”).

eliminating uncompensated uses of materials that they own.²⁸ To accomplish this goal, businesses in the cultural industries, among other actions, have successfully devised legal mechanisms to exercise greater control over uses of their cultural assets and thus eliminate uncompensated uses. Although valuable asset approaches that seek to wring all possible profit from cultural assets may benefit the owners of such assets, they may have cultural consequences that should be more closely scrutinized. The cultural material protected by intellectual property is often far more than a valuable asset and may serve important cultural functions and may play a role in vibrant living cultural traditions.

Valuable asset models and changing technologies of creation and dissemination have facilitated the exploitation of cultural material as assets. At least three parallel forces in the digital era have contributed to the appeal of value maximization models that intensely exploit cultural content as assets. First of all, the potential consumer markets for such assets are expanding, and intangibles have become both increasingly used in the production of goods and services and increasingly consumed by a broad range of consumers, creators and others.²⁹

Secondly, investment markets are increasingly recognizing the market value of intellectual property assets, and markets for intellectual property have emerged and continue to develop. Consequently, investors and markets value intangibles such as content and other entertainment assets that have become core assets for many companies in the digital era.³⁰ As General Electric, owner of NBC-Universal Studios notes in a recent annual report: “[e]ntertainment assets are highly valued by investors.”³¹ Similarly, Viacom notes that “our digital assets are becoming an increasingly important aspect of our business.”³² An important part of the creation of market value for intellectual property assets is the emergence of players that specifically focus on creating liquid markets for intellectual property assets,³³ particularly patents; one industry player Ocean Tomo, for example, describes itself as “the leading Intellectual Capital Merchant Banc firm that specializes in understanding and leveraging Intellectual Property assets” and is “developing a suite of patent-based indexes and investable securities thereupon that provide investors, asset managers and

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

²⁹ Arewa, *Knowledge Economy*, *supra* note 6, at ___ (“In addition to increased use of intangibles in the production of goods and services, an expansion has also occurred in the consumption of goods that are themselves nonphysical, such as digital products, services, and entertainment.”) (citations omitted).

³⁰ *Id.* at ___ (discussing evidence demonstrating the rapidly increasing value of intangibles in many economies generally as well as with respect to specific companies); Ocean Tomo, Ocean Tomo Indexes (“The transformation of the global economy to a knowledge economy has placed an unprecedented focus on companies’ intangible assets, including intellectual property assets: patents, trademarks and copyrights.”), at <http://www.oceantomo.com/indexes.html>.

³¹ GE 2006 ANNUAL REPORT 6 (2007).

³² VIACOM 2006 ANNUAL REPORT, *supra* note 14, at 4.

³³ Joff Wild, *Introduction: Exciting Times for IP Market Makers*, IP VALUE 2009 (2009), <http://www.iam-magazine.com/issues/Article.ashx?g=e7cc64da-8081-4072-a10a-0432c0522a23>

financial advisors with compelling investment options and viable benchmarks.”³⁴

Similarly, transactions involving the securitization of royalty streams from copyrighted works have contributed to the development of intellectual property markets.³⁵ In 1997, David Bowie became the first popular artist to issue bonds backed by royalties from his copyrighted works,³⁶ raising \$55 million from issuing asset backed bonds whose collateral consisted of future royalties from 25 Bowie albums recorded before 1990.³⁷ Following the Bowie Bond issuance, a number of other music industry players issued bonds or engaged in similar transactions, including artists such as including Marvin Gaye (estate), James Brown, and Rod Stewart. Other bond issuance transactions involved songwriters and music catalogs.³⁸ The creation of markets for intellectual property assets has intensified existing pressures to make intellectual rights stronger. Stronger intellectual property rights are thought to provide greater predictability that may be beneficial in the creation of markets for intellectual property rights and other intangibles.³⁹

Finally, although the Internet and technology as connected to freedom have become enduring memes in the digital era, technological changes during the digital era have in many respects enhanced opportunities for the control of content.⁴⁰ Mechanisms for control of content include digital rights management,⁴¹ which potentially offers content owners the ability to control uses of content to a degree not possible prior to the advent of digital content. The combination of increased value attributed to intangibles such as entertainment assets and technological mechanisms of control explain why some industry players characterize recent technology shifts as the “prelude

³⁴ Ocean Tomo, Ocean Tomo Indexes (describing the intellectual property indexes of Ocean Tomo, which describes itself as Intellectual Capital Merchant Banc Firm), at <http://www.oceantomo.com/indexes.html>.

