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Michael J. Madison

University of Pittsburgh School of Law, madison@pitt.edu

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Intellectual Property and Americana, or Why IP Gets the Blues

Michael J. Madison *

I.

This Essay examines briefly some “cultural models” of the twentieth century for insights applicable to “business models” of the twenty-first century. It does so in light of an early proposition of the law and economics of intellectual property law.

Intellectual property lawyers got fascinated by “business models” around the time that two emerging trends converged roughly a decade ago. First, the distributed technical architecture of the Internet was realized commercially and socially via the original Napster file-sharing technology, which enabled massive unauthorized distribution of copyrighted musical recordings in digital form. From the standpoint of the businesses themselves, Napster and its legitimate cousins—eBay and Amazon.com—threatened to submerge the distinction between business models used by firms that created or distributed intellectual property, on the one hand, and the objects of intellectual property rights themselves, on the other.¹ Second, and around the same time, the

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* Associate Professor and Associate Dean for Research, University of Pittsburgh School of Law. Copyright © 2007 Michael J. Madison. Email: madison@pitt.edu. Thanks to George Taylor, Rebecca Tushnet, and Siva Vaidhyanathan for their comments and suggestions. Thanks to Daniel Corbett for excellent and enthusiastic research assistance.

¹ See generally Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381, 389–404 (2005) (describing the authoritative character of “things” in the law). For examples of intangible property claims in service of business model protection, see *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1060–64, 1069–72 (N.D. Cal. 2000) (granting motion for injunction based on

same convergence appeared from the standpoint of intellectual property law. Patent law suggested explicitly that “business methods” might be the objects of intellectual property protection,² even if those methods were not embodied in some technological form.³ Litigation against Napster and other file-sharing firms and technologies made explicit the fact that copyright and other forms of intellectual property law were being used to protect business models themselves, not merely the works produced and distributed via the incentives offered by intellectual property law.⁴

The high tide of patent protection for business methods appears to be receding,⁵ and with a decade of e-commerce experience, distinctions between business methods and their intellectual property-protected objects have gotten somewhat clearer.⁶ Peer-to-

“trespass to chattels” theory where defendant used software robots to search eBay for current auctions) and *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343 (Fed. Cir. 2001) (rejecting effort to enforce patent in “1-Click” website ordering method).

² *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1375 (Fed. Cir. 1998).

³ *Cf. Ex parte Lundgren*, 76 U.S.P.Q.2d 1385, 1387–88 (B.P.A.I. 2004) (rejecting a separate “technological arts” test for patentability).

⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 926 (2005) (“In addition to this evidence of express promotion, marketing, and intent to promote further, the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works.”). Some scholars criticized the application of copyright law on precisely this point. *See, e.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 267–68 (2002).

⁵ *See In re Comiskey*, 499 F.3d 1365, 1378 (Fed. Cir. 2007) (noting that the Patent Act “does not allow patents to be issued on particular business systems—such as a particular type of arbitration—that depend entirely on the use of mental processes”); *cf. In re Nuijten*, 500 F.3d 1346, 1352–57 (Fed. Cir. 2007) (concluding that a transitory signal with an embedded digital watermark did not constitute patentable subject matter).

⁶ Apple’s iTunes Music Store, for example, has succeeded phenomenally by persuading consumers that what they are downloading to their iPods for ninety-nine cents per song are “copies” of their favorite artists’ works, even though these digital tracks have little of the inherent durability and reconfigurability of songs delivered on compact disc, vinyl, or even on cassette tape. That is not to understate the enormous consumer benefits of the iTunes/iPod ecology. But when they pay for Digital Rights Management-encoded music files housed on tiny, fragile electronic storage devices, even with the flexibility to burn iTunes downloads to some number of portable disks, consumers aren’t getting the “things” from iTunes that they may believe that they are getting. *Cf. Christopher Sprigman, The 99¢ Question*, 5 J. TELECOMM. & HIGH TECH. L. 87, 105–07 (2006) (describing the mismatch between likely consumer expectations and the observed ninety-nine cents per song pricing scheme).

peer distribution of music has been reconceptualized as an element of the ecology of “social production” of various sorts, from the volunteer-generated “encyclopedia” known as Wikipedia⁷ to open source computer software programs. Even if much of the “business model” dust has settled, and even if “social production” models for producing creative and innovative works appear to be capable of supporting stable commercial enterprises,⁸ a different sort of uncertainty remains. Today, the propriety of explicitly building an enterprise on the value of intellectual property created elsewhere is hotly contested. What is “intellectual property” and what is “business model” may be clearer than it was a decade ago, but these two concepts are inextricably linked in evolving cultural forms.

Pressure to translate those forms into comprehensible legal frameworks remains high. Consider debates about the viability and legitimacy of video-sharing websites such as YouTube⁹ and searchable online archives such as the Google Books Library Project.¹⁰ Are these enterprises creating legitimate and durable social value from “spillovers” that always accompany works of intellectual property?¹¹ Are they unfairly appropriating the returns on investment by innovators? For my purposes, the question is whether and how law can help us sort out this distinction.¹² What

⁷ See Wikipedia, <http://wikipedia.org> (last visited Jan. 27, 2008).

⁸ See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (describing the promise of stable distributed production models).

⁹ See YouTube – Broadcast Yourself, <http://www.youtube.com> (last visited Jan. 27, 2008).

¹⁰ See Google Books Library Project – An enhanced card catalog of the world’s books, <http://books.google.com/googlebooks/library.html> (last visited Jan. 27, 2008).

¹¹ Cf. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 276–79 (2007); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1058–65 (2005) (both describing the importance of not allowing creators of intellectual property works to capture all of the social value associated with those works).

¹² Cf. Robert P. Merges, *Software and Patent Scope: A Report from the Middle Innings*, 85 TEX. L. REV. 1627, 1641–42 (2007) (describing the limited role of law in the flourishing of the software industry, despite fears that software patenting would suppress innovation and growth). While Merges argues that other material conditions have been more important to the durability and flourishing of the software field—for example, the

does thinking about “business models” tell us about how to think about the relationship between law that structures innovation and creativity, on the one hand, and other forces and factors that do the same? And what does thinking about the latter tell us about novel business model disputes?

II.

In their classic study of the law and economics of copyright law, William Landes and Richard Posner argued:

[I]t is easy to note particular distortions that copyright law corrects. Without copyright protection, . . . [t]here would be increased incentives to create faddish, ephemeral, and otherwise transitory works because the gains from being first in the market for such works would be likely to exceed the losses from absence of copyright protection.¹³

Landes and Posner argued that copyright law reduces the risks associated with novelty. By definition, authors and publishers must share their works in order to make money from them, but new creative works face an uncertain and potentially unappreciative audience, and pirates may lurk around the first corner that the work encounters in the market. Authors and publishers might respond by investing in fads and making money via repeatedly looking to a first mover advantage. The law relieves the pressure to do this by offering copyright protection for creative works and by making that protection last a meaningful amount of time.¹⁴ This offers an incentive to produce creative works that pay

structure of the investment community and the character of the technology itself—he notes that certain patent law doctrines remain quite important. *Id.* at 1642.

¹³ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 331–32 (1989) (hereinafter Landes & Posner, *Copyright Law*). Elsewhere, Landes and Posner make a related but distinct point about the economics of patent law. In the absence of a patent regime, an inventor would have an incentive to focus on innovation subject to appropriation via a first mover advantage, and/or to focus on innovation subject to appropriation via trade secrecy. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 294–95 (2003).

¹⁴ But not too long, and not so long that the copyright owner is indifferent to its duration. *Cf.* William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1659–60 (2004) (suggesting that a modest

off over time, and/or across multiple markets, rather than right away.

This theoretical observation is incomplete in some obvious ways—certain copyright-based industries focus obsessively on early returns, despite those same industries having lobbied extensively and successfully for expanded copyright protection,¹⁵ and long-term durability may be needed in some cases only to recoup wastefully high costs of production¹⁶—but it contains a kernel of truth. Other things being equal, both society and intellectual property law do prefer the durable to the faddish.¹⁷

The point generalizes from copyright to patent and from the descriptive to the normative. Other things being equal, law and public policy should find ways to enable creativity and innovation delivered via institutions and in forms that are simultaneously durable and legitimate.¹⁸ The durability interest means this:

“maintenance fee” be imposed on registrants of published works, in order to discourage opportunistic over-claiming of copyright interests).

