

CREATIVE COPYRIGHT FOR CREATIVE BUSINESS

NOTE

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- I. Copyright as incentives vs. copyright for its own sake.....137
- II. Thinking Creatively: Transcending the Locksmith 144

WHAT DOES IT MEAN TO THINK CREATIVELY ABOUT CREATIVE INTELLECTUAL assets in a digitally networked environment? How do we conceive of copyright law in the face of consumer cultures that expect flexibility in the use of copyrighted works and the ability to share creative digital goods? How should we approach copyright enforcement, licensing, and business designs in light of value created by users of intellectual works?

In this short essay, prepared for the inaugural issue of the University of Puerto Rico Business Law Journal, I will argue that the intuitive attitude that dominates copyright law, practice and advocacy may, in some occasions, be an obstacle to developing successful business enterprises in the creative fields. I present these views, not with specific prescriptions about how to design business models, but to generally challenge the idea that flexible and liberal views about copyright law are necessarily anathema to successful commercial ventures in the current milieu.

I. COPYRIGHT AS INCENTIVES VS. COPYRIGHT FOR ITS OWN SAKE

Traditional economic justifications for intellectual property start from the assumption that—unlike tangible property—information products are public goods subject to free riding which, consequently, risks underproduction.¹ The

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¹ That is, they are non-excludable and non-rival, therefore, one could not exclude others from using an idea once made available; consumption by one does not prevent consumption by others. Because of the inability to exclude others, it is thought that a producer of intellectual works will not be able to recoup fixed costs of creation, hence, the idea will not be produced in the first place. See WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 12-13 (2003); COOTER & ULEN, *LAW AND ECONOMICS* 124-42 (2008). To address this problem and incentive

copyright monopoly thus aims to maximize efficiency by providing sufficient incentives to compensate free riding while avoiding deadweight loss. But because innovation is cumulative, information is both an output and an input of the creative process.² In this sense, information products have social value (as inputs to downstream innovators) that exceed the private value to the first upstream creator.³

The scope and duration of copyright law depends on how much these innovation *spillovers*, or positive externalities, are believed to aid follow-on creators. Hence, copyright's scope depends on policy determinations about balancing incentives provided to initial creators with the innovation's social benefits.⁴ This balance has been one of the laws' most celebrated goals: to incentivize creators by granting a statutory monopoly over works, while simultaneously limiting the monopoly to feed a public domain for further creators.

Nonetheless, it is well known that digital technologies have changed the landscape in which copyright law operates. They have disturbed balances previously thought to accommodate conflicting (but complementary) interests in

production and dissemination of intellectual works, the law grants some creators monopoly rights over their works. This, consequently, may give rise to economic distortions: namely, that the copyright owner may obtain monopoly profits, and that a loss in consumer surplus (or deadweight loss) will be created (consumers who value the work at less than the monopoly price will not purchase it, although they would otherwise consume it at competitive price). Because a monopolist's marginal revenue declines as the number of copies sold increases (on account of the downward-slope in demand curve), the marginal revenue is always lower than the price (instead of equal to price as for a competitive firm) for all units sold—unless price discrimination is possible. The monopolist will maximize her profits, and consequently, will grant access to the work up until where marginal revenue equals marginal cost. Therefore, she will choose a level of output lower than one offered in a competitive market, whilst choosing a price higher than those in said competitive markets. COOTER & ULEN, *supra* at 32-36 (2008); William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700-05 (1988).

2 Innovations are the output of a first creator and an input to the second (while the first creator's input is an earlier creator's output). LANDES & POSNER, *supra* note 1, 66-67.