³⁵ Keith Medansky, *Considering Intellectual Property Securitisation*, IP VALUE 2005 (2005), <http://www.dlapiper.com/global/publications/detail.aspx?pub=295>.

³⁶ Mark Steyn, *Bowie Bonds*, Slate.com, May 8, 1997, <http://www.slate.com/id/2894/>.

³⁷ Medansky, *supra* note 35; *Who's Who in Bowie Bonds*, <http://projects.exeter.ac.uk/RDavies/arian/bowiebonds.html>.

³⁸ Medansky, *supra* note 35; *Who's Who*, *supra* note 37.

³⁹ 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).

⁴⁰ LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999) (noting with respect to cyberspace that the “invisible hand, though commerce is constructing an architecture that perfects control”); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 8 (2004) (“for the first time in our tradition, the ordinary ways in which individuals create and share culture fall within the reach of the regulation of the law, which has expanded to draw within its control a vast amount of culture and creativity that it never reached before.”); LITMAN, *supra* note 9, at 27 (“copyright owners were able to persuade Congress to pass the Digital Millennium Copyright Act, which encourages the use of technological protections to facilitate a pay-per-view, pay-per-use system using some sort of automatic debit payment before anyone can have access to anything.”) (citations omitted).

⁴¹ Ian Kerr, *If Left to Their Own Devices...How DRM and Anti-Circumvention Laws Can Be Used to Hack Privacy*, in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 167, 167-71 (Michael Geist ed. 2005), at <http://iankerr.ca/content/view/22/70/> (noting that laws enabling DRM facilitate its implementation as a primary means of enforcing digital copyright).

to a new golden age of media.”⁴² As a recent News Corporation Annual Report notes, “[t]echnology is liberating us from old constraints, lowering key costs, easing access to new customers and markets and multiplying the choices we can offer.”⁴³

The approach of many players in the cultural industries during the digital era has focused on using technology and other mechanisms of control to maintain and enhance the value of content. Although value maximization approaches and valuable asset models with respect to intangibles such as intellectual property have become increasingly pervasive during the digital era,⁴⁴ the use of control mechanisms in the content arena is by no means a digital era novelty.⁴⁵ In the context of the cultural industries, even prior to the digital era, standard business practices have entailed increasing the value of content by exercising greater control on both the creation and distribution side. This is evident, for example, in the music industry, which maximized the value of the musical content through control mechanisms on both the creation and distribution side with respect to artists and consumers.⁴⁶ During the digital era, dominant industry players in cultural industries sectors such as the music industry have experienced at least some degree of digital era disintermediation and reintermediation, which have been in part rooted in the development digital content and alternative technologies of dissemination of such content, both authorized and unauthorized, such as those available through the Internet.⁴⁷ The availability of such alternatives on both the creation and distribution side have led to significant and deleterious business consequences in the music industry, which was the first segment of the cultural industries to confront the implications of digital era content.⁴⁸

Events in the music industry have likely reinforced valuable asset tendencies among cultural industry firms. The messy situation in the digital music sphere may suggest to players in other areas such as digital video that greater control might be the best strategy for maximizing the asset value of content in the digital era.⁴⁹ Firms within the cultural industries, not surprising, use various means to increase the value of content assets by creating broader and stronger boundaries that enable greater extraction of revenues from cultural assets. Consequently, players in the cultural industries advocate stronger intellectual property laws to protect against the threat of piracy. As Viacom notes in a recent annual report, “[u]nauthorized distribution of copyrighted material over the Internet such as through video sharing and other file sharing services that either ignore or

⁴² NEWS CORPORATION 2006 ANNUAL REPORT 9 (2007).

⁴³ *Id.*

⁴⁴ LESSIG, *supra* note 40, at ____.

⁴⁵ Arewa, *supra* note 6, at ____.

⁴⁶ Nicola F. Sharpe & Olufunmilayo B. Arewa, *Is Apple Playing Fair? Navigating the iPod DRM Controversy*, 5 NW. J. TECH. & INTELL. PROP. (2007) (discussing music industry control mechanisms on the creation and distribution side).

⁴⁷ *Id.*

⁴⁸ 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”).