¹⁵ Cf. EDWARD JAY EPSTEIN, *THE BIG PICTURE: THE NEW LOGIC OF MONEY AND POWER IN HOLLYWOOD* (2005) (discussing the film industry’s emphasis on big theatrical openings); Edward Jay Epstein, *Gross Misunderstanding*, SLATE, May 16, 2005, <http://www.slate.com/id/2118819> (arguing that there is a disconnect between public fetishism over the opening weekend theatrical gross for feature films, on the one hand, and the actual revenue model that sustains the motion picture industry, which is far more dependent on non-theatrical channels, on the other).

¹⁶ See Sharon Waxman, *Studios Rush to Cash in on DVD Boom*, N.Y. TIMES, Apr. 20, 2004, at E1 (describing the “windfall” effect of DVD sales allowing studios to recoup massive upfront investments).

¹⁷ But see STEVEN JOHNSON, *EVERYTHING BAD IS GOOD FOR YOU: HOW TODAY’S POPULAR CULTURE IS ACTUALLY MAKING US SMARTER* (2005) (suggesting that there is value in creative work that plays to the modern audience’s short attention span). I don’t need to take a position on the normative point here. I only draw attention to the paradox. In fact, if it helps, I can say that I agree that the law wrongly excludes both the faddish and what it assumes to be truly durable, and that it does so in both cases for the same wrong reason—the narrow view of law’s role in enabling these cultural patterns.

¹⁸ In numerous ways, copyright law seeks to exclude “transitory” or “nonserious” works yet simultaneously to enable access to durable, “serious” things and techniques. Copyright once was considered too important for advertising, a distinction cured in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), and too legitimating for pornographers. See Ann Bartow, *Open Access, Law, Knowledge, Copyrights, Dominance and Subordination*, 10 LEWIS & CLARK L. REV. 869, 882–83 (2006) (suggesting that offering copyright protection to pornography encouraged its production). Even today, important creative fields like clothing design and cuisine exist only in copyright’s “negative” space, rather than under its positive umbrella. See Kal Raustiala &

Notwithstanding large differences between copyright and patent, the two bodies of law share an interest in enabling appropriation in the long-term by developers and distributors of the new, and by their successors. Both “Progress of Science and the useful Arts,” the Constitutional metric for both copyright and patent policy,¹⁹ and the Constitutional requirement that grants of exclusive rights to authors and inventors exist for “limited Times”²⁰ implicitly emphasize creative and innovative development over the long term. The Constitutional language highlights the legitimacy interest as related but distinct. In Constitutional terms, the legitimacy of an intellectual property-related form or practice can be measured externally, as it relates to some social understanding of “Progress.”

I use the phrase “legitimacy” simultaneously to refer to both this external sense and to legitimacy measured internally, that is, on the understanding of participants in a cultural form. In both ways, legitimacy is grounded in accepted social and cultural practice rather than solely in acknowledgement via formal state sanction. The legitimacy of a cultural practice is not only a question of whether it has been blessed by a duly-enacted statute or a well-behaved judge. Legislators know this, too, even if their understanding is only implicitly reflected in the law. Both copyright and patent rely on autonomous cultural forms—materiality most clearly, which may be expressed in language—that derive their legitimacy from non-legal sources. Both

Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1762–68 (2006). Copyright’s current requirement that creative works be “fixed in a tangible medium of expression,” an updating of the historical requirement that copyright attached only to works that were published, serves the same purpose. Fixation and/or publication usually implies durability and thus equates with various forms of social value.

Copyright doctrine, like Landes and Posner’s theory, also embodies the paradox that some cultural patterns are deemed to be enduring precisely because they are not protected by the law. See, e.g., Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921 (2007) (arguing that § 102(b) of the Copyright Act does more than merely restate the traditional principle that copyright does not protect “ideas,” but that systems, principles, and methods of operation are made independently unprotectable and for good reason: so that other authors may use them).

¹⁹ U.S. CONST., art. I, § 8, cl. 8.

²⁰ *Id.*

copyright and patent are legal constructs attached to the intangible products of the mind. From the first copyright and patent legislation, those constructs have depended on materiality—inherently durable thingness, based on the social and cultural acceptance of things—to make their effects felt in the world. Copyright attached to books and other tangible things and now springs forth only when a “work of authorship” is “fixed in a tangible medium of expression.”²¹ A patent exists only when the protected “invention” is articulated materially in the language of a proper patent claim.²²

III.

Both copyright and patent exclude certain subject matter from their scope of protection. In other words, they offer incentives for the production of some things, but not for others. No one may copyright an “idea” or anything similar to or related to an idea—such as a fact, system, method, or process.²³ No one may patent a law of nature, scientific principle, mathematical formula, abstract idea, or artifact found in nature.²⁴ And now, it appears, no one may patent a method not embodied in some stable technological form,²⁵ and no one may patent a business method as such, because such a method is the equivalent of an abstract idea.²⁶

Among the reasons for these exclusions is that ideas and abstractions both exist *and persist* without the incentives offered by intellectual property law.²⁷ No “author” needs copyright

²¹ 17 U.S.C. § 102(a) (2006).

²² 35 U.S.C. § 112 (2006). I make an implicit argument here that patent claims are material rather than merely conceptual. For more on this point, see Madison, *supra* note 1, at 383–85.

²³ See 17 U.S.C. § 102(b) (2006); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 360 (1991) (confirming the exclusion of facts and ideas from copyright protection as a Constitutional matter).

²⁴ See 35 U.S.C. § 101 (2006) (defining patentable subject matter); *In re Comiskey*, 499 F.3d 1365, 1374–79 (Fed. Cir. 2007) (summarizing the Federal Circuit’s current interpretation of § 101).

²⁵ See *In re Nuijten*, 500 F.3d 1346, 1352–57 (Fed Cir. 2007).

²⁶ See *Comiskey*, 499 F.3d at 1378.

²⁷ See Landes & Posner, *Copyright Law*, *supra* note 13, at 349–59 (asserting that given the relatively nominal cost of developing “ideas,” granting copyright protection would

incentives to produce an “idea,” and no “inventor” needs patent incentives to produce an “abstract idea.” The scholarly literature on business methods patents is especially clear on this point.²⁸ The imperatives of a competitive market economy typically suffice to motivate firms to develop innovative business models, and the dynamics of such an economy typically suffice to explain the persistence of some models and the failure of others.²⁹

The ebb and flow of cultural and technological innovation make clear, however, that distinctions in practice between “idea” and “expression,” between “abstract idea” and “invention,” and between “intellectual property object” and “business model” are fluid at the least and evanescent at best.

When viewed in light of business models and business methods, the law’s simultaneous emphasis on the durable and on the material produces a paradox. Implicit in the basic proposition of the law and economics of intellectual property, stated elegantly by Landes and Posner, is that without the incentives offered by the

invite rent-seeking by authors). Other explanations for the distinction are plentiful, though rarely fully persuasive. “Ideas” in copyright and “laws of nature” or “abstract ideas” in patent law lack “originality” or “novelty,” and “authors” and “inventors,” respectively, which is true only under certain contested assumptions about the nature of each of those concepts. See Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007). Allowing intellectual property protection for these “ideas” or “abstract ideas” would raise the cost of follow-on creativity or invention to a degree that society finds unacceptable. Yet that is sometimes a problem, too, with things that *are* granted copyright or patent protection. A more honest justification for subject matter exclusions might involve a declaration that a line simply has to be drawn, and intellectual property protection is properly invoked when a “work” (or its counterpart in patent law, an “invention”) has been properly delineated. See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 608–09 (2005).

²⁸ See Rochelle Cooper Dreyfuss, *Are Business Method Patents Bad for Business?*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 263, 277–79 (2000); John R. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L. REV. 1139, 1175 (1999).

²⁹ This is a simplification. Antitrust law and unfair competition law exist to police certain significant failures of market processes. The law has largely retreated, however, from the notion that a general law of unfair competition should police those failures with respect to competition among business models, as such. *Compare* Int’l News Serv. v. Associated Press, 248 U.S. 215, 232–46 (1918) (establishing liability for misappropriation of plaintiff’s “hot news” by a competitor), *with* National Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) (considerably narrowing the scope of the law of “hot news” misappropriation).

law, intangible non-rival things—including ideas and business methods and models—would be under-produced and would not endure. On the one hand, incentives are needed to produce durable intangibles. On the other hand, the most durable intangibles yet devised—“ideas” in copyright law and “abstract ideas” in patent law—arise and persist without any legal incentive whatsoever. The law treats the latter as robust, and the former as fragile. How can this be?

IV.