3 Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

4 See Suzanne Scotchmer, *Standing in the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP., No. 1 (1991), at 29-41. The weaker copyright protection is, the more a second author can take from previous works without paying a license and thus, the lower the second author's costs of creating new works. LANDES & POSNER, *supra* note 1 at 68. Conversely, the stronger the protection, the higher the cost of creating works for the second author. This is why copyright law must balance its incentive-producing function with a level of public access to allow for follow-up creativity. *Id.* at 69. Because these are all empirical questions, Frischmann & Lemley, *supra* note 3 at 268-71, it is not surprising that, when adhering to the incentives paradigm, the Supreme Court defers to Congress as a matter of institutional competence. *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 558 (1985); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas"); ("The Copyright Clause ...empowers Congress to define the scope of the substantive right. Judicial deference to such congressional definition is 'but a corollary to the grant to Congress of any Article I power.'"). On judicial deference in the copyright context see Paul Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L. J. 2331 (2003).

incentives and public access. The ease with which digital products can be reproduced and shared at virtually no cost enabled innovative practices that concomitantly shocked a content industry whose entire revenue plan depended on the sale of physical copies.⁵ With that shock came a multilayered response spearheaded by law and technology.⁶

Copyright owners' initial response to challenges posed by digital technologies is—to some extent—understandable. These technologies are after all, intensely disruptive of well established business models. Former Harvard Business School professor Debora Spar described a cycle that emerges when disruptive technologies appear where, after a period of *creative anarchy* triggered by the innovation, settled interests seek stability through the law.⁷ Following an initial unregulated and disruptive period, radical technological developments, once they reach a level of maturity and commercialization, are gradually normalized and regulated (by state or private organizations). What had been a threatening technology is eventually tamed—in many cases to protect the interests of the very pioneers who brought about the innovation. In other cases, it is not pioneers who ask for rules; professor Spar contends that “sometimes it is the state, and sometimes a coalition of societal groups affected by the new technology and the market it has wrought.”⁸ In any case, private firms usually ask for rules when a new technology *lands* in a context that is unprepared to assimilate it.

This is exactly what happened when digital technologies *landed* in an analog world. Both legal and technological responses to these technologies were put into place. In the process, copyright protection stopped being regarded instrumentally, *i.e.*, as a means to an end (to provide innovation incentives), and was replaced by a view of copyright as an end in itself (that is, copyright protection

⁵ For an interesting example of how the content industry has reacted to these new business models see the conflicting positions of the music industry and the startup MP3.com over the new entrant's impact on the incumbent's potential (yet unexplored) market *in* UMG Recordings v. MP3.com, Inc., 92 F. Supp.2d 349 (S.D.N.Y. 2000). *Cf.* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007) (displaying a more permissive attitude toward the market entrant where, as in that case, use of copyrighted content is *transformative* under fair use analysis—even when making exact copies of the original work, albeit for different purposes—since transformative uses cannot be inferred to produce a market harm to copyright owner absent a showing of such harm).

⁶ As is the case of the employment of DRMs and the enactment of the anti-circumvention provisions of the Digital Millennium Copyright Act. Pub. L. 105-304, 112 Stat. 2863 (1998), 17 U.S.C.A. §§ 1201-05.

⁷ *Creative anarchy* refers to a phase in the life of a disruptive innovation when, together with commercialization of the innovation, an unregulated *anarchic* market emerges spawning a host of competitors and innovators. Here, many innovations emerge from both enthusiasts (such as free and open software) and commercially minded enterprises. The technology, at this stage, appears unruly and undomesticated (e.g. Napster in the late 1990s), but in fact, it eventually is (e.g. MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913 (2005)) (sometimes at the behest of initial innovators, and sometimes at the insistence of interests affected by the technology). DEBORA L. SPAR, RULING THE WAVES: FROM THE COMPASS TO THE INTERNET, A HISTORY OF BUSINESS AND POLITICS ALONG THE TECHNOLOGICAL FRONTIER 15 (2001).

⁸ *Id.* at 18.

for its own sake). This view promotes absolute protection of works regardless of copyright's incentivizing promise. We can see how his paradigm got settled by examining some of the technological and legal responses to the impact of digital technologies on copyright law.