⁴⁹ Arewa, *supra* note 24, at ____.

interfere with the security features of digital content is a threat to copyright owners' to protect and exploit their property."⁵⁰ As a number of authors have noted, however, content owners' discussion of piracy typically reveal a sleight of hand whereby all unauthorized uses are equated with piracy.⁵¹ The tendency to equate unauthorized uses with piracy has become a foundational argument for many who advocate stronger copyright laws.⁵² 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. 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,⁵³ but which nonetheless may have a significant impact on perceptions of cultural production.⁵⁴

C. *Business, Intellectual Property and Culture: Conceptions of Creation*

Models of culture profoundly shape conceptions of creation. Although often not readily acknowledged, valuable asset models and value maximization approaches to culture that emphasize the use of control mechanisms to ensure compensation to owners of content also have significant cultural implications that should not be ignored. The cultural implications of value maximization approaches merit greater attention in legal discussions of intellectual property, particularly with respect to assumptions made about appropriate manners and models of creation. Intellectual property relates to cultural knowledge that is not bounded. As a result, cultural value inheres in intellectual property resources in ways that are often not fully discussed in considerations of intellectual property that otherwise focus on economic and business value. Conceptions of broader sociocultural value are imbedded, however, in the Intellectual Property clause of the U.S. Constitution, which grants Congress the power to pass laws that "promote the progress of science and useful arts."⁵⁵

Valuable asset models typically assume that intellectual property resources exist largely to enable protection of revenue streams for the copyright owner. This vision of intellectual property often focuses on ways that owners of copyrighted works can protect and control their property. The vision of creation in such models is inherently limited. Valuable asset models often treat

⁵⁰ VIACOM 2006 ANNUAL REPORT, *supra* note 32, at 14.

⁵¹ LESSIG, FREE CULTURE, *supra* note 40, 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.").

⁵² LITMAN, *supra* note 9, at 85 (noting expansion in uses of term piracy, which in past was applied to those who made and sold large numbers of counterfeit copies but which today is used to describe "any unlicensed activity").

⁵³ Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006) (discussing the pervasive nature of musical borrowing and its implications for conceptions of creation processes).

⁵⁴ Netanel, *supra* note 17, at 12 ("The metaphors used to describe social practices and legal rules have a powerful impact on people's perception of them. For that reason, the copyright industry has assiduously promoted the notion that copyright is 'property' and that all who make unlicensed use of copyrighted material are 'pirates' or 'thieves'.") (citations omitted).

⁵⁵ U.S. CONST. Art. I, §8, cl. 8.

intellectual property assets much like museum pieces to which access and authority to modify should be tightly controlled. Such treatment has significant implications for the capacity of others to engage in unauthorized uses of such works.

II. CREATIVITY AND PLAY

A. *The Invention of Classical Music: Valuable Asset Treatment of Living Traditions*

The ethos surrounding valuable asset models of culture today parallels conceptions of cultural authority that developed around the classical music tradition at the end of the nineteenth century. At that time, norms of creation that became predominant in the classical tradition led to classical and other high culture works being sacralized.⁵⁶ This sacralization process “entailed the separation of elite culture from popular culture and the creation of sacred authors. Works of these sacred authors could not be abridged or altered and were to be performed in worship-like settings in which audience participation was not permitted.”⁵⁷ This sacralization process reflects conceptions of culture as a valuable asset with the owner of the valuable asset or certain authorized representatives controlling its access and use. Further instances of valuable asset conceptions were evident in the music arena, which during the nineteenth century was increasingly involved in business and economic changes associated with the ending of the patronage system and growth of the commercial music publishing industry.⁵⁸ The classical music tradition constitutes an invented tradition constructed in the nineteenth around works deemed to have value.⁵⁹ The invention of the classical tradition of music reflects an attempt to valorize certain composers and types of music and place such music into categories that made them increasingly untouchable and unable to be modified or altered.⁶⁰

Particularly relevant today are ways in which sacralization in the music arena in the nineteenth

⁵⁶ LAWRENCE LEVINE, *HIGH BROW, LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* (1988) (noting the change in the relationship of Shakespeare and other cultural forms to the American audience, from a part of mainstream popular culture to become part of elite culture).

⁵⁷ Arewa, *supra* note 53, at ____.