As my reference to competitive markets suggests, Landes and Posner give insufficient weight to the role of other social and cultural influences on the production and distribution of information and knowledge. I am far from the first person to make that observation.³⁰ Social norms, networks, and institutional imperatives sustain models of information production and distribution. Material conditions do likewise. Narratives and other conceptual forms of various sorts structure sustainability and legitimacy. Most of this is well known, though it is not always well understood or accounted for.³¹

Often missing in accounts of these other influences, however, is an account of law itself as a part of them. By diminishing the role of law in cultural production, law tends to disappear entirely. That is a mistake. One succinct but less than illuminating way to put the point is that neither norms nor materiality nor language, nor any other relevant conceptual or ideological construct, are

³⁰ See, e.g., Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) (describing different modes of regulation in cyberspace).

³¹ Classic works on the sociology of culture largely take legal structures for granted. See generally PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION* (Randal Johnson ed., Columbia Univ. Press 1993); MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (Steven Rendall trans., Univ. of Cal. Press 1984) (1974); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973). Even the best work on the construction of culture from the perspective of regulating information and knowledge, JAMES BOYLE, *SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996) and Benkler, *supra* note 8, largely propose substituting a new narrative—the information environment for Boyle and social production for Benkler—for an old one.

exogenous to the legal system itself.³² Law is often regarded, wrongly, as the core (or depending on the metaphor, the foundation—or even the pinnacle) of a system for sustaining innovation or creativity. In the alternative, law is sometimes regarded as irrelevant to the functioning of such a system, or as an influence that is aligned with but independent of social and cultural forces. That view is equally wrong. What I consider in the rest of this Essay are some ways in which law and other things intersect to produce durable and legitimate forms of information production, distribution, sharing, and exchange. Instead of viewing the law of “ideas” and the law of “invention” or “creativity” as distinct, I view them as integrated with each other and with a host of other considerations.

I illustrate the point via examples drawn not from the world of business and business models, and not from industrial processes, file sharing, peer production, or open source software, but from some slices of Americana—the persistent, shared objects and experiences that we use to define ourselves as creators and consumers of American culture, that is, as American citizens.³³ Business is a form of culture. For my purposes, figuring out why business models and methods evolve and persist is no different in principle from figuring out why any cultural practice or form evolves and persists. Sociologists, anthropologists, economists, and historians have struggled for decades to figure out where culture comes from and why it sticks around. I cannot end their struggle. I can, however, illustrate the role of law in constructing some of the ostensibly “non-legal” or “extra-legal” influences on the problem. And so long as I get to choose some examples, I

³² Cf. Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. LEGAL STUD. 217, 219 (1993) (arguing that market preferences are endogenous to existing legal policy, including the setting of legal entitlements).

³³ Julie Cohen writes:

What makes the network good can only be defined by generating richly detailed ethnographies of the experiences the network enables and the activities it supports, and articulating a normative theory to explain what is good, and worth preserving, about those experiences and activities. To say that the network is us is to say that the network is the sum of the experiences and actions of its individual, situated users, and of the patterns and flows that their interactions create.

Julie E. Cohen, *Network Stories*, 70 LAW & CONTEMP. PROBS. 91, 92 (2007).

choose examples that are more fun for a copyright scholar than, say, potentially patentable tax strategies, which have been the subject of much recent debate. My examples are three distinct forms of Americana: *The Rocky Horror Picture Show*, town bands, and the blues.

V.

In these reviews of three slices of American culture, I make a single point. In each case what appears to be a purely “cultural” or “social” phenomenon, and which therefore sits on the conventionally “unprotected” side of the intellectual property line, is sustained indirectly and sometimes directly by legal structures that feed the material and conceptual processes more typically characterized as guiding these developments. Stripped of the jargon, durable cultural forms are typically composed of (material) communal forms of one sort or another and related (conceptual) ways of thinking and believing that both bind us to communities and distinguish individuals within them.³⁴ Law is an inescapable part of both. Some of those legal structures are housed in intellectual property law. Others are housed elsewhere.

A. *The Rocky Horror Picture Show*

The Rocky Horror Picture Show is perhaps the best-known example of an American cult motion picture.³⁵ The film was released in 1975 as an adaptation of *The Rocky Horror Show*, a stage production that originated two years earlier in London.³⁶ The movie tells the story of Brad (a priggish Barry Bostwick) and Janet (a virginal Susan Sarandon), who wander innocently out of a rainstorm and into the castle occupied by Dr. Frank-N-Furter (Tim

³⁴ How to integrate these two perspectives in law generally is the subject of thoughtful commentary in George H. Taylor, *Derrick Bell's Narratives as Parables*, 31 N.Y.U. REV. L. & SOC. CHANGE 225 (2007). See also Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 641 (David Kairys ed., 3d ed. 1998); George Taylor & Michael J. Madison, *Metaphor, Objects, and Commodities*, 54 CLEV. ST. L. REV. 141 (2006).

³⁵ THE ROCKY HORROR PICTURE SHOW (20th Century Fox Film Corp. 1975).

³⁶ For a look back at the production, see SCOTT MICHAELS & DAVID EVANS, ROCKY HORROR: FROM CONCEPT TO CULT (2002).

Curry), a self-declared “sweet transvestite from Transsexual, Transylvania,”³⁷ and the oddball members of the Annual Transylvanian Convention.³⁸ Sex and horror and dining and dancing ensue, including *The Time Warp*, the film’s signature musical number, in a mélange of science fiction, camp, and Frankenstein-ian themes.

Almost immediately after the initial release of the film, theatrical audiences adopted and adapted it as an audience participation phenomenon.³⁹ Midnight showings filled theaters with people dressing and dancing like the characters on the screen. “Shadowcasts” emulating the film’s characters appeared on stages in front of movie screens. A patois of audience repartee or “call backs” developed, along with a syntax to describe the phenomenon itself. A person who attended a “performance” of *Rocky Horror* for the first time was referred to as a “virgin.” Audience members brought and used what quickly became a standard repertoire of props to use or throw during appropriate scenes in the film: toast, rice, toilet paper, water balloons, or squirt guns.⁴⁰ There was, in short, a metanarrative of participation keyed to the narrative on the screen.

From a sociological point of view, all of this is mildly interesting as examples of cult and ritual (specifically, the socialization and identity-formation processes that constitute audience participation groups) and social and textual narratives (the content of the film, and the routinized audience responses) oriented to a focal object (the film), a specific place (the theater), and a specific time (midnight).⁴¹

³⁷ In the relatively plotless domain of the film, Transsexual is a planet located in the galaxy Transylvania.

³⁸ See, e.g., Bill Henkin, *THE ROCKY HORROR PICTURE SHOW BOOK* (1979).

³⁹ See Anna Quindlen, *Midnights at ‘Rocky Horror,’* N.Y. TIMES, Mar. 9, 1979, at C1; Sal Piro, *CREATURES OF THE NIGHT: THE ROCKY HORROR EXPERIENCE* (1990); *The Rocky Horror Picture Show cult following*, Wikipedia, http://en.wikipedia.org/wiki/The_Rocky_Horror_Picture_Show_cult_following (last visited Nov. 28, 2007).

⁴⁰ See SAL PIRO & MICHAEL HESS, *THE OFFICIAL ROCKY HORROR PICTURE SHOW AUDIENCE PAR-TIC-I-PATION GUIDE* (1991).

⁴¹ See JEFFREY WEINSTOCK, *THE ROCKY HORROR PICTURE Show* (2007); Patrick T. Kinkade & Michael A. Katovich, *Toward a Sociology of Cult Films: Reading “Rocky Horror,”* 33 SOC. Q. 191 (1992); Liz Locke, “Don’t Dream It, Be It”: *The Rocky Horror*

Far more interesting for my purposes is that both cult and ritual persist more than thirty years after the film's initial release. Many of the adolescents who remember attending *Rocky Horror* screenings as teenagers and college students are old enough to return—as I did in August 2007—with their own teenage children. The general cultural and social sensibilities of America have changed dramatically since the late 1970s, when the *Rocky Horror* phenomenon first evolved. Much of the identity-challenging, transgressive character of the film itself and of audience participation has evaporated in the mists of changing social mores. Yet the theatrical version of the film remains in release. Midnight showings still occur. Teenagers and college students (and others) fill theaters while dressed in character, shadowing the characters on the screen, yelling “call backs,” dancing the Time Warp, anointing “virgins,” and throwing toast. The film spawned institutionalized “casts” of audience performers, who organize and manage midnight showings and conventions.⁴² Since videocassettes and DVDs of the film have become available for rental and now purchase, midnight “showings” of the film now take place in basements and family rooms where groups of friends “perform” in costume and with props.⁴³

Framed in the way that Landes and Posner suggested, the persistence of the *Rocky Horror* phenomenon is a curious thing. The audience participation phenomenon, indeed the entire *Rocky Horror* culture, may have begun as a fad. But it quickly took shape and became a durable “work,” to borrow the copyright term, notwithstanding the fact that aside from the film itself, intellectual property law had almost nothing to do with it. The *Rocky Horror* example therefore suggests the obvious: Landes and Posner are no

Picture Show as Cultural Performance, NEW DIRECTIONS IN FOLKLORE, May–July 1999, <http://www.temple.edu/isllc/newfolk/rhps1.html>.