Technological responses are well known; I have discussed them in other writings.⁹

The very same features of the digital age that empower ordinary individuals also lead business continually to expand markets for intellectual property and digital content. Yet as businesses do so, they must deal with features of the digital age that empower consumers and give them new abilities to copy, distribute, and manipulate digital content.¹⁰

Thus, in an effort to control and monetize particularized uses of content, we have witnessed the emergence of Digital Rights Management systems or Technological Protection Measures (these are "technological method[s] intended to promote the authorized use of digital works.")¹¹

As a consequence, through these technologies content owners today are capable of controlling their works well beyond legitimate claims of copyright by limiting fair uses; affecting—otherwise protected—personal non-commercial use of content;¹² regulating works in the public domain;¹³ or impeding the exercise of rights that a user would otherwise have according to the first sale doctrine.¹⁴ In some cases, as with the music industry, consumer demand for interoperability and flexibility in the use of digital goods has pressured content owners to provide works with less rigorous protection.¹⁵

On the legal side, these technological responses are reinforced by the Digital Millennium Copyright Act (DMCA), which severely punishes efforts to circum-

⁹ Hiram A. Meléndez-Juarbe, *DRM Interoperability*, 15 B.U. J. SCI. TECH. L. 181 (2009).

¹⁰ Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 14 (2004).

¹¹ Ian Kerr, Alana Maurushat & Christian Tacit, *Technological Protection Measures: Tilting at Copyright's Windmill*, 34 OTTAWA L. REV. 7, 13 (2002-2003). See generally, EBERHARD BECKER, ET AL. (EDS.), *DIGITAL RIGHTS MANAGEMENT: TECHNOLOGICAL, LEGAL AND POLITICAL ASPECTS* 3 (2003); JOAN VAN TASSEL, *DIGITAL RIGHTS MANAGEMENT: PROTECTING AND MONETIZING CONTENT* (2006).

¹² *Sony v. Universal Studios*, 464 U.S. 417 (1984); Pamela Samuelson, *Copyright And Freedom Of Expression In Historical Perspective*, 10 J. INTELL. PROP. L. 319, 331 (2003); L. Ray Patterson & Christopher M. Thomas, *Personal Use In Copyright Law: An Unrecognized Constitutional Right*, 50 J. COPYRIGHT SOC'Y U.S.A. 475 (2003).

¹³ Timothy Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 HARV. J. L. & TECH. 49 (2006); Dan Burk & Julie Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 57 (2001).

¹⁴ 17 U.S.C. § 109(a) ("the owner of a particular copy . . . is entitled . . . to sell or otherwise dispose of the possession of that copy . . .").

¹⁵ Meléndez-Juarbe, *supra* note 9 at 218.

vent DRMs' access-control mechanisms.¹⁶ Section 1201(a) of the DMCA prohibits the circumvention of a "technological protection measure that effectively controls access to a work,"¹⁷ while section 1201(b) addresses the manufacture, distribution or traffic technologies primarily designed to circumvent a DRM "that effectively protects a right of the copyright owner."¹⁸ Courts have found that the DMCA's anti-circumvention provisions are independent from the fair use defense, finding liability even if such defense is available.¹⁹

These legal and technological developments can be said to create a new legal right to control how we *access* copyrighted works, even if we legitimately own specific media (e.g., a DVD) containing such work (e.g., a movie).²⁰ These reactions emerged late in the twentieth century in the context of an unprecedented amplification of the copyright monopoly, both procedurally and substantively, as explained at the margin.²¹

While it is true that digital technologies unsettled the underlying terrain that supported a balance between incentives and public access, current copyright protection (both through law and technological protection measures) has redrawn previous balances and strengthened the copyright monopoly well

¹⁶ It also prohibits the manufacture or distribution of such technology. See 17 U.S.C. §§ 1201-1205.

¹⁷ 17 U.S.C. § 1201(a).

¹⁸ 17 U.S.C. § 1201(b).

¹⁹ *Realnetworks, Inc. v. Streambox, Inc.*, 2000 WL 127311 (W.D. Wash. 2000); *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000). *But see* *Lexmark v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004); *Chamberlain v. Skylink*, 381 F. 3d 1178 (Fed. Cir. 2004) (requiring that the protection against circumvention technology under 1201(a) be related to copyrighted work).