⁵⁸ Wiliam Weber, *Mass Culture and the Reshaping of European Musical Taste, 1770–1870*, 25 *INT’L REV. AESTHETICS & SOC. MUSIC* 175, 186 (1994) (attributing rise of a classical tradition in music to the “simultaneous collapse of the patronal tradition and the rise of the printing industry”).

⁵⁹ Robert Walser, *Eruptions: Heavy Metal Appropriations of Classical Virtuosity*, 11 *POPULAR MUSIC* 263, 265 (1992) (noting that the classical tradition is an invented tradition in which present interests have constructed a vision of the past to legitimate present-day institutions or social relations); James Parakilas, *Classical Music as Popular Music*, 3 *J. MUSICOLOGY* 1, 4 (1984) (“The repertory of Western ‘classical music,’ however, was formed under the spell of nineteenth century European ideas of history: the archeological idea of history as reconstruction, the evolutionary idea of history as a process of perpetual change, the progressive idea of history as the formation of the present.”); Robert Fink, *Elvis Everywhere: Musicology and Popular Music Studies at the Twilight of the Canon*, 16 *AM. MUSIC* 135, 141 (1998) (“Since about 1830 or so we have lived in the West with a quite circumscribed repertoire of so-called Classical Music . . . [which until 1965] occupied a secure . . . position at the top of a generally accepted hierarchy of musical culture.”).

⁶⁰ Arewa, *supra* note 57, at ____.

century led to significant changes in the ways in which cultural works were transmitted and shared. In the cultural industries today, for example, conceptions of control increasingly overlap with ideas about who are appropriate stewards to control access to and uses of the products of the cultural industries. Such cultural texts, however, are increasingly part of the common cultural toolkit, particularly in a world in which the media is both pervasive and an active component of cultural interchange. The nineteenth century trend to sacralization also demonstrates the broader cultural impact of the adoption of valuable asset conceptions in the cultural arena with respect to what are now characterized as high culture forms.⁶¹ For example, sacralization in opera occurred relatively later, and opera retained elements of a shared musical culture well into the nineteenth century.⁶² The opera *Cinderella* exemplifies the treatment of operatic works in the nineteenth century. This opera had its first American performance in 1831, just one year after its London premiere, and became one of the “most popular works of musical theater in the history of the American stage.”⁶³ However, authority to alter this work was not limited to the composer of the work from which it was extracted, rather, in the nineteenth century accepted cultural practices deriving from earlier time periods also gave others authority to engage with and modify existing works.⁶⁴ An English language version of Gioachino Rossini’s opera *La Cenerentola*,⁶⁵ *Cinderella*, was created by an Irishman named Rophino Lacy, who retained most of Rossini’s music, but who also made “copious additions of music from other operas by the same composer.”⁶⁶ Reflecting the dominance of the sheet music industry in music of the time, the success of the Rossini-Lacy *Cinderella* led to “a rash of publications of favorite songs from this opera.”⁶⁷

Vincenzo Bellini’s opera *Norma*, which premiered in the U.S. in 1836 following its 1831 Milan debut, has been described as one of the central musical events of the nineteenth century.⁶⁸ Many sheet music versions were made of songs from *Norma*,⁶⁹ and the first sheet music versions were still in print in 1870, more than 30 years after their first publication.⁷⁰ Further, many popular songs borrowed from *Norma*,⁷¹ reflecting a nonsacralized view of musical authorship. Opera thus existed as part of a living musical tradition in which existing works were used and otherwise recycled to create new works.

⁶¹ JENNIFER HALL-WITT, *FASHIONABLE ACTS: OPERA AND ELITE CULTURE IN LONDON, 1780-1880* (2007).

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

⁶³ *Id.*

⁶⁴ Arewa, *supra* note 53, at ____.

⁶⁵ Hamm, *supra* note 62, at 71.

⁶⁶ *Id.*

⁶⁷ *Id.* at 74, 76 (noting that operatic sheet music (in English) also became quite popular, with operatic songs becoming part of the American popular song repertory as parlor music that was sung inside the home).

⁶⁸ *Id.* at 79.

⁶⁹ *Id.* at 79-81.

⁷⁰ *Id.* at 82.

⁷¹ *Id.* at 81-83.