⁴² For more information, see the Official Rocky Horror Fan Site, <http://www.rockyhorror.com>, and the site for the Rocky Horror Preservation Foundation, <http://www.rhpf.org>. Links to Rocky Horror “casts” are available at The Ultimate Rocky Horror Links page, <http://www.midnightmadness.org/ultimatelink.htm> (all sites last visited Oct. 22, 2007).

⁴³ There is no way to know the breadth of the basement phenomenon, but I know that it happens. High school seniors in my suburban community were extolled for their *Rocky Horror* performances in a recent yearbook.

sociologists. The audience participation phenomenon sustains itself via both material and conceptual dimensions of classic ritual.⁴⁴ Moreover, to the extent that the film was a fad in the first place, that, too, modestly undercuts their thesis. If copyright was designed to promote culturally durable creative works, in this case it produced a faddish film. The film in turn prompted a durable phenomenon, though apparently not for reasons related to copyright. Fans appropriated the film and made it what it is today.⁴⁵

Law, however, should not be cast aside altogether. The foci of ritual analysis, the “things” at the center of the action, cannot be taken for granted. If *The Rocky Horror Picture Show*, with audience participation, is a durable cultural practice, much of that durability may be traced to copyright—but in ways not described by Landes and Posner. In this case, copyright enables both author and audience to maintain and reflect on the stable identity of the work of authorship itself.⁴⁶ Audience participation in particular and fandom in general exist in symbiosis with the objects of fans’ attention. Those objects are created and conserved via legal mechanisms as well as via ritual.⁴⁷ The fact that *Rocky Horror* both is available for continuing theatrical release and remains in wide distribution via videocassette and DVD, is clearly related to its status as a copyrighted work of authorship.⁴⁸ The different copyright interests at stake can be examined independently, from

⁴⁴ It is possible to get too serious about this possibility. See Amittai F. Aviram, *Postmodern Gay Dionysus: Dr. Frank N. Furter*, 26 J. POPULAR CULTURE 183 (1992) (“[T]he *Rocky Horror Picture Show* centers . . . around the divine itself.”).

⁴⁵ For analysis of the interaction between creative fandom subcultures and copyright law, see Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007).

⁴⁶ See generally Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999) (arguing that copyright should recognize audience interests in stable cultural meanings of copyrighted works).

⁴⁷ While I focus on copyright, other law-based mechanisms for conserving ritualized objects have been invoked. The Librarian of Congress added *The Rocky Horror Picture Show* to the National Film Registry in 2005, “a status that will ensure its long-term preservation as a film whose significance will be recognized for generations to come.” Library of Congress, Saving “Rocky Horror” . . . and Other Classics, <http://www.loc.gov/wiseguide/feb06/horror.html> (last visited Nov. 30, 2007).

⁴⁸ See 17 U.S.C. § 102(a)(6) (2006) (classifying “motion pictures” as “works of authorship”).

the standpoint of the copyright owner and from the standpoint of the film's fans.

From the copyright owner's standpoint, the copyright in the work will last for a good long time to come.⁴⁹ The owner of the copyright has the exclusive right to distribute the film in copies,⁵⁰ as it has done here and as it continues to do. The owner has the exclusive right to control public performances,⁵¹ as it has done here by exercising its right to license exhibition of the film. From the copyright owner's perspective, audience shadowcasting of the film may constitute either preparation of an (unfixed) derivative work or a public performance of the work. If so, the case, then the theatrical audience phenomenon surrounding *Rocky Horror* is the product of a consensual arrangement between producer and fans supported implicitly and conceptually by copyright. The copyright owner has the right to control production of derivative works;⁵² shadowcast producers may be the beneficiaries of implied licenses to create them. There is no suggestion that that the owner of the film's copyright has tried to stop or to license fan-based theatrical performances. In fact, the copyright owner benefits handsomely from licensing terms that base royalties on a percentage of gross sales. The owner has likewise at least implicitly accepted the legitimacy of an abundance of fan-based websites, books, and fan fiction, when copyright law might have sustained suits to enjoin them.

Moreover, the intersection of profit imperatives and copyright law means the integrity of the original work has been largely preserved by the copyright owner, and that the original film remains available and accessible to the public. As noted already, the film is available for theatrical viewing. The film was released on videocassette in 1990 and on DVD in 2000 as a twenty-fifth anniversary two-disc edition, priming the pump for new ritualists.⁵³

⁴⁹ See *id.* §§ 302–05 (establishing the duration of a copyright for works depending on their date of creation and/or publication).

⁵⁰ *Id.* § 106(3).

⁵¹ *Id.* § 106(4).

⁵² See *id.* § 106(2).

⁵³ The distribution history of *Rocky Horror* is recounted at The Rocky Horror Picture Show, Wikipedia, http://en.wikipedia.org/wiki/The_Rocky_Horror_Picture_Show (last

An authorized sequel, *Shock Treatment*, was released in 1981⁵⁴ (when the original *Rocky Horror* phenomenon was well established), but it flopped, suggesting that unauthorized sequels would likely fare no better. If another sequel or a remake has been discussed,⁵⁵ no projects have come to fruition. At this point, it is difficult to conceive of a more foolish business strategy than to “remake” *Rocky Horror*.⁵⁶

From the standpoint of the *Rocky Horror* fan, copyright reasoning takes a slightly different path but arrives largely at the same conclusion. The law secures access to the thing that is at the center of the cultural practice. Audience participation and shadowcasting the film in theaters may be noninfringing uses of the work, because they do not constitute a “performance” of the film or preparation of a derivative work at all. Shadowcasters don’t repeat the lines from the film. Audience members are responding to the film, not emulating it. Even if the audience experience were found formally to trip the wires of Section 106, the so-called “derivative” performance in question likely strikes many people intuitively as the kind of non-threatening enjoyment of a work of authorship that should be either treated as fair use⁵⁷ or excluded from the scope of the copyright owner’s rights in the first place.⁵⁸ Having licensed exhibition of the film, the copyright owner has little ground for protest if fans dress in character and get up and dance in the aisles. Of course, theater owners might protest if they have to sweep up the breadcrumbs and rice, and today, at least some owners prohibit the water pistols and water balloons

visited Nov. 30, 2007) and at The Rocky Horror Picture Show, IMDb, <http://www.imdb.com/title/tt0073629/alternateversions> (last visited Nov. 30, 2007).

⁵⁴ See *Shock Treatment*, The Internet Movie Database, <http://www.imdb.com/title/tt0083067/> (last visited Nov. 30, 2007).

⁵⁵ News tidbits to this effect occasionally percolate through Internet message boards. See, e.g., Posting of Jeff Kleist to <http://www.hometheaterforum.com/htf/showthread.php?t=68176> (Oct. 22, 2007, 12:43 EST) (noting an upcoming announcement of a television remake of *Rocky Horror*).

⁵⁶ One might ask why. From the standpoint of the *Rocky Horror* fan phenomenon, the question is whether a remake or a new sequel would reinforce the existing ritual and community, or disrupt it. My imaginary money is on the latter.

⁵⁷ See 17 U.S.C. § 107 (2006).

⁵⁸ See Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007) (arguing that copyright includes a principle of non-infringing personal use).

that were an integral part of early performances. Fans' access to the film—the ritualized focal object—is secured by copyright in a second way. Fans who buy copies of the videocassette or DVD of *Rocky Horror* can gather friends and show the movie privately (in copyright terms, this is “performing” the audiovisual work), without implicating any of the copyright owner's rights under the Copyright Act.⁵⁹ If recording a broadcast television program in your home and watching it later on a VCR doesn't infringe the rights of copyright owners,⁶⁰ then it is difficult to imagine infringement arising from the private playback of the film, even accompanied by lewd costumes and *The Time Warp*.