²⁰ "Every act of perception or of materialization of a digital copy requires a prior act of access. And if the copyright owner can control access, she can condition how a user apprehends the work, and whether a user may make a further copy." Jane Ginsburg, *From Having Copies to Experiencing Works: The Development on an Access Right in US Copyright Law*, 50 J. COPYRIGHT SOC'Y U.S.A. 113, 115 (2003).

²¹ Since 1976, many of the formal requirements required to protect works have been eliminated, moving copyright protection away from the positive law paradigm. For example, it is no longer required that a work be published prior to protection. 17 U.S.C. § 102(a) ("copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . ."). Requirements such as notice, 17 U.S.C. § 401(a), deposit, 17 U.S.C. § 407(a), registration, 17 U.S.C. § 408(a), and term renewal, 17 U.S.C. § 304, have been eliminated. Today a work is protected by default since its creation and fixation in a tangible medium of expression, 17 U.S.C. § 102(a), for the life of the author plus seventy years, 17 U.S.C. § 302(a), instead of the shorter and fragmented periods that predated the 1976 Act. The term of copyright protection has been extended several times during the last century delaying the entrance of works into the public domain (sometimes even reverting their public domain status and reestablishing their protection). *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Furthermore, copyright protection today is not limited to reproduction rights since it includes, for instance, the right to make derivative works. 17 U.S.C. § 101, 106(2). Additionally, infringement is subject to steep statutory damages, costs and attorney's fees, 17 U.S.C. § 504(c), 505, while the litigation costs to individual users remain notoriously prohibitive.

beyond the basic economic incentives justification. The literature excited by this contemporary reality comes from all sides of the ideological spectrum.²²

In all, the expansive shape of current copyright law and practice cannot be supported by the traditional incentives rationale. It is, however, sometimes justified from other perspectives. For example, both in rhetoric and legal argumentation, strong protections are sometimes favored through a moral argument about what is fair or just: an argument about property rights over information with a whiff of Lockean natural right over one's creations—forgetting that the metes and bounds of the copyright monopoly are just that: a policy-oriented, state-created monopoly.²³ On other occasions, the expansive view of copyright deploys an economic logic unrelated to the provision of incentives. Some favor a regime of *absolute protection*²⁴ through a set of *ex post* economic justifications.²⁵ Contrary to traditional incentives theory that considers copyright's potential incentives *ex ante* (that is, copyright as a *precondition* for innovation), *ex post* advocates argue that absolute and strong intellectual property rights give the first creator (and only him or her) efficient incentives to innovate across time and improve over an existing work.²⁶ According to this controversial (yet, increasingly popular) view, strong protection prevents overuse, or tragedy of the commons, avoiding a decrease in the value of intellectual property rights.²⁷ In

²² See, e.g., LANDES & POSNER, *supra* note 1; WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT (Stanford University Press 2004); BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2009); NEIL NETANEL, COPYRIGHT'S PARADOX 34-35 (Oxford University Press 2008); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 29 (YALE UNIVERSITY PRESS 2006).

²³ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶¶ 25-52. On Locke, see generally JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 137- 252 (1988). On its relation to copyright law see Dianne Leenheer Zimmerman, *Information Goods as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 675-77 (1992); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1979 (2006).

²⁴ Anne Barron, *Copyright Infringement, 'Free Riding' and the Lifeworld*, 8 (LSE Working Papers 17/2008, 2008), available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280893.

²⁵ Mark Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004).

²⁶ See e.g., Randal C. Picker, *Fair Use v. Fair Access*, 16 (U. Chi. L. & Econ. Olin Working Paper No. 392, 2008), available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104764 (arguing that the initial author is in a better position to "take advantage of the information that we know will be forthcoming to make the second-stage investment decision").