Toward the latter part of the nineteenth century, as was the case with Shakespeare,⁷² music became increasingly sacralized and reflected to a greater extent valuable asset assumptions.⁷³ This sacralization and increased emphasis on music authorship significantly influenced the performance of musical texts in that performers “were obliged increasingly to stick to the sacred text of the great masters.”⁷⁴ In addition, the practice of abridgement, once common in the nineteenth century and which had:

[N]ot disturbed such composers as Mozart and Chopin, was not consistent with the growing aura of sanctity that surrounded symphonic compositions or the sense that a true work of art had an integrity which must not be interfered with by anyone, be it audience, soloist, or conductor, and was increasingly relegated to such manifestly less “serious” occasions as concerts of the Boston Pops Orchestra.⁷⁵

Growing sanctity associated with sacralization demonstrates one way in which valuable asset treatment may influence living cultural traditions. The core of nineteenth century sacralization processes and other valuable asset approaches rests on assumptions about how valuable cultural assets should be treated. Valuable asset models emphasize the importance of ensuring that valuable cultural assets are controlled by their creators or other authorized curators. Maintaining control was at least implicitly part of models of culture that connected unauthorized uses with a diminution of value of the original work. Although cultural values were to some extent embedded in such discussions, the business and economic value that such valuable assets might generate were intimately connected to this worldview.⁷⁶

Valuable asset models have significant cultural implications for living cultural traditions. Prior to the nineteenth century, for example, the classical music tradition was a living tradition. This living musical tradition was embedded in a social context where music performance was connected to the activities of everyday life, including marriages, funerals, namedays and saints’ days.⁷⁷ The classical tradition as a living musical tradition necessarily reflected widespread collaboration and borrowing among creators and active involvement of audiences with this living musical tradition.⁷⁸

The valuable asset focused model that became prominent in the nineteenth century valorized

⁷² LEVINE, *supra* note 56, at 20-32 (discussing sacralization and Shakespeare).

⁷³ Hamm, *supra* note 62, at 87 (noting that opera “became class entertainment, produced chiefly for the cultural and social aristocracy of America”).

⁷⁴ LEVINE, *supra* note 56, at 138.

⁷⁵ *Id.* at 139.

⁷⁶ Arewa, *supra* note 53, at 585 (“The sacralization process also reflected the increasing influence of commercial forces such as the sheet music industry and the increasing commercial focus of composers more generally.”)

⁷⁷ Greg Dimitriadis, *Hip Hop: From Live Performance to Mediated Narrative*, 15 *POPULAR MUSIC* 179, 182 (1996) (discussing the autonomy from social context evident in post-renaissance classical music); Weber, *supra* note 58, at 177 (noting the original contexts of musical performance of much classical music)

⁷⁸ Arewa, *supra* note 53, at 584-590; 601-612.

autonomous creation. This model also promoted behavioral norms of creation that deemphasized the collaboration and sharing that has been characteristic of musical creation in all genres and time periods.⁷⁹ The valuable asset aspects of the construction of the classical music canon significantly diminished the living culture aspects of classical music and led increasingly to a musical tradition in which museum pieces became predominant and the work of living composers less performed.⁸⁰ The predominance of such museum pieces is a significant contrast to the living musical traditions that had previously been dominant before the eighteenth century.⁸¹ For example, improvisation was a significant force in classical music into the twentieth century, but became diminished as the classical canon took form.⁸² The elimination of improvisation from the classical tradition by the early twentieth century gives testimony to the ways in which valuable asset conceptions have the potential to shape and diminish important aspects of living cultural traditions.⁸³ The products of such living cultural traditions are by their nature used by others. The classical music tradition as museum tradition also reflects changing assumptions about the acceptable use of existing cultural texts by others and further reflects the attenuation of the classical music living tradition. The elimination of improvisation from the classical tradition is a consequence of sacralization and the reverence given music of the canonized classical tradition.⁸⁴ This museum tradition rooted in assumptions similar to valuable asset models of culture was likely a factor in the fading of classical music as a living musical tradition.⁸⁵

In addition to constraining living cultures by a tendency to insist that existing texts not be changed or are somehow diminished by being changed, valuable asset models may also lead to tyrannies of tradition that make it difficult for those not deemed authorized to change existing cultural texts.⁸⁶ Conceptions of cultural knowledge that rest upon valuable asset models may fail to incorporate sufficient understanding of the importance of culture as a vibrant living force. Examining culture through this alternative lens enhances our understanding of how change,

⁷⁹ J. Peter Burkholder, *Borrowing*, in 4 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 1 (Stanley Sadie & John Tyrrell eds., 2001), available at <http://www.grovemusic.com>

⁸⁰ J. Peter Burkholder, *Museum Pieces: The Historicist Mainstream in Music of the Last Hundred Years*, 2 J. MUSICOLOGY 115, 119 (1983) (noting the development of classical music as a museum tradition and the accompanying decline in performances of works by living composers).