The distinction between these two interpretations, while subtle in terms of the pragmatics of the *Rocky Horror* ritual, is more than a matter of legal arcana. Legally, if audience practice is construed as a matter of implied license and tolerated use, the copyright owner has the authority to change course and shut down the practice or assert claims to royalties.⁶¹ That possibility seems remote. But socially and culturally, it means that the copyright owner and the audience co-exist in a certain dynamic tension, each responding to the other as well as to the film itself. The owner allows the audience a degree of freedom. Audience response assures the owner a return that encourages continued access. A construction that frees the audience from the scope of the copyright owner's legal claims gives the practice a different character. Its durability and legitimacy are more substantial than they would be under the construction that emphasizes toleration by the copyright owner. The scope, depth, and continuity of audience response is framed internally, by the audience itself, rather than partially externally, by the implicit copyright claim. Neither construction is inherently “better” than the other as a matter of the durability of the practice, but the two versions offer distinct trajectories.

⁵⁹ The Copyright Act only grants the copyright owner the exclusive right to perform the work publicly. 17 U.S.C. § 106(4) (2006).

⁶⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁶¹ Possible claims for equitable relief would be subject to a laches defense, at the very least, in addition to standard fair use arguments.

B. Town Bands

It may be difficult to imagine Landes and Posner contemplating the copyright implications of *The Rocky Horror Picture Show*, so perhaps a tamer example of Americana illustrates equally well the complexity lurking in their simple observation about what intellectual property law does and does not aim to produce. I draw out explicitly some things that the *Rocky Horror* example leaves implicit and then add a new layer of analysis. The example is the American town band. Not long after I attended a recent theatrical “performance” of *The Rocky Horror Picture Show*, on the other side of the country I participated in a cultural ritual of longer standing. I attended a performance of the Chatham town band on a summer evening in Chatham, Massachusetts, on Cape Cod.

The town band in Chatham has been performing free concerts on Friday nights in July and August for roughly seventy years. The band plays on a bandstand in a park in the center of town. Families stroll by during the day and reserve their spaces on the lawn with blankets and folding chairs. By the time the concert starts, the park is full and abuzz with several generations of Chatham residents and vacationers. The band is an all-volunteer group. The repertoire focuses on band classics: Sousa and other marches, “patriotic” standards, songs for young children (Old MacDonald, etc.), and the occasional show tune or classic Disney musical number.

In almost every respect, the Chatham Band is a throwback to the late nineteenth century, when having a band was almost a requirement of being a town and bands and other musical groups were indispensable to the identities of local communities organized around nationality and ethnicity.⁶² In many parts of the country,

⁶² On the history of town bands in the United States, see MARGARET HINDLE HAZEN & ROBERT M. HAZEN, *THE MUSIC MEN* (1987); KENNETH KREITNER, *DISCOURSING SWEET MUSIC: TOWN BANDS AND COMMUNITY LIFE IN TURN-OF-THE-CENTURY PENNSYLVANIA* (Univ. of Ill. Press 1990); Paula Savaglio, *Polka Bands and Choral Groups: The Musical Self-Representation of Polish-Americans in Detroit*, 40 *ETHNOMUSICOLOGY* 35 (1996); *NEW ENGLAND MUSIC: THE PUBLIC SPHERE, 1600–1900*, ANNUAL PROCEEDINGS OF THE DUBLIN SEMINAR FOR NEW ENGLAND FOLKLIFE (1996). In a recent article tracing the emergence of music as a form of recognizable property, Michael Carroll traces the

all that remains of this musical tradition is the high school marching band, though the Chatham Band is hardly alone as a survivor, especially in New England.⁶³ The intriguing question here is similar to the question that I raised above in connection with *Rocky Horror*. Why is the Chatham Band still performing, when similar bands all around the country have disappeared and its repertoire is not, let us say, *au courant*? There is, after all, nothing proprietary in the band or its method, and little proprietary in its selection of music. Landes and Posner might predict that to sustain the cultural form, some form of exclusive right might be required, and they again might be (modestly) surprised to note that the Chatham Band flourishes without any visible help from the legal system.

As I noted earlier, sociologists know better than to assume that the legal system makes practices durable, but as I also noted before, even sociologists ought not to overlook certain features of the legal system lurking in the background. The continuity of the Chatham Band depends, in important ways, on law. I could focus on the objects of the Chatham ritual, that is, the musical works that the band plays. Much of its public domain repertoire was once copyrighted, and owners of works still in copyright would be entitled to royalties but for the presence of Section 110(4) of the Copyright Act, which exempts these performances from the owners' exclusive rights.⁶⁴ The performances are therefore inexpensive to produce. But Section 110(4) would apply to any town or community band that performs free concerts for local

community band phenomenon back to 13th and 14th century Europe. See 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, 1446–47 (2004).

⁶³ For example, the Kansas State Historical Society maintains an online exhibit on town bands that refers to their persistence in some communities. They're Playing Our Song: Community Bands in Kansas, Kansas State Historical Society, <http://www.kshs.org/exhibits/bands/bands2.htm> (last visited Nov. 26, 2007).

⁶⁴ 17 U.S.C. § 110(4) (2006). This section applies only so long as the performance is not commercial in character and is not transmitted (by radio or television, for example), so long as no direct or indirect admission charge is imposed, and so long as the performers, organizers, and sponsors receive no fees for their involvement. As is often the case with copyright legislation, this paraphrase does not quite capture all of the nuances of the statute.

citizens. Why has the Chatham Band persisted when so many others have not?

There are a couple of things at work here that are also at work in the *Rocky Horror* example, though I didn't draw them out above. Both cultural practices feature a continuing and a palpable sense of engagement by a group of insiders and a relatively salient boundary that marks the existence of the group. In the *Rocky Horror* setting, some of that boundary is marked by language. New initiates are "virgins." Some of it comes from knowledge of the specific expectations of audience participation. And some of it emerges—as I implied with the reference above to home videotaping—from the fact that *Rocky Horror* performances take place in places that are treated, both socially and legally, as *private*.⁶⁵ In Chatham, that palpable sense of the group is not constructed by a legal regime that marks a home or a rented movie theater as a private space. Instead, that group sense comes from the reverse, equally steeped in legal structures: from the fact that band performances are public.

The Chatham Band plays today on the Whit Tileston Bandstand in Kate Gould Park, just off of Main Street in Chatham's modest central shopping district. Both the bandstand and the park are owned and maintained by the Town of Chatham,⁶⁶ that is, both are public property, and the park itself is open and accessible to all. The Bandstand is named for the long-time leader of the band, who reportedly was responsible for institutionalizing the band in the years after World War II,⁶⁷ and it was originally built, according to one report, in response to a local fundraising drive initiated by the cry, "This band is too big for this little bandstand!"⁶⁸ The shallow hollow that constitutes the park where the bandstand sits is almost perfectly sized in proportion to the structure and to the size of the crowd that turns out, and it is literally a stone's throw from the heart of the town's Main Street.

⁶⁵ See Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. (forthcoming 2008) (emphasizing the spatial dimensions of privacy).

⁶⁶ See Nancy Barr, *Chatham Band Concerts*, <http://www.capecodtravelguide.com/chatham-band-concerts.php> (last visited Nov. 26, 2007).

⁶⁷ *Id.*

⁶⁸ *Id.*

The site of the concerts has long offered an almost ideal coordination point for the community.⁶⁹ The practice of depositing blankets and chairs and ultimately the size of the crowd reflect the concerts' continuing role in summertime Chatham. Hundreds of people turn out to hear the music and to waltz and bunny-hop on the grass—though of course they don't waltz and bunny-hop at the same time, at least not as a matter of course.

The name of the bandstand bears comment as well. Continuity of the band's leadership during the latter half of the twentieth century was essential to the band's durability. When the bandleader died, naming the bandstand after him may have been a masterstroke. While the name is far from salient in the minds of the town's younger residents and visitors, for long-timers—and there are many in Chatham—the name likely sustains the cultural tradition nearly as well as the bandleader himself might have. And the act of naming at least implicitly involved a bit of right-of-publicity jujitsu.

In other words, here again is a symbiotic relationship among law, social structure, object, and place, which resembles in broad outline the symbiosis evident on the surface of the *Rocky Horror* phenomenon. A focal object and a focal place in both contexts offer a relatively stable referent. In both there is a continuing group dynamic to engage with that focus that allows for both continuity and adaptation in the practice itself. The group comes together for a given performance; a related but distinct group comes together for the next. Law structures the focus. It privileges or protects what is alternatively the private or public character of the group.