²⁷ LANDES & POSNER, *supra* note 1 at 222 (discussing congestion externalities that they argue are applicable to copyright law):

One purpose of giving the owner of a copyright a monopoly of derivative works is to facilitate the scope and timing of the exploitation of the copyrighted work—to avoid, as it were, the 'congestion' that would result if once the work was published anyone could make and

this sense, the argument ceases to be about initial incentives and morphs into an argument about absolute copyright protection at all costs as an end in itself and for its own sake (about protecting the copyright owner well after creation and well beyond what's necessary for innovation).

The shape of copyright law has increasingly been influenced by these *ex-post* justifications, although recent judicial decisions, especially in the realm of *fair use*, have begun to pull back a bit.²⁸ Content industries, their lawyers, and counsels sometimes believe that absolute protection and strong copyright enforcement are the only way to grapple with the perceived threat of digital technologies. The centralization of *all copyright monopoly facets* in the hands of the owner is seen as the only efficient way to use that creative good. That belief usually comes armed with its own supply of rhetorical devices about *piracy*, *theft*, *fairness*, and, as described by Google's Senior Copyright Counsel William Patry, a host of overblown metaphors that contribute to a moral panic about quotidian engagement with digital works.²⁹

Sometimes, as the music industry has learned in recent years, creative industries are forced to modify absolute protection strategies because of their alienating effects on consumer demand or difficulty with practical enforcement.³⁰ But in the main, businesses, as well as their strategists and attorneys, have a hard time conceiving the protection of their intellectual assets through something other than the *ex post*, absolute protection paradigm. Although there are a million reasons why as a matter of social or constitutional policy these inclinations might be unwise, my aim is not to explore them here.³¹ The question here is different: whether these inclinations make sense in cases where user creativity and flexibility in the use of digital works create value. In such cases we must ask whether it makes more sense to embrace, rather than reject or attack, the disruptive features of digital technologies. Businesses may be able to capture value created by public access practices and make such capture the premise of creative business models in our digital era. This is the challenge to which I turn next.

sell translations, abridgements, burlesques, sequels, versions in other media from that of the original . . . or other variants without the copyright owner's authorization.

Id. at 226.

²⁸ Bill Graham Archives v. Dorling Kindersley, 448 F.3d 605 (2d Cir. 2006); Perfect 10 v. Visa, 494 F.3d 788 (9th Cir. 2007); Perfect 10 v. Amazon, 508 F.3d 1146 (9th Cir. 2007) (displaying a more permissive attitude toward the market entrant where, as in that case, use of copyrighted content is *transformative* under fair use analysis—even when making exact copies of the original work, albeit for different purposes—since transformative uses cannot be inferred to produce a market harm to copyright owner absent a showing of such harm).

²⁹ WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHTS WARS (2009).

³⁰ Meléndez Juarbe, *supra* note 9 at 216-17.

³¹ See Hiram Meléndez Juarbe, Creative Commons y la Agenda de Contenido Abierto, 69 REV. COL. ABOG. P.R. 151 (2008); Meléndez Juarbe, *supra* note 9; LESSIG, *supra* note 22; NETANEL, *supra* note 22; BOYLE, *supra* note 22; FISHER, *supra* note 22.

II. THINKING CREATIVELY: TRANSCENDING THE LOCKSMITH

Not all businesses think creatively about their intellectual property. They should; but they don't.

Diane Zimmerman observes four types of reactions by businesses in the creative fields to the interaction between copyright law and digital technologies.³² These are: *Naysayers*, *Locksmiths*, *Subverters*, and *Explorers*. The first conforms a minority breed that stays away from digital distribution channels while embracing traditional legal protections. For instance, for a long time copyrights holders over *The Beatles'* musical compositions were *Naysayers*, refusing almost all forms of online digital distribution.³³

Explorers, at the other extreme, abandon copyright laws altogether, seeking profits from services connected to their creative works while experimenting with innovative business models. These "are individuals and entities interested in disseminating their own expressive materials—and who may well hope to profit directly or indirectly from doing so—but without help from the formal legal regime set out in the Copyright Act."³⁴ Musicians (such as the band Radiohead), authors (like Stephen King), and many others sometimes benefit from innovative distribution and payment schemes such as voluntary pricing, honor systems or mixed schemes where hard copies are sold and digital copies are not.