⁸¹ Arewa, *supra* note 53, at 589-591.

⁸² DEREK BAILEY, IMPROVISATION: ITS NATURE AND PRACTICE IN MUSIC 19, 29-38 (1992) (noting that “improvisation played an important part throughout most of its [classical music’s] early history”).

⁸³ Philip Tagg, *Open Letter: ‘Black Music’, ‘Afro-American Music’ and ‘European Music’*, 8 POPULAR MUSIC 285, 290 (1989) (noting that improvisation was virtually eliminated from the European classical tradition by 1910).

⁸⁴ Robin Moore, *The Decline of Improvisation in Western Art Music: An Interpretation of Change*, 23 INT’L REV. AESTHETICS & SOC. MUSIC 61, 79 (1992) (“Reverence for the music of past eras is in itself an impediment to improvisation. Spontaneous innovations cannot occur in music which is intended to be more a replication from 1790 than a musical event of today.”).

⁸⁵ Tagg, *supra* note 83, at 290 (“The ideological aim of this notation fetish . . . was to forestall sacrilege upon the ‘eternal values’ of immutable Masterworks This strategy was so successful that it finally managed to suffocate the living tradition it claimed to hold so dear . . .”).

⁸⁶ Moore, *supra* note 84, at 79 (“Classical performers, bound both to the score and a desire to interpret it ‘correctly,’ feel constrained by a ‘tyranny of tradition.’”).

modification and reuse are inherent aspects of living cultural traditions that contrasts significantly with museum traditions. Valuable asset models thus do not adequately contemplate living cultural traditions in which borrowing, sharing and similar practices are often the norm.⁸⁷ Rather, they are often based on idealized notions of culture that reflects assumptions of nineteenth century sacralization applied to ever greater swathes of cultural material. The assumptions on which conceptions of sacralization are based contain remarkable similarities to valuable asset conceptions of cultural material protected by intellectual property. Consequently, twenty-first century advocates of valuable asset models of culture extend its assumptions to virtually all material to which economic and business value might attach. As a result, valuable asset models in the intellectual property arena have spread this worldview such that it encompasses virtually cultural material that is commercially exploited, regardless of source or derivation.⁸⁸

B. *Models of Culture: Valuable Asset or Vibrant Force*

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

Cultural texts that are also valuable assets may at the same time be key elements in sustaining living cultural traditions. At the core of such living traditions is the ability of cultural participants to use, recreate and recycle existing cultural texts for a variety of purposes, including the creation of new texts, criticism, play, and myriad other activities.⁸⁹ Current intellectual property discussions often valorize the economic and business value using theories rooted in unverified models based on questionable assumptions about creativity and creation.⁹⁰ The use of cultural texts in an age of digital reproduction highlights a paradox that emerges from the growth of the cultural industries in recent years. As the products of the cultural industries become more popular and widely distributed, these texts increasingly become embedded culturally. Such texts may thus form part of a cultural toolkit that may be used by multiple cultural participants. As such, they may have a dual function as cultural product of the cultural industries and cultural element within broader

⁸⁷ Arewa, *supra* note 53, at ____.

⁸⁸ LESSIG, FREE CULTURE, *supra* note 40, at ____.

⁸⁹ Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER'S MAG., Feb. 2007, at 63 (discussing the ways in which literature is reused, recreated and recycled in contradiction to current assumptions in copyright).

⁹⁰ Arewa, *supra* note 22, at ____.

sociocultural contexts. The broader sociocultural significance of such texts must be acknowledged in intellectual property discourse.⁹¹ This means that valuable asset models used to ensure that value flows to owners of cultural texts must be tempered with recognition of the operation of such texts as elements in vibrant and living cultural contexts.