Are the persistence of the Chatham Band and its place in the traditions of Chatham, Massachusetts any more specifically based on any kind of law, let alone intellectual property law, than *Rocky Horror* is specifically dependent on copyright? As I noted in the *Rocky Horror* context, what are the sources of the durability and

⁶⁹ For discussions of the "focal point" theory of legal legitimacy, see THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57–71 (1980); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Robert Sugden, *A Theory of Focal Points*, 105 ECON. J. 533 (1995).

legitimacy of the practice? One cannot tell for sure. Nor is the Chatham Band any more unique as a contemporary town band than is *Rocky Horror* as a contemporary cult film. In both settings, however, a dialogue among author and performer and context and audience, over a period of years, has created and sustained a form of American culture *supported by specific legal structures*. In Chatham, the band might have performed in a high school auditorium, or in a church. The band might have collected donations or sold raffle tickets to offset expenses. Subtle variations might trigger different application of the copyright rule applicable to the band's public performances, perhaps pushing its repertoire more clearly toward public domain material and potentially distancing the band from younger audience members.⁷⁰ Each of these variations likely would have shaped the history and durability of the institution in unpredictable but distinct ways, and in ways that conventional copyright distinctions between "idea" and "expression," and the incentives required to produce each of them, fail to capture. If those forms of culture persist for the long run, then that persistence owes a debt to the law. That debt is not necessarily repaid as Landes and Posner would hypothesize, that is, through the construction of intellectual property rights. The Chatham Band depends in large part on an important and accessible place, on a community's sense of place, and on a place that is specified, owned, and managed by the relevant public authority.

C. *The Blues*

My third and final example illustrates that point by adding yet another distinct piece to the puzzle of durable culture: the blues.⁷¹ "The blues" as an American musical tradition goes back well over a century, extending even beyond the United States to West African musical traditions that were adopted and extended during slavery. Over the course of the late nineteenth and early twentieth

⁷⁰ Many young children respond to Disney "standards," such as songs from *MARY POPPINS* (Walt Disney Productions 1964).

⁷¹ This is both necessary and inevitable. As the great guitarist Albert Collins said in a forgettable film called *Adventures in Babysitting*, "Nobody leaves this place without singing the blues." *ADVENTURES IN BABYSITTING* (Buena Vista Pictures 1987).

centuries, blues-based music grew in complexity and influence, but largely via performance tradition distributed through communities by personal contact and oral (and aural) practice. By the time blues derivatives—rock ‘n’ roll, rhythm ‘n blues, jazz—began to get commercialized and popularized in the 1950s and 1960s, the intellectual property-based blues narrative was well underway. The true originators of the blues rarely inscribed their work in the fixed forms that copyright law had come to expect, and when they encountered the commercial music business, they were harshly exploited.⁷² The blues endures today not because of intellectual property law, but (apparently) despite it.

In the blues, I’ve chosen a musical genre and a cultural tradition rather than a specific work (*Rocky Horror*) or institution (the Chatham Band), and so my analytic ground has shifted somewhat. Unlike either of these things, the blues has a well-known and well-trod cultural and musical history,⁷³ centered on African and African-American communities and based musically on the guitar and repetition, reuse, and adaptation of a simple twelve-bar I-IV-V chord pattern. That foundation lessens the burden of explaining what “the blues” is. But the underlying question remains largely the same: If intellectual property law is so important to the production of durable forms of culture, how can the blues have endured—how can it persist even today—despite its seeming exclusion from copyright? A simple chord pattern is a paradigmatic, unprotected “idea” from a copyright perspective. Blues performances that are fixed neither in recorded form nor via musical notation, don’t satisfy copyright’s subject matter requirements. As I asked above, what are the sources of its

⁷² Well-known examples of early blues artists securing attribution and compensation from rock ‘n’ roll musicians who appropriated their work include Willie Dixon suing Led Zeppelin over *Whole Lotta Love* in 1985 and John Lee Hooker suing ZZ Top over *La Grange*. See *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 952 (9th Cir. 1995). For a discussion of the Dixon case in the context of a thought-provoking review of the intersection of music copyright and the blues tradition, see generally Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 755–72 (2007).

⁷³ See, e.g., WILLIAM BARLOW, *“LOOKING UP AT DOWN”: THE EMERGENCE OF BLUES CULTURE* (Temple Univ. Press 1989); LEROI JONES, *BLUES PEOPLE* (Harper Perennial 1999); ALBERT MURRAY, *STOMPIN’ THE BLUES* (Da Capo 1989); ROBERT PALMER, *DEEP BLUES* (Penguin 1982).

durability and legitimacy? Does intellectual property law get the blues?

It does, and in a way that requires a brief excursion not into ritual foci or ritual locations (though in the guitar and in Chicago, the blues arguably has both), but into the musical practices that constitute the blues and how copyright law has traditionally read on them. Keith Aoki's recent discussion of the blues, as an example of the complex interaction of distributive justice principles and copyright law, leads the way:

While it may seem unfortunate or unjust that certain musical genres remained legally unprotected, the lack of protection for un-notated musical works may have given rise to significant "internal" creative hybridization and cross-fertilization that might not have otherwise occurred. In this instance, "internal" refers to creative practices within the black community or black musical sub-communities wherein musicians borrowed from and incorporated elements from each other's work. In the process, new musical idioms emerged that might not have arisen within a clearly delineated and regulated IP [intellectual property] landscape.⁷⁴

Siva Vaidhyanathan likewise emphasizes the productive tension in the blues between repetition and redundancy, on the one hand, and innovation, on the other, and how blues artists communicated with one another and with their audiences via performance rather than via static objects—recordings or sheet music.⁷⁵ Intellectual property law sustained the blues not via what the law embraced, but via what the law excluded.⁷⁶ At almost every level of abstraction, the law sees in the blues not the concrete

⁷⁴ Aoki, *supra* note 72, at 760.

⁷⁵ SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 117–26 (2001).

⁷⁶ See generally Carroll, *supra* note 62; Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005) (in research on the intersection of music history and property law, focusing principally on how the law brought music within its scope, rather than on how the law excluded music); cf. Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463 (2005) (arguing that black musical forms survived despite their exclusion from copyright).

and protectable, but the general and the unprotectable. Individual notes and chords are “facts”; chord progressions are “ideas” necessary to expression within the genre; full improvisations and performances are not fixed. Repetition of rhythms, riffs, and even melodies does not constitute “originality” or “authorship” in a copyright sense. Learning the rudiments of these things is cheap and easy. In theory, anyone can become a blues musician.

The openness of the blues tradition should not be overstated. The musical dynamism implicit in those characterizations exists in tension with attention to stability and authenticity.⁷⁷ Blues journalists, blues fans, long-time blues musicians, and proprietors of record labels and clubs all enforce rough adherence to the concept of “the blues,” simultaneously and rhetorically an iconic but unowned thing and a persistent narrative of how certain music is created and embraced.⁷⁸ The name itself distills a dynamic tradition into a phrase that denotes “inside” and “outside” the cultural form. You either have (or get) the blues, or you don’t. Both the blues and our cultural understanding of the blues are matters of character and continuing conversations, conceptual constructs paired with the materiality of the music itself. Keith Aoki asks, “Who owns the blues?,” and the traditional answer must be “no one,”⁷⁹ in the sense that no one can own a method—that is, a narrative of cultural production—and no one can own oneself.⁸⁰ Even in the absence of traditional ownership, the blues consists of something fixed and embodied. One resolution offered by Aoki is that both law and culture construct a limited “commons” of artistic resources that blues artists can contribute to and draw on without fear of legal penalty⁸¹—a persistent but metaphoric place that

⁷⁷ Plenty of blues artists have emerged in recent years to claim compensation and/or attribution based on misappropriation of their work. Not all have succeeded. *See, e.g., Ory v. McDonald*, 141 F. App’x 581, 584 (9th Cir. 2005) (affirming grant of summary judgment in favor of defendant Country Joe McDonald, accused of misappropriating “Muskrat Ramble” in connection with his “Fixin’ to Die Rag”).

⁷⁸ *See* VAIDHYANATHAN, *supra* note 75, at 120 (blues), 138 (rap).

⁷⁹ *See* Aoki, *supra* note 72, at 755–72.

⁸⁰ *See* Samuelson, *supra* note 18.

