2008

Intellectual Property and Americana, or Why IP Gets the Blues

Michael J. Madison
University of Pittsburgh School of Law, madison@pitt.edu

Follow this and additional works at: https://ir.lawnet.fordham.edu/iplj

Part of the Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/iplj/vol18/iss3/4

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
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.

Second, and around the same time, the
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, even if those methods were not embodied in some technological form. 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.

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


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 Wikipedia 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, 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 YouTube and searchable online archives such as the Google Books Library Project. Are these enterprises creating legitimate and durable social value from “spillovers” that always accompany works of intellectual property? 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. What

---

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, . . . there 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.


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 production\(^{16}\)—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).


\(^{17}\) 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, and the Constitutional requirement that grants of exclusive rights to authors and inventors exist for “limited Times” 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—inhomogeneous 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.” A patent exists only when the protected “invention” is articulated materially in the language of a proper patent claim.

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. No one may patent a law of nature, scientific principle, mathematical formula, abstract idea, or artifact found in nature. And now, it appears, no one may patent a method not embodied in some stable technological form, and no one may patent a business method as such, because such a method is the equivalent of an abstract idea. Among the reasons for these exclusions is that ideas and abstractions both exist and persist without the incentives offered by intellectual property law. No “author” needs copyright

---

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.
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. 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.

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).


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. 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.

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

---


exogenous to the legal system itself.\textsuperscript{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.\textsuperscript{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

\textsuperscript{32} Cf. Cass R. Sunstein, \textit{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).

\textsuperscript{33} Julie Cohen writes:

\begin{quote}
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.
\end{quote}

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


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.
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

---

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. 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.

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. 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. 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. 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).


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).

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
An authorized sequel, *Shock Treatment*, was released in 1981 (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, 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*.

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 use or excluded from the scope of the copyright owner’s rights in the first place. 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

---


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.


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).


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,

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. 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. 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 \textit{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 \textit{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 \textit{Rocky Horror} performances take place in places that are treated, both socially and legally, as private.\footnote{See Julie E. Cohen, \textit{Privacy, Visibility, Transparency, and Exposure}, 75 U. CHI. L. REV. (forthcoming 2008) (emphasizing the spatial dimensions of privacy).} 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,\footnote{See Nancy Barr, \textit{Chatham Band Concerts}, http://www.capecodtravelguide.com/chatham-band-concerts.php (last visited Nov. 26, 2007).} 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,\footnote{Id.} 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!”\footnote{Id.} 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.
The site of the concerts has long offered an almost ideal coordination point for the community. 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

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


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.
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. 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. 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,” in the sense that no one can own a method—that is, a narrative of cultural production—and no one can own oneself.

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 penalty—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.


85 Id. at 181.


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. 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. They are simultaneously differentiated and preserved. 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

---

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 metaphors\(^93\) 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. In the latter is the market-leading business for music and movie downloading, Apple’s iTunes Music Store. 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.

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. 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. 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. 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.
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

selectively to online searchers. Only books in the public domain or accompanied by the owners’ permission are made available in full-text form. The remainder are available only via short “snippets”—though the entirety of each work is stored somewhere at Google. 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.” 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 liability—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-

---

106 Id.
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. 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. 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 terms) 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.

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 website”); 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).


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. 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. 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).

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.\footnote{See Cohen, supra note 33, at 92–93.} 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.