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

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

Intellectual property frameworks reflect assumptions about knowledge deemed important and worthy of protection as property. Categorization of certain types of knowledge as protectable as intellectual property, however, reflects both historical and sociocultural distinctions that have arisen in particular local contexts.⁹² The notions of cultural property that emerged from among the countries that negotiated the first international intellectual property agreements reflected assumptions about cultural property and boundaries that remain tenuous and uncertain.⁹³ The scope and implications of such assumptions about property and boundary were largely unquestioned with respect to countries outside of the small circle of countries at the negotiating table.⁹⁴ The underlying assumptions of many of these frameworks are now increasingly questioned within many of these same countries. This is reflected, for example, in copyright narratives that have responded to dominant propertization narratives by questioning whether the balance between private and public interests in intellectual property frameworks needs to be restored.⁹⁵ This is the case in the United States where the scope and boundaries of intellectual property rights, particularly

⁹¹ Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990).

⁹² Arewa, *supra* note 22, at ____.

⁹³ Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 100 COLUM. L. REV. ____ (2007).

⁹⁴ Arewa, *supra* note ____, at ____.

⁹⁵ Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L. 279, 283 (2004).

copyright, are quite contested.⁹⁶

Not surprisingly, given the intangible nature of the knowledge to which intellectual property rights attach, the scope of property rights with respect to intellectual property and the appropriate boundaries of such rights remain a recurrent and significant point of tension.⁹⁷ The determination of boundaries remains a significant problem in large part as a consequence of the shared nature of the underlying knowledge to which intellectual property rights attach. Consequently, delineating intellectual property boundaries is often difficult in the face of shared knowledge resources.⁹⁸ The shared nature of knowledge resources is a core aspect of understanding the role of culture as vibrant force. Sharing may be described in a number of ways, including borrowing, diffusion, creolization, mixture, collaboration, all of which typically involve copying and all of which may be an important force in innovation. Incorporating culture as vibrant force assumptions in intellectual property entails better recognition of the mechanisms by which culture is and has always been shared and collaborative. Vibrant force models of culture thus draw attention to borrowing, creolization and appropriation as cultural norms that need greater accommodation within intellectual property frameworks, which typically start from the assumption that such practices are anomalous or should be accorded secondary status in light of an assumed norm of autonomous or “true” creation.⁹⁹

C. *Work, Play and Creativity*

The increased economic and business value of intellectual property has contributed to associations of intellectual property as related to professional and work contexts. This work-focused emphasis makes underlying assumptions about the nature of creation that do not reflect the full spectrum of manners of creation. The vision of creation imbedded in valuable asset models also fails to take sufficient account of the ways in which some methods of creation are based on uses of existing works and the fact that such existing works themselves often reflect uses of works that preceded them. Play exemplifies types of creativity that do not necessarily reflect the assumptions about creation that often come with valuable asset models of culture. Further, activities that might be characterized as play do not always fit within narrow conceptions of professional creation that often inform valuable asset models.

Play is often associated with children, but is increasingly recognized as an important aspect of creativity more generally.¹⁰⁰ Play is deeply rooted in human behavior and plays an important

⁹⁶ LITMAN, *supra* note 9, at ____.

⁹⁷ BRAD SHERMAN AND LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* 61 (1999) (noting conflicts inherent in intellectual property law between the demands of replication (or abstraction) and identification and the fact that many current debates reflect the law working through these conflicts in new contexts).

⁹⁸ Arewa, *supra* note 22, at ____ (discussing the implications of collaborativity for copyright frameworks).

⁹⁹ *Id.* at ____.

¹⁰⁰ Joseph V. Anderson, *Creativity and Play: A Systematic Approach to Managing Innovation*, BUS. HORIZONS, Mar./April 1994, at ____.

sociocultural role more generally.¹⁰¹ Play often exemplifies open-ended, non-goal oriented activities that can be a powerful force in creativity and innovation. Various types of creativity that use existing material could be conceptualized as a type of play, including open source innovation, digital sampling, and jazz and other types of improvisation, for example. Recognition of the importance of activities reflecting or analogous to play for creativity in varied contexts could be used to temper the tendencies of valuable asset models that emphasize control of uses of creative works by incorporating cultural authority to play within intellectual property frameworks.

CONCLUSION

[to come]

¹⁰¹ GORDON BURGHARDT, *THE GENESIS OF ANIMAL PLAY* (2005); Robin Marantz Henig, *Why Do We Play?*, N.Y. TIMES MAG., Jan. 17, 2008, at 38-43; Gary Cross, *Play in America from Pilgrims and Patriots to Kid Jocks and Joystick Jockeys: Or How Play Mirrors Social Change*, 1 AM. J. PLAY ____ (2008).