⁸¹ *See* Aoki, *supra* note 72, at 768.

serves as a legally-managed counterpart to the places and spaces in the *Rocky Horror* and town band examples.⁸²

Law itself manages that status. The final point of this example is that even subtle changes in the law can change the cultural dynamic by sustaining, disrupting, and/or modifying the tradition. Law can simultaneously differentiate and ratify a cultural form, and redirect it. Landes and Posner suggested that intellectual property law encourages the production of durable cultural goods that otherwise would be undersupplied.⁸³ In the examples sketched so far, I've tried to briefly identify ways in which law serves an important but indirect role in constructing sustainable cultural practices. A more accurate revision of that proposition identifies places where intellectual property law changes cultural trajectories. In the context of the blues, at least three times legal intervention redirected the arc of the blues and its descendants. The first was *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*,⁸⁴ in which a district court determined that a musician could infringe an earlier composition via "subconscious" copying.⁸⁵ The second was *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*,⁸⁶ concluding that any sampling of a musical recording by a rap artist violated not only the Copyright Act, but also the Biblical injunction against theft.⁸⁷ The third was *Bridgeport Music, Inc. v. Dimension Films*,⁸⁸ which concluded that any sampling of a copyrighted sound recording—even a single, three-note chord—could trigger copyright infringement.⁸⁹ In the first two of these

⁸² A different resolution is exemplified by Willie Dixon, who released an album in 1970 titled *I Am the Blues*. "Place" and "ownership" of the blues are literal and physical as well as metaphorical. As if anticipating this Article, the owners of the nightclub chain "House of Blues" filed a trademark infringement lawsuit in early October 2007 against the owners of an unaffiliated "House of Blues" establishment in Baton Rouge, Louisiana. HOB Entm't Inc. v. House of Blues Baton Rouge, LLC, No. 07-0727, *complaint filed* (M.D. La. filed Oct. 9, 2007).

⁸³ See *supra* note 13 and accompanying text.

⁸⁴ 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom.* ABKCO Music, Inc. v. Harrisongs, Ltd., 722 F.2d 988 (2d Cir. 1983).

⁸⁵ *Id.* at 181.

⁸⁶ 780 F. Supp. 182 (S.D.N.Y. 1991).

⁸⁷ *Id.* at 183.

⁸⁸ 410 F.3d 792 (6th Cir. 2005).

⁸⁹ See *id.* at 798.

developments, Siva Vaidhyanathan sees a struggle in the music industry between the old and established and the new and emerging.⁹⁰ It is equally noteworthy that seemingly minor changes in the law, when expressed across a cultural practice, produce changes in the nature of the cultural practice itself, changes that cannot be easily characterized as “good” or “bad” or as favoring the new or the old. The law has reshaped the metaphoric musical commons. Rules regarding membership, contribution, and withdrawal have been changed. As all music “samples” must be cleared rather than simply borrowed, and as music composition and production stresses “originality” and “novelty” over re-use of the old, traditional blues forms are extinguished as they morph through contemporary forms of rap and hip-hop.⁹¹ They are simultaneously differentiated and preserved.⁹² Durability and legitimacy turn out to be dynamic and blended things.

VI.

The point of these three samples of Americana is not that Landes and Posner were wrong, but that they were right in ways that their work does not acknowledge. Intellectual property law does play an important role in creating cultural forms and practices and helping them become simultaneously durable and legitimate. But it does so not simply by supplying or withdrawing incentives to produce durable cultural goods. Those same sources of law can disable and disrupt cultural forms. In fact, as the blues example illustrates, under some circumstances intellectual property and related law does more to encourage cultural durability when it

⁹⁰ VAIDHYANATHAN, *supra* note 75, at 117–26.

⁹¹ See Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 640–44 (2006) (suggesting compulsory licensing as a solution to clearance problems for sampling in hip hop).

⁹² See, e.g., Sasha Frere Jones, *A Paler Shade of White*, THE NEW YORKER, Oct. 22, 2007, at 176, 181 (arguing that pressure to be “original” in developing new music has led to a decrease in borrowing and reuse of old themes, to a racial Balkanization of the music industry, but has been accompanied by increased financial independence for black artists and producers and by “democratization” of musical traditions); Will Hermes, *Rocky’s Balkanized Route to the Indies*, N.Y. TIMES, Oct. 21, 2007, § AR2, at 26 (noting the influence of musical genres and styles from around the world on American “independent” music).

chooses *not* to protect cultural products. Law plays a role in constructing and deconstructing the places, objects, narratives, and metaphors⁹³ that allow communities to form, persist, and evolve. And this context-specific “how” of the law matters enormously. Culturally as well as legally, there is a subtle but important difference between implicitly licensed consumer engagement with *The Rocky Horror Picture Show* and the unregulated exercise of consumer imagination, between privately-owned and publicly-owned spaces for town bands and fan participation, and between narratives of performative imitation and clearing samples in African-American music.

Consider this proposition in a different light, applied prospectively rather than retrospectively, and its relevance in the context of business models becomes clear. At the intersection of business models and intellectual property is the same question about sustainability that I used to frame brief reviews of Americana. Intellectual property law adopts a misleading duality: Cultural forms on the “expression” side of the line are relatively fragile and require legal incentives for their production. Cultural forms on the “idea” side of the line are relatively robust and require no such incentives. Having discarded that duality and focused instead on the “how” of the law in the context of cultural durability, what lessons can be applied to business model problems? How can sensitivity to the nuances of law’s role help society build durable and legitimate business models?

This can be worked out only via examples. Among novel intellectual property-based business models, we have some benchmarks—models that law has directly and indirectly declared to be illegitimate and has worked hard to destabilize, and apparently durable models that law has helped to validate. In the former camp are businesses built around peer-to-peer file-sharing software directed to entertainment content (music and film). The Supreme Court’s decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*⁹⁴—condemning the distributors of the Grokster software for having “induced” copyright infringement—was

⁹³ See Taylor, *supra* note 34, at 265 (arguing that narrative and metaphor are forms of materiality).

⁹⁴ 545 U.S. 913 (2005).

framed by a narrative that equated alleged “sharing” of musical recordings with stealing them, and by a robust sense of the object-status of the recordings themselves.⁹⁵ In the latter is the market-leading business for music and movie downloading, Apple’s iTunes Music Store.⁹⁶ In Apple’s case, not only does ninety-nine-cents-per-track pricing give the service an incomparable ease of use, but iTunes operates at the center of a cluster of contractual and technological constraints and enabling devices all protected by various legal rules.⁹⁷

The next step is to consider intellectual property-dependent business models whose durability and legitimacy are contested. One example might be YouTube, the online video-sharing service now owned by Google that is the central problem in debates about legal frameworks for “User Generated Content” or UGC.⁹⁸ A second might be Google Book Search, the shorthand term for a cluster of initiatives also undertaken by Google that involve digitizing mass numbers of books and making all or part of them available via a specialized online search interface.⁹⁹ YouTube users, who often use the service to post and distribute videos of clipped or remixed copyrighted content, prompt allegations that the site is no different than Grokster, a business model predicated on theft of others’ intellectual property.¹⁰⁰ One obvious way in which

⁹⁵ Cf. *id.* Even Justice Breyer’s concurrence, by far the most sympathetic of the Court’s three opinions to the technology at issue, included the following statement: “And deliberate unlawful copying is no less an unlawful taking of property than garden-variety theft.” *Id.* at 961 (Breyer, J., concurring).

⁹⁶ See *supra* note 6 and accompanying text.

⁹⁷ See generally Urs Gasser, *iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media—A Case Study* (Berkman Ctr. for Internet & Soc’y at Harvard Law Sch., Research Publ’n No. 7, 2004-07, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=556802.

⁹⁸ For one definition of “user-generated content,” see User-generated content, Wikipedia, http://en.wikipedia.org/wiki/User_generated_content (last visited Nov. 27, 2007).

⁹⁹ See About Google Book Search, <http://books.google.com/intl/en/googlebooks/about.html> (last visited Nov. 27, 2007).

¹⁰⁰ In March 2007, when Viacom launched a \$1 billion lawsuit against Google in connection with YouTube, Viacom released a statement accusing Google of perpetrating an “unlawful business model” that continues “to steal value from artists.” Press Release, Viacom, *Viacom Files Federal Copyright Infringement Complaint Against YouTube and Google; Suit Seeks Court Ruling to Require YouTube and Google to Comply With*

copyright law could move to render YouTube use “legitimate” and YouTube “practice” sustainable is by declaring that YouTube users are engaging in fair use of copyrighted material. Or a court might declare that YouTube is protected by a statutory “safe harbor” for online service providers who host works posted by their users.¹⁰¹ A less obvious mechanism would be indirectly structured by law. Google is moving to legitimize YouTube in part by developing “fingerprinting” technology that would “objectify” copyrighted content to a degree not currently available, potentially allowing copyright owners to determine that the “thing” posted to YouTube is the same “thing” that the copyright owner produced (or at least owns) in the first place.¹⁰² Sustained application and enforcement of the technology likely would involve some detailed examination and application of the Digital Millennium Copyright Act (“DMCA”).¹⁰³ Whether the “fingerprinting” technology will “work” as hoped is anyone’s guess. Whether the technology represents good policy as a solution to the UGC “problem” is a question for the next and final section of this Essay. Bolstered by the DMCA, it is clearly designed to stabilize YouTube “practice” and render it legitimate, and in that sense reveals the subtle role of law in cultural forms.