In the middle of the spectrum we find *Locksmiths* (those who rely on copyright and other alternative measures to aggressively enforce their interests, such as DRMs) and *Subverters* (who employ copyright law's mechanisms to serve non-enclosure ends, and hence subverting it, such as businesses relying on Free and Open Source Licenses like Creative Commons and GNU Public License). The interaction between *Explorers*, *Locksmiths* and *Subverters* is at the center of current and future arrangements for the distribution of creative works.³⁵

Locksmith attitudes are reflected in the absolute protection (or *ex post*) paradigm previously described, and conform a complex reaction to the effect of digital "disruptive technologies"³⁶ on settled interests. In the current milieu, a driver behind this attitude may be what Harvard Business School's Clayton Christensen calls the *Innovator's Dilemma*.³⁷ According to this view, incumbent businesses are inclined to reject disruptive technologies since—rationally—it is

³² Diane L. Zimmerman, *Living without Copyright in a Digital World*, 70 ALB. L. REV. 1375 (2007).

³³ *Id.* at 1378.

³⁴ *Id.* at 1382.

³⁵ *Id.* at 1383, 1388.

³⁶ Disruptive technologies are those that, contrary to *sustaining* technologies that "improve the performance of established products", they "bring to the market a very different value proposition that had been available previously." CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA* xviii (2000).

³⁷ CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA* (2000).

in their best interest to invest in sustaining innovations (especially those that only improve existing innovations) and not invest in (thus resisting) those radical technologies that may challenge their place in the market.³⁸

Although this account has much explanatory value, it is not always the case that things play out that way. Disruptive technologies are not always seen as threatening. One cannot ignore more complex *Subverter* and *Explorer* attitudes that embrace those disruptive features of digital technologies. For instance, as mentioned, we see emerging business strategies in the music industry that experiment with both open and proprietary products,³⁹ and allow vendors such as iTunes to release DRM-free music.⁴⁰ Increasingly, we see a more subtle world of *Subverters* and *Explorers* or what Lessig calls *hybrid economies*, where “either a commercial entity . . . aims to leverage value from a sharing economy, or . . . a sharing economy . . . builds a commercial entity to better supports its sharing aims.”⁴¹

Classic examples of native-born hybrids are Slashdot.org, Flickr, Youtube, Craigslist and Google: companies that are able to capture the value created by sharing activities by users and build business models that mix the free (free as in *freedom to do things*, and not necessarily free as in *cost-free*) with the proprietary. These companies are able to see and recognize the value that free usage of intellectual resources has to consumers and can earn substantial revenues from it. Some openness—in copyright lingo—does not necessarily contradict economic success.

What is more, we increasingly encounter crossovers into these hybrids. MIT’s Eric Von Hippel describes how companies sometimes find it in their best interest to forego some IP enforcement in order to benefit from user innovation.⁴² The *Lego Mindstorms* project presents a famous example. Lego initially resisted how individuals hacked and repurposed computerized and motorized Lego figures on IP grounds, only to later learn the value that had been created by users in being able to share their modifications and innovations. Lego leveraged this spontaneously-formed, networked community of user innovators, and harnessed its value. Today, we find in their website user created designs and mod-

³⁸ See LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 89-90 (2001); WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 40-41 (2009) (Oxford).

³⁹ See e.g., Jon Fine, *Radio Head’s Business Head*, BUSINESSWEEK, Oct. 1, 2007, http://www.businessweek.com/innovate/FineOnMedia/archives/2007/10/radioheads_busi.html.

⁴⁰ Jesús Díaz, *iTunes Gets DRM Free, New Prices, Purchase Over 3G*, Jan. 6, 2009, <http://i.gizmodo.com/5124588/itunes-gets-drm-free-new-prices-purchase-over-3g>. Since 2007 Apple had been selling songs from EMI’s entire music catalog without DRMs. See Apple, *DRM-Free Songs from EMI Available on iTunes for \$1.29 in May*, Apr. 2, 2007, <http://www.apple.com/pr/library/2007/04/02itunes.html>.

⁴¹ LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 177 (2008).

⁴² ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* (2005).

ifications to their products; innovations embraced by a company that crossed over to a hybrid economy,⁴³ moving from a *Locksmith* attitude to an *Explorer* or *Subverter* one.

Other less-known examples exist. The Center for Technology and Society of the Fundação Getulio Vargas Law School in Brazil and the Young Foundation in London, host the *Open Business* project,⁴⁴ a repository showcasing hundreds of businesses based on hybrid economies. Examples range from music,⁴⁵ fashion,⁴⁶ digital design,⁴⁷ and software development,⁴⁸ to film,⁴⁹ and consulting services.⁵⁰ Lessig's *Remix: Making Art and Commerce Thrive in the Hybrid Economy* describes at length powerful examples.⁵¹

These commercial initiatives emerge, in part, thanks to a measure of disintermediation in human interaction observable in a digitally connected world; the democratization and cheapening of computing power; the irreversible fact that distribution of digital works is virtually costless; the distributed and granular nature of online creativity; and the fact that digital technologies allow communities of users to emerge imposing their creative energies into the works they acquire.⁵² It is not a world of passive *consumers* but, more broadly, a world of active *users* engaged creatively adding value to the works and to the communities they belong to.⁵³ Spillovers of digital creative works are not necessarily used more efficiently if they are controlled by a single entity or person.⁵⁴ In a digitally connected world, sometimes positive externalities of intangible works are better left to the hands of users who are capable of adding value through their use, which can—in turn—form the basis for creative businesses.

As with everything else in a competitive capitalist economy, some of these endeavors are bound to be more successful than others. But some are. And all are based on business models that are not blind to the value created by users and by the very features of digital technologies that are seen as threatening by some. Sometimes—and this is the point I want to drive home—when these entrepre-

43 See LEGO.com MINDSTORMS: Home, <http://mindstorms.lego.com/> (last visited June 3, 2010).

44 OpenBusiness, <http://www.openbusiness.cc/> (last visited June 3, 2010).

45 Magnatune: we are not evil, <http://magnatune.com/> (last visited June 3, 2010).

46 Custom Dress Shirts, <http://www.blank-label.com/> (last visited June 3, 2010).

47 99 designs.com, <http://99designs.com/> (last visited June 3, 2010).

48 The Apache Software Foundation, <http://www.apache.org/> (last visited June 8, 2010); Canonical Homepage, <http://www.canonical.com/> (last visited June 3, 2010).

49 Remixing Cinema, <http://aswarmofangels.com/> (last visited June 3, 2010).

50 Brain Candy LLC, <http://braincandyllc.com/> (last visited June 3, 2010).

51 LESSIG, *supra* note 41.

52 YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2007).

53 Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L. J. 561 (2000).

54 See Frischmann & Lemley, *supra* note 3.

neers consciously forego opportunities for copyright enforcement or adopt open and free licenses such as Creative Commons,⁵⁵ they employ alternative *Explorer* or *Subverter* attitudes toward the interaction between intellectual property and the digital environment. In short, they think creatively about copyright for their creative businesses. In doing so, these entrepreneurs consciously or unconsciously challenge the *absolute protection/Locksmith/ex-post* paradigm.

What is more, when they think creatively about copyright in a digital era, these entrepreneurs challenge the artificially-created polarity between, on one hand, advocating for reasonable copyright regimes that sensibly target the incentives goal and, on the other, successful commercial ventures deployed in our contemporary information economy.

⁵⁵ Puerto Rico - Creative Commons, <http://creativecommons.org/international/pr/> (last visited June 3, 2010).