Google Book Search presents its own set of challenges. Via the Google Books Library Project, of which Google Book Search is a part, Google has declared its intention to create an “enhanced” catalog of all of the world’s books and a digital archive of the text of those books, including works still in copyright, made available

Copyright Laws and Pay \$1 Billion in Damages (Mar. 13, 2007), available at http://www.viacom.com/news/News_Docs/Viacom_Press_Release.pdf; see also *Viacom Int’l Inc. v. YouTube, Inc.*, No. 07 CV 2103 (S.D.N.Y. filed Mar. 13, 2007), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/1/>; Miguel Helft & Geraldine Fabrikant, *WhoseTube? Viacom Sues Google Over Video Clips*, N.Y. TIMES, Mar. 14, 2007, at C1; *Viacom will sue YouTube for \$1bn*, BBC NEWS, Mar. 13, 2007, <http://news.bbc.co.uk/2/hi/business/6446193.stm>.

¹⁰¹ 17 U.S.C. § 512(c) (2006).

¹⁰² See Miguel Helft, *Google Takes Step on Video Copyrights*, N.Y. TIMES, Oct. 16, 2007, at C7.

¹⁰³ See 17 U.S.C. § 1202(b) (2006) (providing cause of action for removal or alteration of “copyright management information”).

selectively to online searchers.¹⁰⁴ Only books in the public domain or accompanied by the owners' permission are made available in full-text form.¹⁰⁵ The remainder are available only via short "snippets"—though the entirety of each work is stored somewhere at Google.¹⁰⁶ As with YouTube and UGC, I reserve judgment on the wisdom of the project for the last Section of the Essay. Here the question is how law might contribute to its sustainability and legitimacy. Google faces challenges from copyright owners, who object to uncompensated "taking" of their works, from libraries that would like to participate in the program but who are aggrieved by Google's licensing terms, and from users and librarians who have raised concerns about the privacy interests of Google "patrons."¹⁰⁷ All of the quotation marks in that sentence signify the complexity of the undertaking not only from a legal perspective, but also from a cultural perspective. Can the project be built to last and rendered both legally and culturally legitimate? As with YouTube, fair use might intervene to protect either the end-users of Google's service—and thus protect Google under what remains of the *Sony* rule of indirect liability¹⁰⁸—or Google itself, on the ground that it is producing only "intermediate" copies of copyrighted works in order to enable genuine "fair use" by end-

¹⁰⁴ See Google Books Library Project – An enhanced card catalog of the world's books, <http://books.google.com/googlebooks/library.html> (last visited Jan. 27, 2008).

¹⁰⁵ Google Book Search: What you'll see when you search on Google Book Search, <http://books.google.com/googlebooks/screenshots.html#fullview> (last visited Nov. 6, 2007).

¹⁰⁶ *Id.*

¹⁰⁷ See Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 U.C. DAVIS L. REV. 1207, 1219–21 (2007) (describing the importance of librarians and librarianship in moderating privacy and privatization problems arising from the Google Library Project); Katie Hafner, *Libraries Shun Deals to Place Books on Web*, N.Y. TIMES, Oct. 22, 2007, at A1.

¹⁰⁸ The Supreme Court issued three opinions in the *Grokster* case, all of them concluding that *Grokster* was liable for copyright infringement committed by *Grokster* users. All three opinions confirmed the nominal survival of the "substantial noninfringing use" standard for claims of secondary liability against technology providers, announced more than than years earlier in *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984). The Court's recognition of a distinct "inducement" of infringement threshold in *Grokster* leaves the viability of *Sony* open to question. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 931 (2005).

users.¹⁰⁹ Public access and privacy concerns would remain, however. A less obvious but no less potentially significant role for law would be to examine the Google Library under antitrust rules in order to assure public access on nondiscriminatory terms.¹¹⁰ Or, Google itself might voluntarily constitute the Google Library more explicitly as a “library”—that is, as a kind of information commons (in property law terms¹¹¹) and as the virtual and metaphoric equivalent to the kind of place for books that has played an essential social and cultural role for centuries, the world over.¹¹²

VII.

This brief material and conceptual reconstruction of Google Book Search is speculative, to say the least. Here I bring the discussion back to ground. This Essay started with business models, and specifically with problematic distinctions between business models and the intellectual property interests that feed them. It concludes with business models. Landes and Posner argued that intellectual property rules are necessary to assure the production of durable cultural goods. Via three brief examples, I took apart and reassembled the Landes and Posner proposition. It

¹⁰⁹ Cf. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (concluding that the defendant’s copying constituted fair use despite the fact that the defendant made complete copies of the plaintiff’s images, because the copying was done “to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site”); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1518–19 (9th Cir. 1993) (concluding that defendant had a viable fair use defense, despite copying the entirety of the plaintiff’s computer code, because the defendant’s copying was an intermediate step in gaining access to unprotectable ideas in that code). *But see Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006), *aff’d in part, rev’d in part sub nom.* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (as amended on rehearing) (distinguishing *Kelly*).

¹¹⁰ Cf. Spencer Weber Waller & Brett M. Frischmann, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. (forthcoming 2008) (advocating revival of essential facilities doctrine in antitrust law, based on the economics of infrastructure).

¹¹¹ Cf. Aoki, *supra* note 72, at 768 (advocating use of a limited commons).

¹¹² See Oren Bracha, *Standing Copyright on its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799 (2007) (describing a copyright analysis of the Google project that would bring it into alignment with the concept of an authentic library).

appears that durability is a more complex thing. Law plays a key role, but in underappreciated ways. Successful business models are durable cultural goods. Directly and indirectly, law is an inevitable and necessary element of that success. To promote that success, we should look for underappreciated ways in which law affects their durability and how law might construct that durability going forward. In some cases, for example, law might make intellectual property objects more concrete, salient, and governable via copyright exclusivity. In other cases, law might make those objects less discrete and integrate them into the narrative of the cultural model. Examples drawn from Americana illustrate the richness of the intellectual property/cultural model intersection. To assure a durable cultural practice, a sharp, consistent distinction between intellectual property objects and other cultural and legal elements is neither required nor always desirable.

I also raised the related question of legitimacy. Durability may not be enough. What society truly wants are legitimate cultural forms, including legitimate business models. Making salient law's construction of material and conceptual elements of culture helps in different ways to legitimate those forms, beyond their being tolerated or accepted by copyright owners, or to undermine their legitimacy.¹¹³ The details of legal engagement bears subtly, but importantly, on their strength and on the patterns of their evolution. In terms of its legitimacy, Google Book Search as a constructed commons overseen by Google itself is a different cultural form and different business model than a hypothetical Google Book Search that is neither formally nor functionally controlled by Google or by copyright owners, even if the pragmatic character of user access is mostly identical.¹¹⁴ Is one form better or worse, or more or less

¹¹³ See *supra* note 69 and accompanying text (referring to the focal point theory of legitimacy).

¹¹⁴ See Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 *FORDHAM L. REV.* 297 (2004) (suggesting that some features of the public domain may be mandatory, rather than discretionary). Achieving such a system based on the Google archive would present important pragmatic problems and face perhaps insuperable doctrinal obstacles. The Open Content Alliance, a Google competitor, is attempting to build a digital archive that more closely resembles a classic "library." See Hafner, *supra* note 107 (describing differences among Google, OCA, and Microsoft book scanning projects).

legitimate? Beyond a certain point, simply teasing out the different roles that law plays cannot help answer that question. Sorting practices into good ones and bad ones eventually requires confronting normative choices.¹¹⁵ In the YouTube context, does Google's proposed technological solution to the UGC "problem" represent good social policy? Does Google Book Search represent desirable social and cultural innovation? These questions can't be answered in terms of Constitutional "Progress"; "more" or "stronger" or "less" intellectual property protection; in terms of incentives for developing new technologies or business models; or on the basis of distributed or concentrated modes of production, business, cultural or otherwise. They may not be answerable at all, except provisionally. If so, then it is all the more important that we understand law's particular contributions to cultural persistence, not so that society can determine what is best once and for all, but so that society can influence what it wants and gets now, and for the foreseeable future.

¹¹⁵ See Cohen, *supra* note 33, at 92–93.